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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
SOUTHERN DIVISION**

CENTER FOR BIOLOGICAL DIVERSITY,)
)
Plaintiff,)

v.)

Case No. 2:14-cv-00226-APG-VCF
(Consolidated with 2:14-cv-00228-APG-VCF)

UNITED STATES BUREAU OF LAND)
MANAGEMENT, *et al.*,)

Defendants,)
and)

SOUTHERN NEVADA WATER)
AUTHORITY,)

Defendant-Intervenor.)

WHITE PINE COUNTY, *et al.*,)

Plaintiffs,)

v.)

UNITED STATES BUREAU OF LAND)
MANAGEMENT, *et al.*,)

Defendants,)
and)

SOUTHERN NEVADA WATER)
AUTHORITY,)

Defendant-Intervenor.)

**PLAINTIFFS WHITE PINE
COUNTY, ET AL.'S REPLY IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT AND
MEMORANDUM IN
OPPOSITION TO DEFENDANT
BUREAU OF LAND
MANAGEMENT, ET AL. AND
DEFENDANT-INTERVENOR
SOUTHERN NEVADA WATER
AUTHORITY MOTIONS FOR
SUMMARY JUDGMENT**

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INTRODUCTION

1
2 Plaintiffs White Pine County, Great Basin Water Network, Central Nevada Regional
3 Water Authority, Sierra Club, Baker Water & Sewer General Improvement District, Utah
4 Physicians for a Healthy Environment, Utah Rivers Council, Utah Audubon Council, and League
5 of Women Voters of Salt Lake, Utah (collectively, “Plaintiffs”) respectfully submit this Reply in
6 Support of Plaintiffs’ Motion for Summary Judgment and Opposition to Defendants United
7 States Bureau of Land Management and Department of Interior’s (collectively “BLM” or
8 “Defendants”) and Defendant-Intervenor Southern Nevada Water Authority’s (“SNWA’s”)
9 Motions for Summary Judgment.¹ As explained in Plaintiffs’ memorandum in Support of
10 Motion for Summary Judgment (“Plaintiffs’ Opening Brief”), BLM’s Final Environmental
11 Impact Statement (“FEIS”) and Record of Decision (“ROD”) for SNWA’s Groundwater
12 Development Project (“GWD Project” or “Project”) and its right-of-way (“ROW”) was
13 fundamentally flawed in its basic approach to analyzing the GWD Project and its potential
14 environmental effects.
15
16

17 BLM does not dispute that the need for SNWA’s GWD Project is “to meet the water
18 needs of the municipalities it serves.” BLM Brief at 1. However, BLM also asserts that the only
19 pertinent purpose and need for its NEPA Review at this stage is BLM’s own need to make a
20 decision on SNWA’s ROW application. BLM Brief at 21. Recognizing the unreasonableness of
21 that narrow focus in light of the fact that BLM effectively has reviewed and approved the GWD
22 Project as a whole, including set amounts of annual pumping from each targeted valley, along
23 with the ROW for the Project’s core infrastructure, BLM acknowledges that it was obliged to
24
25

26 _____
27 ¹ Plaintiffs’ hereby join in and incorporate by reference all arguments made in the Replies in
28 Support of Plaintiffs’ Motions for Summary Judgment and in Opposition to Defendants’ and
Defendant-Intervenor’s Motions for Summary Judgment of Tribal Co-Plaintiffs, the
Confederated Tribes of the Goshute Reservation, and Plaintiff Center for Biological Diversity.
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1 consider the broader implications of the GWD Project. BLM Brief at 22. Nonetheless, BLM
2 repeatedly asserts that it is not necessary to evaluate the significance of or feasibility of
3 mitigating the GWD Project's groundwater pumping impacts at this stage because there will be
4 additional reviews of individual local groundwater pumping facilities at unspecified later stages
5 of the Project's development. The problem with this approach is that it conflates the minor local
6 construction of particular wells and their connections to the main Project infrastructure with the
7 Project's sole real purpose, which is the overall withdrawal of water from the targeted basins and
8 groundwater systems that already has been approved by BLM at this stage of review.
9

10 BLM tries to elide this issue by claiming to have addressed the Project's groundwater
11 pumping effects in a programmatic level analysis of "the potential future impacts of groundwater
12 pumping facilities." BLM Brief at 2. However, BLM's ROD approves not only the main
13 conveyance right of way but also a particular configuration of the whole GWD Project including
14 the amount of groundwater to be pumped out of the four approved target valleys. Analyzing the
15 effects of that presently approved groundwater extraction from these valleys and groundwater
16 systems is not the same as speculative analysis of individual pumping facilities that will not be
17 definitely sited in the valleys until some unspecified time in the future. It is appropriate to defer
18 detailed analysis of localized impacts attributable surface disturbance associated with the specific
19 locations chosen for installing individual wells and their lateral lines to the Project's main
20 pipeline. But the total groundwater pumping amounts have been approved, and there is
21 undisputed evidence in the record showing clearly what the impacts of that pumping will be over
22 time. Consequently, it was incumbent on BLM to thoroughly analyze the impacts of the
23 approved groundwater withdrawal from these valleys and groundwater systems now.
24
25
26

27 The same holds true for BLM's duty to meaningfully consider and provide for the
28 avoidance or mitigation of the Project's impacts up front. Instead, BLM admits that all it has
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1 done is approve a general framework, or plan, to develop an actual monitoring and mitigation
2 plan that BLM will consider and approve at an unspecified point in the future. More specifically,
3 BLM promises to consider the actual potential for effective management and mitigation of
4 harmful impacts in conjunction with its smaller, more localized future review of SNWA's
5 proposals for specific locations of individual wells.

6 As further explained below, BLM's refusal to consider and prepare a supplemental EIS
7 ("SEIS") in response to significant relevant new information and circumstances that indicate
8 fundamental errors in the FEIS's consideration of the GWD Project also violated BLM's
9 obligations under NEPA. A final result of BLM's inadequate approach to the environmental
10 review of the GWD Project was BLM's failure to ensure that the Project will comply with a
11 number of requirements under FLPMA.
12

13 ARGUMENT

14 **I. BLM's NEPA Review Process Was Fundamentally Flawed and Skewed By Its** 15 **Unreasonably Narrow Definition of Purpose and Need**

16 While BLM emphasizes an exceedingly narrow definition of what it was required to
17 consider at this stage of review, describing its action as nothing more than a "decision to approve
18 the grant of a right-of-way for a main conveyance pipeline and associated facilities, including
19 two lateral pipelines," BLM Brief at 3, BLM acknowledges that its decision in the ROD enables
20 SNWA to pump and transport 83,988 afy of groundwater from the four targeted valleys for
21 which the Project has been approved. *See* BLM Brief at 4; AR 188148.
22

23 With regard to the purpose and need being addressed in the EIS, BLM first asserts that
24 the "project" it was required to review in the EIS is the BLM's own decision whether or not to
25 grant SNWA's right-of-way application for the GWD Project. BLM Brief at 21; AR Doc. 12413
26 at 129791-94. BLM's argument essentially amounts to an assertion that it was not required to
27
28

1 define the scope of its analysis with reference to the purpose and need of the underlying actual
2 project, in common sense terms, because that is SNWA's and not the BLM's project, and
3 therefore the purpose and need for the underlying actual use of the right of way only pertains to
4 SNWA and not the BLM, whose only purpose and need was to make a decision on SNWA's
5 ROW application. The implication is that BLM was not obliged to analyze the environmental
6 impacts of the GWD Project, but only was obliged to analyze the impacts of the approval of the
7 ROW application to build the physical pipeline conveyance facilities, notwithstanding the fact
8 that those facilities then of course would be used to effectuate a massive groundwater extraction
9 and export program in perpetuity, which everyone knows is the real purpose of the ROW.
10

11 Perhaps recognizing the fundamental unreasonableness of this position, BLM recognized
12 that it had an obligation to consider the impacts of SNWA's GWD Project as well as the mere
13 construction activity in the ROW to serve that Project. However, by improperly imposing what
14 it termed a "tiered (phased) approach" BLM sought to effectively avoid analyzing the effects of
15 the Project as a whole in any meaningful manner, instead purporting to "analyze[] on a
16 programmatic level the potential impacts of all aspects of the Groundwater Development Project
17 when it is ultimately constructed and operated." BLM Brief at 9. This description of what the
18 BLM saw as its obligation and intent in terms of the scope of analysis of environmental impacts
19 represents a concession that compliance with NEPA requires the BLM to analyze the impacts of
20 the GWD Project as a whole. Given this requirement, it was not permissible for BLM to avoid
21 analysis of those effects or their ability to be effectively mitigated in this primary NEPA review
22 process, which is the only stage of review that will consider the Project in its entirety and the
23 overall impacts of the Project as a whole prior to its approval and implementation.
24
25
26

27 The impropriety of this deferral also is apparent from the fact that elsewhere BLM
28 emphasizes that its evaluation and approval of the GWD Project and its ROW was based on the
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1 Nevada State Engineer's authorization of the precise amount of pumping from the targeted
2 valleys that is approved in the ROD. BLM Brief at 4; AR 188178. This fact illustrates how
3 understanding the amount of water that the GWD Project will remove from the affected valleys
4 and interbasin groundwater flow systems and the effects of that removal lies at the heart of what
5 the BLM was analyzing and approving in the FEIS and ROD.

6 “[A]n agency may not define the objectives of its action in terms so unreasonably narrow
7 that only one alternative from among the environmentally benign ones in the agency's power
8 would accomplish the goals of the agency's action . . . ,” *Nat'l Parks & Conservation Ass'n v*
9 *BLM*, 606 F.3d 1058, 1070 (9th Cir. 2010)(citation omitted), and an agency's purpose and need
10 statement has to meaningfully reflect the full purpose and need for the project, including the
11 underlying proponent's purpose and need for the project. *Friends of Southeast's Future v.*
12 *Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998); *League of Wilderness Defs.-Blue Mtn Diversity*
13 *Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1069 (9th Cir. 2012). In developing a statement of
14 purpose and need, an agency “should consider the needs and goals of the parties involved in the
15 application or permit as well as the public interest.” 43 C.F.R. § 46.420(a)(2); 40 C.F.R. §
16 1502.13. These principles should have led BLM's definition of purpose and need to include the
17 GWD Project's purpose and need in terms of meeting SNWA's water needs along with BLM'S
18 full land and resource management responsibilities with regard to the lands and water-dependent
19 resources over which BLM exercises oversight.

20 This is to say that BLM's purpose and need had to include its obligation to ensure that the
21 project for which it granted the right of way was a reasonable means of meeting southern
22 Nevada's future water needs. This obligation necessarily required BLM to thoroughly consider a
23 reasonable range of alternatives. *Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002). As
24 explained below a reasonable range of alternatives here should have included additional water
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1 conservation measures, desalination, and Colorado River management alternatives in order to
2 determine how much water the GWD Project really reasonably needs to pump and export from
3 the affected basins and groundwater systems in order to meet southern Nevada's actual
4 reasonable future water needs without unnecessarily or unduly harming the public lands and
5 resources that will be affected.

6 The impropriety of the narrow purpose and need statement relied on by BLM to justify its
7 unreasonably constrained consideration of alternatives, impacts and mitigation measures is
8 illustrated by the fact that in an earlier draft of the purpose section of the EIS, BLM did not limit
9 the purpose and need to the strained narrow version included in the FEIS, but instead properly
10 defined the purpose and need as SNWA's underlying purpose of delivering water to southern
11 Nevada. AR Doc. 4112 at 7068.004. That original statement of purpose and need was later
12 narrowed as part of an effort to make it "carefully crafted to withstand legal challenges" and to
13 "minimize the identification of issues ... that subsequently would have to be dealt with." AR
14 Doc. 4134 at 7140; AR Doc. 4136 at 7145; AR Doc. 4301 at 9149; AR Doc. 4302 at 9151. This
15 narrowing of the purpose and need statement is evidence of a predetermination to approve
16 SNWA's GWD Project and its ROW without a genuine searching review of reasonable
17 alternatives or a comprehensive, meaningful analysis of the Project's impacts.

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19
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21 **II. BLM Improperly Failed to Meaningfully Consider Alternatives that Would**
22 **Meet the Same Need as the GWD Project and Its Right of Way**

23 CEQ regulations define "reasonable alternatives" to include alternatives that are
24 technically and economically feasible and which meet the purpose and need of the proposed
25 action. 43 C.R.F. § 46.420(b). The regulations define "*range of alternatives*" to include all
26 reasonable alternatives, or a reasonable number of examples covering the full spectrum of
27 reasonable alternatives. 43 C.R.F. § 46.420(c). BLM acknowledges in its brief that its
28

1 alternatives analysis should “describe and analyze ‘every reasonable alternative within the range
2 dictated by the nature and scope of the proposal.’” BLM Brief at 23 (citing *Alaska Survival v.*
3 *Surface Transp. Bd.*, 705 F.3d 1073, 1087 (9th Cir. 2013) (citation omitted)) (emphasis added);
4 *see also* *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1095 (9th Cir. 2006). “The
5 existence of a viable but unexamined alternative renders an environmental impact statement
6 inadequate.” *Oregon Natural Desert Association v. Bureau of Land Management*, 625 F.3d
7 1092, 1122(9th Cir. 2010) (quoting *Westlands Water Dist. v. United States Dep’t of Interior*, 376
8 F.3d 853, 868 (9th Cir. 2004) (quoting *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d
9 569, 575 (9th Cir. 1998)); *see e.g. Southeast Alaska Conservation Council v. Fed. Highway*
10 *Admin.*, 649 F.3d 1050, 1056 (9th Cir. 2011); *Friends of Yosemite Valley v. Kempthorne*, 520
11 F.3d 1024, 1038 (9th Cir. 2008); *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1095 (9th
12 Cir. 2006). Despite its acknowledged duty to examine all reasonable alternatives, BLM has
13 admittedly only substantively considered six pipeline alternatives that are virtually identical in
14 layout and which differ primarily in amount of water pumped. BLM Brief at 23. Indeed, in its
15 DEIS comments, the Nevada Department of Wildlife noted that the BLM provided “a rather poor
16 selection of choices with little to recommend one over the other particularly at the +200 year
17 timeframe.” AR Doc. 13028 at 145144.

18
19
20
21 The Ninth Circuit has consistently held that where the alternatives evaluated in an EIS are
22 all iterations of the same project or proposal, the range of alternatives is too narrow in violation
23 of NEPA. *See Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008);
24 *Muckleshoot Indian Tribe v. United States Forest Service*, 177 F.3d 800 (9th Cir. 1999). In
25 *Friends of Yosemite Valley*, this Court held that the National Park Service (“NPS”) violated
26 NEPA by failing to examine a reasonable range of alternatives when preparing a Comprehensive
27 Management Plan (“CMP”) for Yosemite National Park. *Id.* In that case, the NPS designated

1 three alternatives, all of which were based on the Visitor Experience and Resource Protection
2 (“VERP”) program, which failed to adequately address user capacity, despite the fact that NPS
3 acknowledged the need for reasonable range of user capacity alternatives. *Id.* at 1038-1039. In
4 that case, the Ninth Circuit reasoned that because each action alternative proposed five-year
5 interim limits consistent with current use, the alternatives were essentially identical. *Id.* Even
6 though two alternatives included maximum use levels and annual visitation limits, the court held
7 the SEIS violated NEPA because the similar alternatives were not sufficiently varied to provide
8 for a genuine, informed choice. *Id.* Similarly, in *Muckleshoot Indian Tribe*, the Court held that
9 the United States Forest Service violated NEPA when it considered only two action alternatives,
10 which involved essentially the same proposal and differed only by the form of transfer and the
11 amount of land transferred. *Muckleshoot Indian Tribe*, 177 F.3d at 813. In that case, the Court
12 held that the USFS failed to consider an alternative that was more consistent with its basic policy
13 objectives than the alternatives that were the subject of final consideration. *Id.*

14
15
16 Here, like NPS in *Friends of Yosemite Valley* and USFS in *Muckleshoot Indian Tribe*,
17 BLM has only evaluated alternatives to the proposed action that are essentially all different
18 iterations of the same project instead of including varied alternatives to provide for a genuine,
19 informed choice. Like the VERP alternatives in *Friends of Yosemite Valley*, each alternative is
20 based on the same underlying framework: a groundwater pumping scenario that varies primarily
21 in the amount of water exported. And like the land exchange alternatives in *Muckleshoot Indian*
22 *Tribe*, the water pumping scenarios are essentially identical to one another and differ primarily in
23 amount of water pumped. Much like the USFS land exchange alternatives in *Muckleshoot*
24 *Indian Tribe*, BLM here has chosen pumping scenarios that would be less consistent with its
25 multiple use and sustained yield mandate than would be the alternatives proposed by White Pine
26 County. Thus, BLM has not examined a reasonable range of alternatives in violation of NEPA.

1 The Court is required to scrutinize BLM's rejection of each of White Pine County's three
2 proposed alternatives - Colorado River management, desalination, and increased conservation -
3 to determine whether the rejections are adequately supported by the record. *See Muckleshoot*,
4 177 F.3d at 814-15. In its brief, BLM attempts to justify its refusal to consider these options on
5 grounds that are unsupported by the record or by fact. Indeed, the EIS itself contains very little
6 discussion of the reasons for rejection of each of White Pine County's proposed alternatives.
7 Such a dearth of information and analysis does not and cannot support a reasoned decision to
8 reject White Pine County's proposed alternatives. *See Southeast Alaska Conservation Council v.*
9 *Fed. Highway Admin.*, 649 F.3d 1050 (9th Cir. 2011). BLM argues that it need not consider
10 alternatives that are unlikely to be implemented or are inconsistent with its basic policy
11 objectives. BLM Brief at 23. However, each of the alternatives proposed by White Pine County,
12 Colorado River management, conservation, and desalination, are, in fact currently being
13 implemented or explored on some level and are more consistent with FLPMA's multiple use and
14 sustained yield mandate than is the GWD Project, which would be far more environmentally
15 destructive than any of White Pine County's proposed alternatives. *See SNWA 2015 Water*
16 *Resources Plan*, attached to Plaintiffs' Opening Brief as Exhibit K, at 26-27, 30-31.

19 BLM also defends its decision to exclude these three viable alternatives from
20 consideration by claiming that alternatives must meet BLM's own goals as "shaped by the
21 application at issue and by the function that the agency plays in the decisional process." BLM
22 Br. at 24. As noted, however, when confronted with a right of way application such as SNWA's
23 BLM's role is not simply to approve project, but to evaluate the project in the context of BLM's
24 duty to manage its land pursuant to FLPMA for multiple use for future generations. 43 U.S.C.
25 §§ 1701(a)(7), 1702(c), (h). The alternatives proposed by White Pine County would, in fact,
26 meet BLM's true purpose: to evaluate SNWA's application in the context of BLM's duties under
27 Plaintiffs WPC, et al.'s Reply in Support of MSJ and Opposition to Defs' Motions for SJ
28

1 the law and as the manager of the land across which a ROW has been requested taking into
2 evaluate the underlying purpose of the GWD Project and to evaluate the environmental
3 consequences of the proposed project and potential alternatives to reach a reasoned decision
4 under NEPA. Moreover, Colorado River management alternatives, desalination, and enhanced
5 conservation all would reduce the need for eastern Nevada groundwater over the long term, a
6 goal that is environmentally preferable to the GWD Project as it is currently proposed and hence
7 warrant consideration in the EIS as stand-alone alternatives or as part of reduced pumping
8 scenarios. While BLM did consider somewhat reduced pumping scenarios, it did not consider
9 where the balance of the water SNWA claims it needs would come from. Thus, even BLM's
10 own pumping scenarios do not meet the need as BLM and SNWA have defined it.

12 BLM and SNWA suggest that only groundwater pumping alternatives would satisfy the
13 policy goals in the Congressional act and thus non-pumping alternatives such as Colorado River
14 management alternatives, desalination, and conservation, are not appropriately included as
15 alternatives in BLM's analysis. However, Defendants miss several key points addressed in
16 Plaintiffs' Opening Brief. First, neither LCCRDA nor SNPLMA mandates a right-of-way for
17 any particular project. Further, nothing in LCCRDA or SNPLMA suggests that such alternatives
18 should not be included in the range of alternatives to be considered as part of the evaluation of
19 whether a proposed project is an appropriate use of the ROW. This approach also would have
20 been the most consistent with BLM's multiple use and sustained yield duties under FLPMA.

23 SNWA also argues that none of the alternatives proposed by White Pine County would
24 meet SNWA's objective of reducing reliance on the Colorado River. However, as noted above,
25 each of the alternatives proposed by White Pine County could have, at the very least, been
26 included as part of reduced pumping scenarios. Additionally, each of these alternatives would,
27

1 in fact, effectively reduce SNWA's reliance on the Colorado River, by providing SNWA with
2 more water and flexibility in management of its Colorado River allocation.

3 Both BLM and SNWA argue that Colorado River management alternatives, desalination,
4 and conservation might not be a complete solution to SNWA's water management problems.
5 However, that fact alone, even if assumed to be true, cannot possibly provide a basis for
6 concluding that the proposed alternatives are do not meet the needs of the project. *See NRDC v.*
7 *Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972) (It is not appropriate ... "to disregard alternatives
8 merely because they do not offer a complete solution to the problem."). BLM and SNWA also
9 assert that trading Colorado River Water for desalinated water would not serve to diversify
10 SNWA's water portfolio. BLM Br. at 24; SNWA Br. at 29. Yet this argument fails to recognize
11 SNWA's primary purpose is "to protect the community from drought and shortages from the
12 Colorado River system . . . and to help supply future projected water demands." AR Doc. 12413
13 at 129671. If additional Colorado River water can be relied on for future demand, then Colorado
14 River water is sufficient to meet at least a portion of the need identified in the EIS. This
15 distinction is significant because SNWA will soon have the ability to draw from Lake Mead even
16 if the Lake Level were to drop below 1000 feet. *See* 2015 SNWA Water Resources plan at 13.
17 Because SNWA may be able to secure an amount of water sufficient to sustain the future of
18 Southern Nevada by trading Colorado River water for desalinated water, those alternatives
19 should have been considered by the BLM. Yet BLM did not prepare an analysis to make such
20 determinations. Instead, the EIS merely makes the conclusory and unsupported statement that it
21 would not serve the BLM's purpose or SNWA's need and dismissed Colorado River
22 management alternatives from consideration. AR Doc. 12413 at 129791.
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27 BLM's rejection of desalination as an alternative to the GWD Project is equally
28 unsupported by, and is in fact contradicted by, evidence in the record. In fact, as noted in
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1 Plaintiffs' Opening Brief and as documented in the record, desalination is more economically
2 feasible and less environmentally damaging than the proposed GWD Project. Plaintiffs'
3 Opening Brief at 12; AR Doc. 231 at 494-496; AR Doc. 484 at 941-957; AR Doc. 971 at 1838-
4 39; AR Doc. 1988 at 4197-99; AR Doc. 6041 at 17319-20; AR Doc. 6042 at 17321; AR Doc.
5 6043 at 17322; AR Doc. 8980 at 34160-61; AR Doc. 9040 at 34290-91; AR Doc. 9386 at 35963,
6 36156-87. Yet BLM's desalination discussion in the EIS consists of only a memorandum from a
7 SNWA biologist who has no background qualifying him as an expert on desalination, and there
8 is no evidence that the BLM adequately considered the above-cited information on the feasibility
9 of desalination or related costs. AR Doc. 12413 at 129792, 94, app. A-2. Moreover, there is
10 evidence in the record which suggests that a desalination cost study was proposed in the fall of
11 2005 and begun soon after that time, but the final study does not appear to have been considered
12 in the FEIS or administrative record. AR Doc. 1989 at 4201; AR Doc. 1993 at 4210. In 2005
13 BLM requested that such a study be done. AR Doc. 2007 at 4264. However, a subsequent email
14 exchange in 2007 indicates a determination to exclude desalination from serious consideration as
15 an alternative. *See* AR Doc. 10551 at 59993 (email correspondence from SNWA to BLM
16 suggesting avoidance of the issue of cost). Following that exchange there does not appear to be a
17 record of the desalination study having been completed or considered, despite the fact that other
18 record evidence suggests BLM did regard desalination as a reasonable alternative that would
19 "totally or partially" meet the purpose and need of the Project. AR Doc. 3657 at 6339.

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23 Thus, despite SNWA's statement that BLM included a "detailed [50 page] analysis"
24 documenting why each alternative was not reasonable, SNWA Br. at 31, evidence in the record
25 suggests that BLM did not give adequate consideration to a desalination alternative and, in fact,
26 made a predetermination, influenced by SNWA, to exclude desalination from meaningful
27 evaluation despite the fact that it unquestionably would address the purpose and need for
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1 SNWA's project. Indeed, on the issue of desalination, the Preliminary Alternatives Report cited
2 by SNWA consists of a 3 ½ page chart that includes no cost information and numerous
3 conclusory statements relating to feasibility, and the 50 plus pages of the Report address
4 seventeen distinct proposed alternatives, each in a similarly cursory fashion. AR Doc. 10537 at
5 59951-54; AR Docs. 10532 - 10548.

6 Further, BLM's and SNWA's conclusory statements that a desalination project would be
7 too expensive, or in other words economically infeasible, must be evaluated in the context of the
8 projected cost of the proposed GWD Project, which would be extremely expensive to build, for
9 which the potentially astronomical mitigation costs have not yet been evaluated, and which
10 appears likely to cause far more serious long-term environmental impacts than any desalination
11 alternative. AR Doc. 231 at 494-496; AR Doc. 484 at 941-957; AR Doc. 971 at 1838-39; AR
12 Doc. 1988 at 4197-99; AR Doc. 6041 at 17319-20; AR Doc. 6042 at 17321; AR Doc. 6043 at
13 17322; AR Doc. 8980 at 34160-61; AR Doc. 9040 at 34290-91; AR Doc. 9386 at 35963, 36156-
14 87. Thus, BLM had no rational basis in the record for concluding that the alternatives proposed
15 by White Pine County are not feasible and those alternatives should have been considered in
16 meaningful depth in the EIS. Similarly, there is no basis in the record to support BLM's
17 assertion that increased conservation measures would not satisfy the need for water in southern
18 Nevada. BLM cites only the FEIS's conclusory dismissal of this alternative from consideration
19 to support its contention that conservation will not satisfy the need for water supplies in southern
20 Nevada, AR Doc. 12413 at 129793, and that statement is belied by the record. See AR Doc.
21 6049 at 17731-32; Doc. 9386 at 36368-70, 72.

22 Although SNWA touts its conservation programs as aggressive, uncontroverted evidence
23 in the record confirms that it lags far behind similarly situated western cities in per capita water
24 use and could do far more to encourage conservation. AR Doc. 9040 at 34290; AR Doc. 9386 at
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1 36064-6; AR Doc. 11088 at 69368-90. In addition, uncontroverted evidence in the record shows
2 that increased conservation could, in fact, eliminate the need for the GWD Project altogether.

3 *See* AR Doc. 9040 at 34290; WPC Opening Brief at 11-12. Nonetheless, BLM chose to
4 disregard this information and instead rejected consideration of increased conservation as even a
5 component of an alternative to the GWD Project that would require less groundwater pumping
6 and therefore would reduce the potential environmental impacts of the proposed use of the
7 ROW. AR Doc. 12413 at 129791-94.

8
9 Rather than meaningfully evaluate these reasonable and feasible alternatives, BLM chose
10 to present and evaluate only SNWA's Proposed Action and six other pumping alternatives which
11 are nothing more than different iterations of SNWA's proposed GWD Project. Accordingly,
12 BLM's conclusory dismissal of these proposed alternatives failed to comply with NEPA.

13
14 **III. BLM Applied an Inappropriately Tiered Approach to the GWD Project and Its**
15 **Right of Way**

16 While BLM straightforwardly asserts that it took the requisite hard look at the potential
17 impacts "of approving a right-of-way for the main conveyance pipeline and related facilities,"
18 BLM Brief at 20, when it comes to the real heart of the matter BLM carefully qualifies its claim
19 as having only looked "on a programmatic level" at "the potential impacts of future groundwater
20 pumping in later phases of the Project." *Id.* This is a carefully calibrated way of alluding to
21 BLM's failure to evaluate the significance of those impacts or the feasibility and effectiveness of
22 proposed mitigation measures for them before approving the GWD Project as a whole. BLM's
23 description of its tiered approach makes it sound as though the project in question has many
24 phases and purposes or functions, of which some "future groundwater pumping" is just one, the
25 real analysis of which can appropriately be deferred until the time when that pumping is
26 imminent, after the main infrastructure for the Project has been built and long after the Project as
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1 a whole already has been approved. BLM' consequently admits that it only intends to analyze
2 the impacts of the GWD Project's pumping in the narrow localized NEPA reviews that will be
3 performed in the future for individual wells and their small lateral lines connecting to the main
4 pipeline when specific sites for those wells are identified by SNWA. By couching the
5 description of its analysis of the GWD Project as a whole and its potential impacts in terms of
6 being on a "programmatic level," BLM attempts to finesse away the reality that it has improperly
7 avoided analyzing the potential impacts of the GWD Project before approving the Project as a
8 whole and allowing enormous natural and financial resources to be committed to its construction.
9 This is precisely the danger that NEPA and the CEQ regulations were designed to prevent.
10

11 It is misleading to characterize the groundwater pumping and export as simply one of the
12 "later phases" of the GWD Project. *See* BLM Brief at 20. That should be obvious from the very
13 name of the Project – the Groundwater Development Project. As its name clearly demonstrates,
14 the GWD Project has only one true goal or purpose, which is to extract groundwater from the
15 targeted rural basins, and the broader regional interbasin groundwater flow systems of which
16 they are an integral part, and transport that water to the Las Vegas Valley for consumptive use.
17 The only, very limited, sense in which it even is plausible to talk of "phases" with regard to this
18 plainly unified and unitary Project is in the sense that SNWA is not yet ready to build the
19 Project, has proposed to take at least several years to construct the Project, and that SNWA is not
20 ready to commit to, and may seek to change, the specific locations for drilling individual wells
21 that will accomplish the groundwater pumping from the basins and systems that already have
22 been identified as the sources for that groundwater. None of this delay and uncertainty on
23 SNWA's part changes the fact that the GWD Project is one unified project. The complexity and
24 sensitivity of the fragile high desert ecosystems and groundwater flow systems that will be
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1 affected by the GWD Project should not be confused with the Project itself, which is essentially
2 straightforward and unitary, if massive.

3 BLM attempts to bypass the basic unity of the GWD project by making much of the fact
4 that its current decision does not approve ROWs for individual wells and their connections to the
5 main pipeline, as if the deferral of the minor final siting of individual wells somehow alters the
6 fundamental fact the Project as a whole has been approved, including the amount of water to be
7 pumped out of each target valley and groundwater system, by the BLM's current decision.
8

9 BLM attempts to justify its deferral of an evaluation of the significance of the GWD
10 Project's impacts and the feasibility of mitigating those impacts to later minor site specific
11 NEPA review processes for the specific siting of individual wells by claiming that those later,
12 narrower reviews will be the appropriate time to assess the impacts and mitigation of impacts
13 caused by the entire Project. In addition to being counterintuitive, it is implausible to suggest
14 that full-fledged review of the Project's impacts and the feasibility of mitigation for those
15 impacts can be effectively done in conjunction with the siting of minor local components after
16 the Project's main infrastructure already is built. However, the current NEPA review is the only
17 NEPA review of the Project as a whole and the final NEPA review prior to the much narrower
18 site-specific reviews. BLM Brief at 9.
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21 Once major finances and resources have been committed to the Project, and southern
22 Nevada has been induced to rely on the Project's completion, it would be unrealistic to expect
23 BLM to use the subordinate tiered NEPA review related to the local siting of some individual
24 wells within the targeted valleys for which the overall pumping already has been approved as an
25 occasion to re-analyze and reverse the approval of the whole Project. *See Marsh v. Or. Natural*
26 *Res. Council*, 490 U.S. 360, 371 (1989); *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir.
27 1983). So, it is misleading to suggest that the full analysis of impacts and mitigation for the
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1 GWD can reasonably be deferred in just that way because BLM “is not obligated to grant rights-
2 of-way for future groundwater development facilities.” BLM Brief at 4 (citing AR 188132).

3 BLM deferred consideration of the impacts of the Project as a whole on the grounds: (1)
4 that the model it was using did not permit identification of specific impacts in specific locales at
5 specific times; (2) that such impacts would be addressed individually in later, narrow site-
6 specific reviews for the siting of particular wells and their connector lines to the main pipeline
7 infrastructure; and (3) that the mitigation of such impacts will be addressed in the COM Plan that
8 is to be developed later. In other words, what BLM refers to as having “thoroughly analyzed”
9 the Project’s impacts amounts to BLM’s assertion that it could not analyze those impacts at this
10 time and therefore is deferring actual consideration of the impacts of the Project as a whole to
11 later site-specific reviews under an as-yet undeveloped monitoring and mitigation plan despite
12 the fact that the Project as a whole already has been effectively approved, and consequently will
13 be treated as a given in later narrowly focused site-specific reviews for the siting of individual
14 wells. In practical terms, therefore, it is disingenuous to suggest that once the GWD Project as a
15 whole has been approved and billions of dollars have been committed to build the Project’s main
16 pipeline infrastructure, that it will be realistic for BLM to reverse its decision as to the whole
17 Project in the context of subsequent narrow review stages that will deal only with the specific
18 siting of the wells within those valleys to conduct the pumping that already has been approved.
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22 *See Watt*, 716 F.2d at 952.

23 BLM claims that its approval of the GWD Project and its ROW on the basis of its FEIS is
24 not like situations in which agencies have made site-specific decisions on the basis of a
25 programmatic EIS (“PEIS”) in violation of NEPA. BLM Brief at 27-28. BLM claims that it has
26 approved only main conveyance line and related facilities, and that it has analyzed the
27 environmental impacts of those “aspects of the project, as well as the long term impacts of the
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1 Project as a whole.” BLM Brief at 28. However, BLM’s assertion that it has not made site
2 specific decisions is incorrect. The FEIS and ROD effectively approved the GWD Project as a
3 whole, plain and simple. All that is left for future NEPA review phases is the narrow individual
4 reviews and decisions that will be made for the siting of specific wells within the targeted valleys
5 for the amount of groundwater pumping that already has been approved, and the lines to connect
6 them to the main pipeline which already has been approved to carry that water out of those
7 valleys. The amount of groundwater that will be pumped by the whole Project out of each of
8 these valleys and the affected groundwater systems has been determined and approved by BLM
9 at this stage of review. So, in reality, the impacts to these valleys and the interbasin groundwater
10 flow systems of which they are an integral part already is ripe for detailed comprehensive
11 evaluation.
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14 BLM’s statutory mandate also does not support BLM’s deferral of meaningful evaluation
15 of the Project’s impacts and the feasibility of mitigating those impacts to some indeterminate
16 future lower level of review for the siting of individual wells. SNPLMA and LCCRDA only
17 require BLM to grant a right of way for *some* water conveyance system. They do not require
18 approval of this, or any, specific proposed project. Further, with the exception of two expressly
19 excepted sections of FLPMA, LCCRDA does not excuse BLM from its obligations under NEPA,
20 FLPMA, or NHPA to rigorously analyze the potential impacts of both the proposed Project and
21 reasonable alternatives that could meet the same, or part of the same, need and alleviate some or
22 all of the potential harmful impacts to the environment and cultural resources. LCCRDA
23 explicitly requires the BLM to comply fully with NEPA’s requirements before deciding whether
24 to approve a particular project and grant a right of way for that project. BLM Brief at 6;
25 LCCRDA at § 301(b)(3). In affirming that requirement Congress emphasized BLM’s obligation
26 to “identif[y] and consider[] . . . potential impacts to fish and wildlife resources and habitat.” *Id.*
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1 The fact that Congress highlighted BLM's obligation to attend to such environmental impacts
2 prior to approving the right of way for any project undercuts BLM's decision to defer substantive
3 consideration of such impacts and their mitigability until some unspecified point in the future.

4 Congress's intent that BLM should conduct an up-front analysis of a proposed water conveyance
5 project's impacts is further reflected in LCCRDA's express protection of existing senior water
6 rights under either Nevada or Utah law in the area that could be affected by whatever water
7 conveyance project might be proposed for use of the right-of-way. LCCRDA at § 301(d)(2)-(3).
8

9 **IV. BLM Failed to Take the Requisite Hard Look at the Environmental Impacts of the**
10 **Project**

11 **A. BLM Failed to Adequately Consider Impacts to Water Resources and**
12 **Resulting Environmental Impacts**

13 As discussed in Plaintiffs' Opening Brief, BLM improperly eliminated a wide range of
14 environmental impacts from any consideration by limiting its identification of impacts to those
15 exceeding a 10 foot drawdown of the water table or a 5% reduction in spring flow even though it
16 was apparent that significant environmental impacts likely will occur as a result of lesser
17 amounts of drawdown and spring flow reduction, which are inevitable and undeniable results of
18 the groundwater withdrawal contemplated by the GWD Project. Similarly, Plaintiffs have
19 pointed out that BLM failed to adequately consider the GWD Project's impacts by limiting its
20 consideration of the GWD Project's impacts to 200 years even though the Project is proposed to
21 operate in perpetuity and the resulting drawdown indisputably will continue to grow worse far
22 beyond that truncated time frame.
23

24 As noted above, BLM conceded that it is obliged to evaluate the full range of
25 environmental impacts that the GWD Project is likely to cause. In order to do that it is necessary
26 to analyze the drawdown of the affected groundwater systems over the life of the Project, and
27 also the reasonably foreseeable continuing effects of the Project after its projected life has come
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1 to an end. *See Northern Plains Resource Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1077-
2 79 (9th Cir. 2012); *cf. Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 521-25 (9th Cir. 2010)
3 (same under analogous ESA standard). Under BLM's supervision, and with input from other
4 federal agencies, SNWA developed a groundwater flow model to assist in the evaluation of the
5 likely impacts from the GWD Project's proposed pumping. BLM Brief at 9. But,
6 notwithstanding the undisputed fact that the GWD Project is anticipated to pump in perpetuity,
7 BLM only analyzed impacts from the Project's pumping for three limited periods: the time it is
8 completely built; 75 years after full build out; and 200 years after build out. BLM Brief at 10. In
9 this case, a 200 year limit on the timeframe within which environmental impacts were considered
10 was not reasonable or adequate because the Project is anticipated to extract groundwater from the
11 affected valleys and groundwater systems in perpetuity. AR Doc. 12413 at 129730; AR Doc.
12 47363 at 192249.
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15 This incompleteness of BLM's identification and consideration of the Project's impacts
16 was compounded by BLM's failure to consider potentially significant environmental impacts in
17 areas where the Project has been modeled to draw down the water table by less than 10 feet or
18 reduce spring flows by less than 5%. Neither BLM nor SNWA contest that drawdowns of less
19 than 10 feet and spring flow reductions of less than 5% can result in significant harms to
20 phreatophytic (groundwater dependent) plants, to a variety of sub-irrigated areas, and to springs
21 and their pools. All of these potential significant environmental impacts were excluded from any
22 consideration by BLM's improper limitation of the identification and consideration of impacts to
23 only those occurring in the considerably smaller area in which a 10 foot drawdown or 5% spring
24 flow reduction could be demonstrated with certainty during the truncated timeframe in which
25 they analyzed the impacts to groundwater of the project's groundwater pumping.
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1 In response, BLM argues that its decision to impose these parameters was within its
2 discretion, and that it selected them in recognition of the groundwater model's uncertainties.
3 BLM Brief at 29-30. However, the model is not at all uncertain about the uniform trend that the
4 GWD Project's pumping will cause, namely steadily worsening drawdowns of the groundwater
5 table in the targeted valleys and eventually throughout the interbasin groundwater flow systems
6 of which they are an integral part. AR 9386 at 35966-67, 35969, 36263, 36266, 36932, 36977-
7 81; AR Doc 12413 at 129572, 129588-94; AR Doc. 12414 at 130196-202. BLM argues that its
8 use of the 10 foot drawdown and 5% flow reduction limitations were justified by the regional
9 scale of its model and by the potential for season fluctuations to produce similar smaller scale
10 drawdowns and reductions in spring flow. As White Pine County pointed out to BLM in
11 comments, however, the existence of such seasonal fluctuations is not a logical reason to fail to
12 factor in the cumulative additional persistent drawdown that will occur as a result of the GWD
13 Project. AR Doc. 9386 at 36264-65. BLM also points to its use of such limitations in modeling
14 other EISs, but does not acknowledge that all of the EISs it references were for more localized
15 projects, all of which had much shorter term, finite lifespans.

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18 Because the GWD Project will pump the approved amounts of water continuously and all
19 the evidence in the record, including the model, demonstrates with certainty that the GWD
20 Project's pumping will cause these drawdowns throughout an identifiable area far broader than
21 the 10 foot drawdown and 5% flow reduction cutoffs reveal, the comprehensive consideration of
22 the Project's environmental impacts mandated by NEPA required BLM to identify and consider
23 significant impacts across that larger area. Instead, BLM used the excuse of short term
24 uncertainty in the model to avoid that consideration. Even if it could not be said at what precise
25 point in time in the short-run the drawdown definitely will occur in each precise location, there is
26 no dispute that the GWD Project will cause these impacts across a defined hydrologically
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1 connected area. AR Doc. 9386 at 36264-65. Accordingly, it was incumbent on BLM to identify
2 and evaluate those impacts across that considerably broader area than was produced by imposing
3 the 10 foot drawdown and 5% spring flow reduction cutoffs of the impacts analysis. At the very
4 least, the BLM should have accounted for the fact that the impacts to not magically cease at the
5 10 foot drawdown contour. It is known with certainty that outside the 10 foot drawdown
6 contour, there will be drawdown. BLM's failure to account for this sizeable additional area of
7 impact in its effects analysis results in a clear failure to take a hard look at these impacts.
8

9 With regard to the imposition of a 200 year limit on the timeframe over which BLM
10 considered the GWD Project's environmental impacts, BLM merely asserts that analyzing
11 impacts over a longer period of time would be unrealistic because of uncertainties and potential
12 changes. *See* BLM Brief at 31. This rationale does not withstand careful consideration. The
13 assertion that lower levels of impacts would be difficult to distinguish from seasonal fluctuations
14 of groundwater levels simply does not hold up over time, as a persistent small reduction (say 3
15 feet of drawdown or 3% of spring flow) would be distinguishable from the shorter term
16 fluctuations the BLM is using as cover to avoid that area of impacts analysis.
17

18 BLM points to no other uncertainties justifying this limitation of the timeframe for a
19 Project that is proposed to operate in perpetuity other than alluding vaguely to potential changes
20 to groundwater pumping and environmental conditions in the most general of terms. BLM Brief
21 at 31. These supposed uncertainties do not make sense in this context. With regard to the first,
22 the BLM was considering and approving a determinate amount of groundwater to be pumped
23 from the targeted valleys by the Project on a permanent basis. Whether or not that amount might
24 hypothetically be changed at some unknown time in the future in no way alters the BLM's
25 obligations to consider the impacts of the project it actually was considering at this time. With
26 regard to environmental conditions, BLM does not provide any more specific explanation of
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1 what it might be contemplating, but there is no evidence of any such potential changed
2 conditions other than climate change, which commenters pointed out would only exacerbate the
3 already predictable increasing drawdowns that the GWD Project will cause. AR Doc. 9040 at
4 34318-24 While the fact that climate change presents a real risk that the GWD Project's impacts
5 will be considerably worse than has been acknowledged should have been fully addressed in
6 BLM's cumulative effects analysis, it in no way undercuts BLM's obligations to
7 comprehensively consider the GWD Project's environmental impacts over the full anticipated
8 life of the Project, and even beyond that over the full time frame in which the Project's impacts
9 can be expected to continue to occur. *See Northern Plains Resource Council*, 668 F.3d at 1077-
10 79; *Wild Fish Conservancy*, 628 F.3d at 521-25. As White Pine County pointed out to BLM in
11 comments, all the available evidence, including the model used by BLM, demonstrates beyond
12 dispute that the impacts of the GWD Project's groundwater pumping will persist and worsen for
13 a very long period even if that pumping someday stops. *See AR 36266 at 36972 – 37001*. In
14 addition to illustrating the likely ineffectiveness of the monitoring and mitigation approach that
15 BLM relied on in the FEIS, this long-term progressive worsening and persistence of the Project's
16 environmental impacts invalidates BLM's claim that it was reasonable not to consider the
17 Project's long-term impacts beyond an arbitrarily selected 200 year limit. Accordingly, BLM's
18 decision to limit its analysis to 200 years was not reasonable and is not entitled to deference.

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22 BLM argues that its limitation of the environmental impacts analysis for the GWD
23 Project to 200 years should be accorded deference because a 200 year time frame provided BLM
24 with a useful long-term comparison of impacts. This self-affirming assertion does not hold up
25 under reasoned scrutiny. As the Ninth Circuit has made clear, the temporal scope of an agency's
26 analysis of a project's impacts must bear a rational relationship to the project's anticipated
27 duration, or life, and to the length of time during which the project's indirect effects can be
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1 expected to occur. As the courts in *Northern Plains Resource Council v. Surface Transportation*
2 *Board* and *Wildlife Fish Conservancy v. Salazar* observed, both NEPA and its implementing
3 regulations and analogous provisions of the Endangered Species Act (“ESA”) and ESA’s
4 implementing regulations require the agency to ground the temporal scope of an environmental
5 effects analysis in both the duration of the project being considered (which here is permanent or
6 perpetual) and even beyond the anticipated end of the project involved so as to cover effects that
7 will occur later in time but still are reasonably foreseeable or certain to occur. *See Northern*
8 *Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1077-79 (9th Cir. 2012); *Wildlife*
9 *Fish Conservancy v. Salazar*, 628 F.3d 513, 521-29 (9th Cir. 2010); 40 C.F.R. § 1508.8(b); 50
10 C.F.R. § 402.02. As noted above and in Plaintiffs’ Opening Brief, the GWD Project is intended
11 to operate in perpetuity and the progressive drawdown of the affected groundwater systems and
12 resulting effects from the approved WGD Project’s pumping over the extreme long term is
13 reasonably/essentially certain to occur. Accordingly, BLM was obliged to consider the Project’s
14 effects over a longer period of time than 200 years, and its failure to do so deprived BLM and the
15 public of necessary information to make an informed decision regarding the GWD Project and its
16 ROW.

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20 **B. BLM Failed to Develop a Monitoring and Mitigation Program that Includes**
21 **Mitigation Thresholds and Failed to Assess the Effectiveness of Mitigation**

22 i. BLM Failed to Address Thresholds for When Mitigation Is Necessary to
23 Prevent Irreversible Impacts

24 Agencies are obliged to discuss mitigation in sufficient detail in the EIS and to evaluate
25 its potential to be effective. *Pacific Coast Federation of Fishermen’s Associations v. Blank*, 693
26 F.3d 1084, 1103 (9th Cir. 2012). BLM does not dispute the fact that it has yet to develop the
27 COM Plan referenced in the FEIS and has not identified thresholds for when mitigation measures
28 must be implemented to protect these resources from inevitable undue degradation. BLM Brief
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1 at 35. Thus, it is clear that BLM has failed to take a hard look at predicted impacts as required
2 by NEPA. BLM was made aware of this critical shortcoming in its analysis by EPA, U.S. Fish
3 and Wildlife Service, Nevada Department of Wildlife, White Pine County, and other cooperating
4 agencies that repeatedly brought these concerns to BLM's attention during the NEPA process.
5 AR Doc. 9230 at 34965; AR Doc. 9262 at 35066; AR Doc. 9469 at 38117; AR Doc. 9386 at
6 35969; *id.* at 36269-72; AR Doc. 11284 at 74079; *see also* CBD Opening Brief at 23-24.

7
8 Specifically, USFWS comments on the DEIS stated that:

9 [b]etween the ADEIS and this DEIS, the following language was
10 removed: "The cumulative impact analysis also was discussed in
11 relation to any regulatory, biological, socioeconomic, or physical
12 thresholds" and these thresholds were uniformly not applied to the
13 resources under consideration in the DEIS. Thresholds such as
14 those above, are strongly recommended in guidance documents
15 such as the CEQ handbook "Considering Cumulative Effects
16 Under the National Environmental Policy Act" (1997) and an EPA
17 advisory Memorandum titled "Consideration of Cumulative
18 Impacts in EPA Review of NEPA Documents" (1999). Thresholds
19 are critical in presenting meaningful impact analysis to the public
20 who has little knowledge about current status and trends of natural
21 resources. Absent the identification of trends in various species
22 and their habitats, there is no context for evaluating the impacts
23 disclosed in the DEIS. We recommend revisiting the cumulative
24 effects analysis and applying appropriate thresholds that put
25 impacts into context for more effective and meaningful decision-
26 making.

27 AR Doc. 9262 at 35066. Thus, at the Administrative Draft stage of the BLM's analysis of the
28 GWD Project, the proper identification of thresholds was contemplated, but later in the process it
was decided that identification of thresholds would be postponed until after approval of the
Project at this stage of review. *Compare* AR Doc. 7700 at 27129.001 (ADEIS-2 at p. 3-12), *with*
AR Doc. 8162 at 29381 (DEIS at p. 3-12), *and* AR Doc. 12413 at 129844 (FEIS at p. 3-12).

Rather than seriously considering comments of cooperating agencies, as BLM
acknowledges that it is required to do, BLM Brief at 39, n. 14, BLM deferred consideration of

1 EPA's concerns to an uncertain later time, *outside* of the NEPA process. *See* AR Doc. 12417 at
2 133065 (stating that "impact thresholds" and "mitigation effectiveness" will be included "in the
3 development of a comprehensive project-wide monitoring and mitigation plan"). As a result, the
4 cooperating agencies reiterated their concerns in later comments on the "Administrative Final
5 EIS" ("AFEIS"). Specifically, EPA stated that "the mitigation and adaptive management
6 strategy outlined in the AFEIS does not appear viable." AR Doc. 12155 at 95991. EPA further
7 commented that:
8

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

14 *Id.* at 95992. EPA again requested that the BLM perform "an evaluation of the effectiveness of
15 the adaptive management strategy, considering the long recovery times for groundwater levels to
16 rebound after the cessation of pumping." *Id.*; *see also id.* at 95994 (stating that BLM's plan
17 "does not appear to be an effective mitigation proposal" due to "the very long timeframes for
18 effects of adaptive management actions (e.g. stopping groundwater pumping) to be seen in the
19 landscape").²

21 BLM concedes that the identification of mitigation thresholds will occur at a later time,
22 outside of the NEPA process, by "SNWA and other parties." BLM Brief at 34 (explaining that
23 "SNWA and other parties" will "establish environmental indicators," and that "SNWA and other
24

26 _____
27 ² EPA restated its position yet again in its comments on the Final EIS: "We have concerns
28 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.
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1 parties” will “develop specific early warning thresholds”).³ However, BLM’s approach is not
2 sufficient under NEPA, which requires that “environmental information is available to public
3 officials and citizens *before* decisions are made and before actions are taken.” 40 C.F.R. §
4 1500.1(b) (emphasis added); *Blue Mts. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216
5 (9th Cir. 1998) (“NEPA emphasizes the importance of . . . comprehensive up-front
6 environmental analysis” to ensure that the agency will not regret its decision “after it is too late
7 to correct”); *see also* 40 C.F.R. § 1502.16(h) (an EIS must address mitigation); *id.* § 1508.20
8 (mitigation includes avoiding the impact altogether, minimizing impacts by limiting the degree
9 or magnitude of the action and its implementation, rectifying the impact by restoring the affected
10 environment, reducing or eliminating the impact over time, and compensating for the impact).
11 As EPA pointed out, the DOI Adaptive Management Technical guide states that “adaptive
12 management is not possible if objectives are not identified . . . If the objectives are not clear and
13 measurable, the adaptive framework is undermined.” AR Doc. 12115 at 095995.

16 Finally, BLM attempts to defend its failure to develop a mitigation plan with triggers by
17 suggesting that the law does not require such a standard. However, every case cited by BLM
18 involves either a project for which the contours have not yet been developed or an actual
19 mitigation plan which contains thresholds and a discussion of the potential effectiveness of that
20 plan. These scenarios are clearly distinguishable from the GWD Project, which has been put
21 before the BLM with significant specificity, for which impacts have been predicted to be
22 massive and widespread, and for which a mitigation plan does not even exist. The BLM relies
23 primarily on the Ninth Circuit’s opinion in *Northern Alaska Env’tl. Ctr. v. Kempthorne*, 457 F.3d
24
25

26
27 ³ SNWA argues that it does not have veto power over the process, *see* SNWA Brief at 43, but
28 the fact remains that the monitoring and mitigation approach reflected in the framework for the
COM Plan puts SNWA in the position of effective control over monitoring determinations that
may prevent BLM from knowing when thresholds have been exceeded.

1 969 (9th Cir. 2006), suggesting that the mitigation plan in that case similarly involved a lack of
2 specificity. *See* BLM Brief at 37. However, unlike *Northern Alaska*, here there is no mitigation
3 plan at all, but merely a plan to develop a mitigation plan. AR Doc. 12415 at 131175; *see also*
4 BLM Brief at 35 (acknowledging that the COM Plan has not yet been developed). Additionally,
5 the proposal in *Northern Alaska* is distinguishable from the case before the Court. There BLM
6 was analyzing a plan for oil and gas leases across “vast reaches” of northern Alaska. *N. Alaska*
7 *Envtl. Ctr.*, 457 F.3d at 972. Significantly, in *Northern Alaska* the court found that BLM did not
8 know at that leasing stage which specific areas, if any, “subsequent exploration would find most
9 suitable for drilling.” *Id.* at 974. The court therefore held that “[b]ecause it is impossible to know
10 which, if any, areas . . . are most likely to be developed, BLM development of more specific
11 mitigating measures cannot be required at this stage.” *Id.* at 979. Similarly, in *San Juan*
12 *Citizens*, the agency did not yet know the location or extent of future gas development. *San Juan*
13 *Citizens Alliance v. Stiles*, 654 F.3d 1038, 1054-55 (10th Cir. 2011). Here, however, the location
14 of the groundwater development is known and the extent of impacts and drawdown is
15 unavoidably broad and massive and is a certainty. *Robertson v. Methow Valley Citizens Council*
16 is similarly distinguishable. 490 U.S. 332 (1989). In that case, the USFS prepared an EIS for a
17 special use permit application related to a theoretical ski area for which no plan of development
18 had even be developed. Here, however, the GWD Project’s contours are known and the project
19 is predicted to have massive and devastating widespread impacts.
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23 In *Okanogan Highlands Alliance v. Williams*, this Court explained that the purpose of the
24 mitigation requirement is to satisfy NEPA’s “demand that an EIS . . . discuss ‘any adverse
25 environmental effects which cannot be avoided should the proposal be implemented.’”
26

27 *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000). In *Okanogan*, the
28 mitigation plan did satisfy that standard because it included a discussion of the likelihood of the

1 plan's effectiveness. *Id.* at 474. Here, the future COM Plan does not satisfy that standard,
2 because the BLM provides no information about whether the mitigation plan has any hope of
3 being effective. *See infra*, subsection IV(B)(ii). The court in *Okanogan* further noted that, "We
4 need only be satisfied that the agency took the requisite "hard look" at the possible mitigating
5 measures; but, on the other hand, a "perfunctory description" is not adequate to satisfy NEPA's
6 requirements." *Id.* (citing *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d
7 1372, 1380 (9th Cir.1998)). Indeed, as the court in *Okanogan* noted, "[a] 'mere listing' of
8 mitigating measures, without supporting analytical data, also is inadequate." *Id.* (citing *Idaho*
9 *Sporting Cong.*, 137 F.3d 1146, 1161 (9th Cir. 1998)). Here, the BLM has failed to draw the
10 connection between the listed generic mitigation measures that could be included in the future
11 COM Plan and their potential to be effective and does not include thresholds for when they
12 would be implemented. Thus, the BLM's outline for a future COM Plan amounts to no more
13 than a "mere listing" of potential mitigation measures and is insufficient under NEPA. *City of*
14 *Carmel-by-the-Sea v. U.S. Department of Transportation*, is similarly distinguishable because
15 there the court upheld a mitigation plan that included thresholds for specific mitigation measures.
16 123 F.3d 1142, 1154 (9th Cir. 1997).

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20 *Pacific Coast Federation of Fishermen's Associations v. Blank*, also makes clear that
21 "[m]itigation must 'be discussed in sufficient detail to ensure that environmental consequences
22 have been fairly evaluated.'" 693 F.3d 1084, 1103 (9th Cir. 2012) (citing *Methow Valley*
23 *Citizens Council*, 490 U.S. at 353, 109 S.Ct. 1835)). The court in *Pacific Coast* further
24 underscored the fact that "[s]uch discussion necessarily includes an assessment of whether the
25 proposed mitigation measures can be effective." 693 F.3d at 1084 (citing *S. Fork Band Council*
26 *of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir.2009)). In *Pacific*
27 *Coast* the mitigation plan contained both goals and specific measures designed to meet those
28

1 goals. Moreover, in that case, the proposed action was designed to better manage fishing so as to
2 maintain the resource as a viable one for future use. That alone distinguishes that case from the
3 GWD Project, which carries with it significant adverse environmental impacts which must be
4 evaluated and for which mitigation will be necessary.

5 In this case, because a mitigation plan does not yet exist, there has been no assessment of
6 whether any proposed mitigation measures can, in fact, be effective. In the absence of such an
7 assessment, there could not be, and has not been, a fair or thorough evaluation of the GWD
8 Project's likely environmental impacts. This is particularly striking here because BLM's
9 analysis has revealed that there will be severe impacts to water, vegetation, and other resources
10 in the targeted basins and hydrologically connected basins. AR Doc. 47277 at 188142; AR Doc.
11 12414 at 130183; *id.* at 130350. Unlike the unknown drilling locations and impacts in *Northern*
12 *Alaska*, here the impacts are known with certainty to be widespread and severe. While specific
13 well locations are unknown at this time, what is known is that SNWA plans to withdraw an
14 established amount of groundwater from the targeted basins using its proposed wells. Indeed the
15 drawdown predictions do not vary significantly in magnitude between alternatives depicting
16 SNWA's existing points of diversion versus alternatives depicting distributed pumping
17 scenarios. AR Doc. 12413 at 129579.

18 The fact that the precise impacts at precise locations at a given time are not yet
19 discernible does not detract from the fact that there will unquestionably be devastating impacts
20 over a vast area for which mitigation will be necessary. Despite this fact, BLM has not
21 explained why the feasibility or effectiveness of a comprehensive effective mitigation strategy
22 for these impacts, including basic thresholds to trigger mitigation measures, could not be fully
23 addressed in this primary NEPA review, which will be the only stage to consider the GWD
24 Project as a whole before it is approved to proceed. The answer may be reflected in the record

1 evidence suggesting that the proposed mitigation strategy simply cannot be effective given the
2 massive impacts and lag times associated with SNWA's proposed groundwater withdrawals. AR
3 Doc. 9386 at 35969; *id* at 36972-37001. Given this evidence, it is even more critical that BLM
4 specify concrete measures and triggers in a monitoring and mitigation plan now and evaluate the
5 potential for the COM Plan to be effective at this stage of NEPA review.

6 ii. BLM Failed to Take a Hard Look at Environmental Impacts by Failing to
7 Evaluate the Effectiveness of the Future COM Plan
8

9 Not only does the description of the anticipated COM Plan fail to include triggers for
10 mitigation, BLM fails to evaluate the potential effectiveness of that anticipated plan.
11 Commenters, including EPA, US Fish and Wildlife Service, Nevada Department of Wildlife, and
12 White Pine County, raised the issues of the "effectiveness of the mitigation strategy, as a whole,
13 in preserving regional ecosystem functions." AR Doc. 9469 at 38117 (EPA DEIS Comments);
14 *see also* AR Doc. 9262 at 35070 (USFWS DEIS Comments); AR Doc. 9230 at 34965 (NDOW
15 DEIS Comments); AR Doc. 9386 at 36972-37001 (White Pine County DEIS Comments); *id.* at
16 36985-37001; and "the time lag between cessation of pumping and recovery of groundwater
17 levels." AR Doc. 12115 at 95996 (EPA AFEIS Comments).⁴
18

19 As explained by EPA, BLM cannot defer its assessment of the mitigation effectiveness
20 for the Project to the future COM Plan, as the "courts have ruled that agencies should discuss
21 mitigation measures, along with an assessment of whether they can be effective, in the EIS." AR
22 Doc. 12115 at 95993-94 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352
23 (1989); *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1381 (9th Cir.
24 1998) (finding that agency failed to provide "an estimate of how effective the mitigation
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28 ⁴ *See also* AR Doc. 9262 at 35070 (U.S. FWS, raising concern about the ability of mitigation
measures to provide early warning of negative impacts given time lags in aquifer response).
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1 measures would be if adopted)); *see also S. Fork Band Council of W. Shoshone of Nev. v. U.S.*
2 *Dep't of Interior*, 588 F.3d 718, 727 (9th Cir.2009) (a discussion of mitigation measures
3 necessarily includes “an assessment of whether the proposed mitigation measures can be
4 effective). Additionally, the “omission of a reasonably complete discussion of possible
5 mitigation measures would undermine the action-forcing function of NEPA and prevent the
6 agency and interested parties from properly evaluating the severity of the adverse affects.” *Id.*
7 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989)).
8

9 In an effort to distract from its failure to address the effectiveness of the future COM Plan
10 at a more basic level, BLM touts its consideration of individual theoretical components of its
11 mitigation strategy. BLM Brief at 40. EPA pointed out the inadequacy of this approach in its
12 comments on the DEIS:

13 [T]he DEIS attempts to convey effectiveness of each proposed
14 mitigation measure and the residual impacts that would occur after
15 mitigation. However, the DEIS does not evaluate the probable
16 effectiveness of the mitigation strategy, as a whole, in preserving
17 regional ecosystem functions. *Because of the large magnitude and*
18 *scale of potential impacts, it is critical that an evaluation of*
19 *regional mitigation effectiveness be included in the programmatic-*
20 *level impact assessment and not deferred to future tiered NEPA*
21 *analysis.*

22 AR Doc. 9469 at 38117 (emphasis added). The EPA further notes that “[t]he AFEIS
23 acknowledges that ‘the success of mitigation would depend on site-specific conditions and
24 details of the mitigation plan’ ... yet the development of the [COM plan] is deferred until after
25 BLM’s decision.” AR Doc. 12115 at 95993. Thus, as EPA pointed out, BLM itself has
26 acknowledged that it is unable to determine whether the COM Plan will be effective.

27 BLM also argues that it appropriately considered the long delay between when any
28 established thresholds are exceeded and when water levels would return to equilibrium. BLM
Brief at 41. However, BLM fails to consider that these delays may, in fact, render mitigation
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1 impossible. AR Doc. 12414 at 130128. As explained by EPA and by White Pine County, the
2 very long response time likely will render BLM's entire mitigation plan ineffective. AR Doc.
3 9386 at 36978-81; *id.* at 36985-37001; AR Doc. 12115 at 95994. More specifically, BLM's
4 "adaptive management" approach "does not appear to be an effective mitigation proposal for this
5 project" in part because "the very long timeframes for effects of adaptive management actions
6 (e.g. stopping groundwater pumping) to be seen in the landscape could result in irreversible loss
7 of resources." AR Doc. 12115 at 95994; AR Doc. 9386 at 36972-37001; *id.* at 36985-37001.

9 In contrast to EPA's identification of this issue as a fundamental problem affecting the
10 entire mitigation and "adaptive management" strategy, BLM merely stated in the EIS, under its
11 discussion of "potential residual impacts," that the recovery of water levels in some areas "could
12 take several years or decades." AR Doc. 12414 at 130128. "Therefore, a long-term reduction in
13 surface discharge at perennial surface water source areas is likely to occur in some areas." *Id.*
14 BLM's grudging acknowledgement of "potential residual impacts" on "federal resources" in
15 "some areas," lasting "several years to decades," however, is far different from EPA's more
16 fundamental criticism that "the mitigation and adaptive management strategy outlined in the
17 [EIS] does not appear viable." AR Doc. 12115 at 95991. Indeed, BLM admits that "reasonable
18 or adequate mitigation measures for long-term reductions of groundwater discharge...may not be
19 available for all locations" BLM Brief at 40. Thus, BLM has essentially conceded that its
20 proposed framework for monitoring and mitigation may indeed be ineffective. Yet the agency
21 has failed to actually evaluate the extent of its effectiveness, and so has failed to take a hard look
22 at the impacts of the GWD Project. Instead, BLM has attempted to minimize and sidestep the
23 extent to which mitigation may in fact be impossible.

27 **V. BLM Improperly Failed to Prepare a Supplemental EIS Despite the Fact that New**
28 **Circumstances and Information Were Present After the Draft EIS Was Circulated**
for Notice and Comment

1 BLM concedes that an SEIS is required when new circumstances or new information is
2 significant with respect to the nature of the project or its environmental impacts. BLM Brief at
3 55; 40 C.F.R. § 1502.9(c). The vacating of SNWA's previously approved water rights for the
4 GWD Project by Nevada State courts that have found insufficient evidence to demonstrate the
5 availability of water to supply the Project clearly significant information and a significant new
6 circumstance that goes directly to the heart of the GWD Project's viability and its potential to
7 cause unmitigable harm to the environment and existing water rights. The same is true with
8 regard to the finding by the Nevada state district court in *White Pine County v. King*, CV-
9 1204049 (Nev. Dist. Ct. Dec. 13, 2013), that the monitoring and mitigation approach relied on by
10 SNWA and the BLM as the basis for approval of the GWD Project and its ROW is lacking in the
11 kind of specific information and measures that would be necessary for a reviewing agency to
12 make an informed, soundly reasoned, determination regarding the severity of the Project's
13 environmental impacts or the ability to effectively mitigate those impacts. Further, changes in
14 the viability of desalination as an alternative as well as a significantly diminished population
15 forecast warrant the preparation of an SEIS. Finally, the addition of alternative F after the close
16 of the notice and comment period on the Draft EIS warrants a supplemental EIS.

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20 **A. Major Federal Action Still Remains to Occur on the GWD Project and Its**
21 **Right of Way**

22 To avoid the plain reality that the decision challenged in this lawsuit is one step in an
23 ongoing course of major federal action relating to the approval and implementation of the GWD
24 Project that will continue to occur for many more years, BLM asserts that the only relevant
25 action to occur was its approval of the ROW for the GWD Project's main pipeline infrastructure.
26 BLM Brief at 56. In making this assertion BLM contradicts its own arguments elsewhere that its
27 "tiered approach" to analyzing the GWD Project and its deferral of analysis of actual impacts
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1 and of the effectiveness of a monitoring and mitigation plan is appropriate because the approval
2 of the GWD Project and its principal ROW is only the first in a long series of major federal
3 reviews and actions required for the design and implementation, and operation of the Project,
4 including the monitoring and mitigation plan. *See* BLM Brief at 4-5.

5 As BLM recognizes, whether an SEIS is required “turns on the value of the new
6 information to the still pending decisionmaking process.” BLM Brief at 56 (quoting *Center for*
7 *Biological Diversity v. Salazar*, 706 F.3d 1085, 1095 (9th Cir. 2013)). In an effort circumvent its
8 own admission that a great deal of federal decisionmaking concerning the GWD Project is still
9 pending and will take many more years to complete, BLM Brief at 4-5, BLM essentially argues
10 that it need not supplement the FEIS that addresses the GWD Project as a whole because each
11 later more narrowly focused tiered NEPA review for the local siting of the Project’s wells will
12 constitute an entirely discrete major federal action that will receive its own separate NEPA
13 review at the time it is proposed. BLM Brief at 57. This counterintuitive proposition rests on the
14 assumption that NEPA analysis of the Project as a whole can be meaningfully supplemented in
15 the way intended under NEPA after the main infrastructure already has been constructed in the
16 context of much more localized siting proposals for individual wells. This argument is both
17 implausible and inconsistent with NEPA’s intent to ensure that an agency fully considers the
18 relevant information concerning a proposals potential environmental impacts before committing
19 to that course of action. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

23 **B. Significant New Circumstances and Information Concerning the GWD**
24 **Project Require Supplemental NEPA Analysis**

25 i. Since the Issuance of the ROD, Nevada State Courts Have Invalidated the
26 Water Rights for the GWD Project Warranting the Preparation of an SEIS

27 As noted, in 2013, after the ROD’s issuance in 2012, a Nevada State District Court
28 overturned the State Engineer’s approval of SNWA’s water rights applications for the GWD
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1 Project. The state court's decision vacating SNWA's water rights for the GWD Project were,
2 like an earlier state court decision, based findings that the available evidence indicated that there
3 are: (1) a lack of available water to supply the GWD Project; (2) a likelihood that the Project, in
4 the form approved by BLM, will result in unsustainable groundwater mining and cause severe
5 unmitigable environmental impacts and conflicts with senior existing water rights; and (3)
6 fundamental deficiencies in the still inchoate monitoring and mitigation approach that do not
7 provide a reviewing agency with sufficient information to make an informed decision about the
8 Project's potential impacts and the feasibility of mitigating those impacts. The state district court
9 remanded the matter to the State Engineer to reconsider the applications in light of these
10 deficiencies. *See White Pine County v. King*, CV-1204049 (Nev. Dist. Ct. Dec. 13, 2013). This
11 state court decision is the kind of information and development that warrants preparation of an
12 SEIS because it appears to have effectively eliminated, or at least dramatically reduced, the
13 amount of water available to supply the Project, and to have determined that the proposed
14 monitoring and mitigation framework for the Project is simply insufficient to support an
15 informed analysis of the Project's environmental impacts and their ability to be mitigated. It also
16 constitutes new information that is significant and relevant enough to require an SEIS because
17 the decision reveals the fact that the available modelling evidence indicates that the Project as
18 approved by BLM would involve unsustainable groundwater mining of the basins and
19 groundwater systems being tapped, which would result in unreasonable and unmitigable
20 environmental harms and conflicts with existing water rights.

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24 BLM premised its analysis and approval of the GWD Project and its right-of-way, in part,
25 on the assertion that it did not have enough information to make such determinations, and would
26 therefore rely on later tiered stages of review to make those determinations. The State court
27 decision has brought to light the fact that the available evidence indicates that the amount of
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1 groundwater pumping approved by BLM inevitably will result in unsustainable, environmentally
2 destructive, groundwater mining. BLM's NEPA analysis of the GWD Project also was
3 predicated on the State Engineer's determination of how much groundwater was sustainably
4 available to supply the GWD Project and the State Engineer's willingness to rely on the same
5 monitoring and mitigation approach as BLM relied on. Now that this information has been
6 exposed in the State court decisions, it is essential that BLM re-examine the Project and consider
7 alternatives that can be reliably shown not to involve groundwater mining.
8

9 The Nevada State Supreme Court's decision in *Eureka County v. State Engineer*, 131
10 Nev. Adv. Op. 84, 2015 WL 6550647 (Oct. 29, 2015), also is highly relevant because the court
11 found in that case that a monitoring and mitigation plan closely analogous to the approach relied
12 on by BLM here was categorically inadequate to support an informed decision about another
13 groundwater development project's impacts and the ability to mitigate those impacts. These
14 state court decisions invalidating the GWD Project's water rights and finding the monitoring and
15 mitigation approach relied on by BLM to be inadequate for an informed decision as to the
16 Project's impacts and the ability to mitigate those impacts constitute significant new information
17 and circumstances that are relevant and require the preparation of an SEIS.
18

19
20 ii. Updated Population Projections Significantly Undercut the Need for the
21 GWD Project and Warrants the Preparation of an SEIS

22 As explained in Plaintiffs' Opening Brief an SEIS also should be required in this case in
23 light of the significant new information contained in the 2014 CBER report and SNWA's 2015
24 Water Resources Plan, attached to Plaintiffs' Opening Brief as Exhibits J and K, both of which
25 were released after the ROD and both of which contain significant relevant information calling
26 into question the purpose and need for the GWD Project and its ROW and the ripeness of the
27 Project and ROW for consideration and approval at this time. The 2014 CBER report contains
28

1 information reflecting a dramatic reduction in the projected population of southern Nevada over
2 the coming years which indicates a corresponding decrease in the need for the GWD Project and
3 its ROW at this time. This new information and changed circumstance is reflected in the
4 dramatically reduced potential need for the GWD Project over at least the next 20 years, and
5 perhaps at all, predicted in SNWA's 2015 Water Resources Plan. The information in both of
6 these reports, and the changed circumstances they reflect, significantly undercut and call into
7 question the need for the GWD Project at all and the timeliness of approving the Project to
8 proceed at this time, when no construction is planned, no water rights for the Project exist, the
9 purported need for the Project appears to have evaporated, and there is a lack of adequate
10 scientific data and analysis to assess the significance of the Project's environmental impacts or
11 the feasibility of mitigating those impacts. Accordingly, the new information in the 2014 CBER
12 report and 2015 SNWA Water Resources Plan, and the changed circumstance they reflect,
13 require the preparation of an SEIS.
14
15

16 iii. New Information Concerning the Feasibility of Desalination Also
17 Warrants the Preparation of an SEIS

18 BLM argues that information reflecting the feasibility and cost-effectiveness of
19 desalination is not relevant because it would not serve to diversify SNWA's water supply
20 scheme. BLM Brief at 61. This argument fails to account for the fact that, as explained above
21 and in Plaintiffs' Opening Brief, desalination could meet some or all of the need that the GWD
22 Project is proposed to meet. The fact that, since the issuance of the ROD, a desalination plant
23 has come on line in southern California that produces more than half the amount of water the
24 GWD Project was approved to supply for less than one third of the cost is relevant and
25 significant information when viewed in contrast to the alternatives analysis in the FEIS, which
26 dismissed desalination as an alternative on the basis of a few conclusory assertions that it would
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28

1 not be feasible or cost effective. AR Doc 12413 at 129794. In fact, desalination now provides
2 the city of San Diego with up to 56,000 acre feet of fresh water per year for a cost of roughly \$1
3 billion, just a fraction of the cost SNWA projects for its proposed GWD Project. *Compare* Press
4 release: Carlsbad Desalination Plant Named International Plant of the Year for 2016,
5 <http://carlsbaddesal.com/carlsbad-desalination-plant-named-international-plant-of-the-year-for->
6 2016, attached hereto as Exhibit A, *with* AR Doc. 12413 at 129552. In an apparent
7 acknowledgement of desalination's feasibility, SNWA currently is exploring desalination
8 opportunities, despite the agency's statement in its brief that desalination is economically
9 infeasible. AR Doc. 6049 at 17742; SNWA Water Resource Plan, at 16, 25, 27-29, 38 (2015),
10 attached as Exhibit K to Plaintiffs' Opening Brief.
11

12 iv. The Addition of a New Alternative F in the Final EIS Required the
13 Preparation of an SEIS

14 BLM argues that because it selected a modified version of Alternative F that reduced the
15 amount of groundwater pumping from the amount originally proposed in Alternative F, the
16 reduced version of that new alternative falls within the range that had been analyzed in the DEIS
17 and therefore does not require preparation of an SEIS. BLM Brief at 61-2. This argument
18 misses the point that the DEIS advised the public that BLM was inclined to select Alternative A,
19 which would have included Snake Valley but would have limited pumping in these four valleys
20 to the an amount lower than either version of Alternative F, which was not revealed to the public
21 until the FEIS. Also, in the DEIS the only alternative to analyze pumping from the four valleys
22 ultimately approved was Alternative E, which only allowed for 78,755 af/yr of groundwater
23 pumping from those valleys. AR Doc. 12413 at 129795.
24

25 An SEIS is not required so long as a new alternative introduced after the DEIS stage of
26 public review and comment falls within the range of alternatives considered in the DEIS and was
27
28

1 thereby disclosed to the public for review and comment at that time. *Russell County Sportsmen*,
2 668 F.3d at 1045. Here, however, new Alternative F was first proposed in the FEIS and then
3 adopted at a reduced amount in the ROD. Both versions of Alternative F exceed the only
4 Alternative presented in the DEIS for pumping in these four valleys alone. AR Doc 12413 at
5 129795. The fact is that Alternative F was not disclosed to the public in the DEIS, and it exceeds
6 the level of pumping for these four valleys that was disclosed in any Alternative at the DEIS
7 stage. Consequently, the public was not provided with the required opportunity to review and
8 comment on either version of Alternative F at the DEIS stage of review, and therefore BLM's
9 selection of new Alternative F in the ROD is another ground for requiring that an SEIS be
10 prepared. *California v. Block*, 690 F.2d 753, 772 (9th Cir. 1982).

11
12 **VI. BLM's Approval of the GWD Project and Its Right of Way Failed to Comply with**
13 **FLPMA**

14 **A. BLM Failed to Ensure Compliance with Mandatory Requirements in the Ely**
15 **RMP**

16
17 BLM acknowledges that the terms and conditions imposed on BLM's approval of the
18 GWD Project and its ROW attempt to ensure compliance with the Ely District Resource
19 Management Plan ("Ely RMP") only "with respect to the construction of the main conveyance
20 pipeline." BLM Brief at 63. BLM concedes that it has not ensured that the Project's
21 groundwater pumping will or can be done in conformance with the Ely RMP's mandatory
22 compensatory mitigation requirements, *id.*, despite the fact that the pumping and export of
23 groundwater from the targeted valleys and groundwater systems is the entire purpose of the
24 Project and the only reason for its ROW. *Id.* (offering only that "terms and conditions will be
25 refined in later stages of the Project to more specifically address impacts to water sources").
26 BLM offers no support for its position that it need not demonstrate that the Project as a whole
27
28

1 will comply with the Ely RMP's mandatory standards in this EIS which is the only one that
2 addresses the Project as a whole. BLM's conclusory assertion that it will ensure compliance
3 with regard to the Project's groundwater pumping in the future is not sufficient to satisfy
4 FLMPA's requirement of compliance with the requirements of the Ely RMP. *See Or. Natural*
5 *Res. Council Fund v. Bring*, 492 F.3d 1120, 1131-32 (9th Cir. 2007); *Native Ecosystems Council*
6 *v. U.S. Forest Serv.*, 418 F.3d 953, 963 (9th Cir. 2005).

7
8 Even with regard to the loss of special species habitat attributable only to the construction
9 of the main pipeline, BLM argues that the 2:1 compensatory acreage requirement in Ely RMP
10 SS-10 only should be applied to acreage that is "permanently converted" and not to acreage that
11 is subjected to even long term disturbance. *Id.* at 64. For the greater sage-grouse this translates
12 to a difference in the compensatory habitat mitigation by an order of magnitude. *Compare AR*
13 *Doc. 12414 at 130467* (260 acres permanently converted compared with 3,868 acres subject to
14 long term disturbance) *with AR Doc. 47277 at 188424* (2:1 compensatory habitat mitigation only
15 for "permanently converted" habitat). BLM provides no record support or other support for its
16 failure to provide 2:1 habitat compensation for some special status species' habitat that
17 effectively will be lost for a considerable amount of time. Similarly, BLM does not provide any
18 record support or a reasoned basis for its decision not to provide the required 2:1 habitat
19 compensation for foraging habitat for golden eagles, ferruginous hawks or special status bat
20 species, merely reciting its decision and asserting that it was reasonable. BLM Brief at 66.

21
22
23 BLM also argues that it did not have to comply with Ely RMP management standards
24 requiring mitigation for loss of aquatic habitat and restoration of damage to water resources, such
25 as seeps and springs, likely to result from the GWD Project's groundwater pumping because it
26 has not yet approved specific locally sited groundwater pumping facilities. This argument fails
27 to recognize the fact that BLM has approved the GWD Project as a whole, including the amount

1 of water to be pumped from each targeted valley, along with the Project's main conveyance
2 ROW, and the fact that BLM's modeling shows that the approved amount of groundwater
3 pumping will systemically draw down the affected groundwater systems to such an extent that
4 there will be significant impacts and loss of aquatic habitat in the affected valleys regardless of
5 where specific wells are sited within the targeted valleys. AR Doc. 9386 at 36932, 36977-781;
6 AR Doc. 12413 at 129588-94; AR Doc. 12414 at 130317, 130419, 130431-33, 130350, 130196-
7 202; AR Doc. 12416 at 132199-437. Because BLM has approved the GWD Project as a whole
8 at this primary stage of review, which is the only review that will consider the impacts of the
9 Project as a whole, BLM's argument that it need not ensure protection of or mitigation for
10 aquatic habitat for the entire Project until later stages of site specific review is incorrect. By the
11 same token, BLM's reliance on the framework for future development of a monitoring and
12 mitigation plan, BLM Brief at 68, is not an adequate substitute for actually ensuring that aquatic
13 habitat will be mitigated, as required by Ely RMP standards WL-4 and WL-18, at this stage of
14 review when the GWD Project as a whole is being approved. For the reasons discussed above,
15 BLM's assertion that its yet to be developed monitoring and mitigation plan may be relied on in
16 lieu of an evaluation of the effectiveness of an actual mitigation plan and measures prior to the
17 Project's approval runs afoul of NEPA's mandate that such analysis be performed at the earliest
18 possible time to avoid conflicts and unreasonable impacts before agencies and other parties have
19 become committed to a particular choice of action. *See Marsh v. Oregon Natural Resources*
20 *Council*, 490 U.S. 360, 371 (1989); *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983).

24 With regard to the need to comply with mitigation standards for vegetation, BLM cannot
25 point to and does not argue that it has made any provision to comply with the Ely RMP's
26 management standards, including VEG 18, with respect to the GWD Project's groundwater
27 pumping. Here, as elsewhere, BLM argues that it was not required to consider or ensure
28 Plaintiffs WPC, et al.'s Reply in Support of MSJ and Opposition to Defs' Motions for SJ
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1 compliance with the Ely RMP's standards and objectives prior to approving the GWD Project as
2 a whole because it says it will comply with those requirements in later narrow review stages
3 dealing with the siting of specific wells. BLM Brief at 69-70. However, as explained above, the
4 modeling for the GWD Project reveals that the level of groundwater pumping approved at this
5 stage of review will produce drawdowns and related impacts across the affected basins
6 regardless of the specific siting of wells within the targeted valleys. BLM's failure to ensure
7 compliance with these mandatory standards under the Ely RMP at this stage of review violates
8 the requirement that agencies integrate NEPA analysis "at the earliest possible time" to avoid
9 potential conflicts, 40 C.F.R. § 1501.2, and determine in an EIS whether the project will comply
10 with other environmental laws, 40 C.F.R. § 1502.2(d).
11

12 **B. BLM Failed to Properly Determine that the GWD Project Will Not Cause**
13 **Unnecessary or Undue Degradation**

14 BLM argues that its conclusory assertion that the approval of the GWD Project and ROW
15 complies with FLPMA's requirement that BLM prevent the "unnecessary or undue degradation"
16 of public lands, 43 U.S.C. § 1732(b), is entitled to deference because of BLM's broad discretion
17 in implementing that prohibition. BLM Brief at 73. While BLM is correct that it has
18 considerable discretion in implementing the prohibition against unnecessary or undue
19 degradation, that discretion is not unlimited. As previously explained, in this case BLM has
20 effectively approved the GWD Project as a whole, including specified amounts of groundwater
21 pumping from the targeted valleys in perpetuity. *See* Plaintiffs' Opening Brief at 7, 13-14.
22

23 In considering and approving the Project as a whole, BLM relied on its "conceptual
24 form" of a monitoring and mitigation plan to be developed in the future as a sufficient safeguard
25 against unnecessary or undue degradation of the affected public lands without actually evaluating
26 the potential effectiveness of any concrete mitigation measures for the Project's likely impacts.
27
28

1 See BLM Brief at 73. With regard to the risks posed by the Project's groundwater pumping as
2 approved by BLM, then, all that BLM actually has done to prevent unnecessary or undue
3 degradation is include a requirement for a monitoring and mitigation plan (the "COM Plan") to
4 be developed in the future. *Id.* This stands in stark contrast to the agency action upheld in
5 *Theodore Roosevelt Conservation Partnership v. Salazar*, where the D.C. Circuit predicated its
6 determination that BLM did not violate the prohibition against unnecessary or undue degradation
7 on its finding that BLM had provided for a set of precisely described concrete monitoring and
8 mitigation measures and commitments than the BLM has relied on in approving the GWD
9 Project. See 661 F.3d 66, 77-78 (D.C. Cir. 2011).

11 The cases relied on by BLM in arguing for deference to its "unnecessary or undue
12 degradation" determination all are readily distinguishable from this case and do not, in fact,
13 support BLM's conclusory assertion that the GWD Project will not cause unnecessary or undue
14 degradation on the basis of a mere conceptual framework for the eventual development of a
15 monitoring and mitigation plan without any evaluation of the potential effectiveness of specific
16 measures. To begin with, *Gardner v. BLM*, 638 F.3d 1217 (9th Cir. 2011), is inapposite because
17 it involved a failure to act claim under 5 U.S.C. § 706(1). In the two other cases cited by BLM
18 the courts pointedly based their findings that the agency had complied with FLPMA's
19 prohibition against unnecessary or undue degradation on the fact that the agency had based its
20 determination on far more precise and concrete monitoring and mitigation plans and measures
21 than the "conceptual form" of a plan that BLM relied in this case. See *S. Fork Band Council of*
22 *W. Shoshone of Nevada v. U.S. Dep't of the Interior*, No. 3:08-cv-616, 2012 WL 13780, at *2, *3
23 D. Nev. Jan. 4, 2012); *Quechan Tribe of the Ft. Yuma Indian Reservation v. U.S. Dep't of the*
24 *Interior*, 927 F. Supp. 2d 921, 940 (S.D. Cal. 2013); see also *S. Fork Band Council of W.*
25 *Shoshone of Nevada v. U.S. Dep't of the Interior*, 588 F.3d 718, 724-25 (2009).

C. BLM Failed to Ensure Compliance with Air Quality Standards

1
2 BLM claims it has adequately ensured that the GWD Project's approved pumping will
3 comply with air quality standards by providing for the future development of a monitoring and
4 mitigation plan that will ensure compliance with air quality standards. BLM Brief at 72. This
5 argument rests on BLM's assumption it need not actually evaluate the effectiveness of an as yet
6 undeveloped monitoring and mitigation plan or any actual proposed mitigation measures in order
7 to ensure that air quality standards will be complied with, despite the likely impacts from the
8 Project's long-term groundwater pumping. As explained previously, the vague framework for
9 the development of a monitoring and mitigation plan contained in the FEIS did not provide BLM
10 with sufficient information to make a reasoned determination about the potential effectiveness of
11 any mitigation measures, including measures that may be developed in the future to mitigate air
12 quality impacts. Accordingly, BLM lacked a basis for making an informed determination about
13 the ability for the GWD Project as approved to comply with air quality standards in any of the
14 areas potentially affected by the Project's long term groundwater pumping.
15

CONCLUSION

16
17
18 As described above, BLM's failure to comply with NEPA, FLPMA, and the NHPA,
19 BLM's is arbitrary, capricious, an abuse of discretion, and not in accordance with the law and
20 procedures required by law. 5 U.S.C. §§ 706(1), (2)(A), (D). For this and the foregoing reasons,
21 the undisputed facts confirm that BLM violated its duties under NEPA, FLPMA, and NHPA
22 when issuing the 2012 ROD for the GWD Project and granting a ROW to SNWA. Accordingly,
23 Plaintiffs respectfully request the Court to grant Plaintiffs' Motion for Summary Judgment, deny
24 BLM's and SNWA's Motions for Summary Judgment, and issue an order declaring BLM's
25 approval of the GWD Project and ROW unlawful and vacating BLM's decision.
26
27

Dated: June 1, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

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2 I hereby certify that I electronically filed the foregoing **PLAINTIFFS WHITE PINE**
3 **COUNTY, ET AL.'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
4 **AND MEMORANDUM IN OPPOSITION TO DEFENDANT BUREAU OF LAND**
5 **MANAGEMENT ET AL. AND DEFENDANT-INTERVENOR SOUTHERN NEVADA**
6 **WATER AUTHORITY MOTIONS FOR SUMMARY JUDGMENT** with the Clerk of Court
7 using the CM/ECF system which sent notification of such filing to the following:
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10 Dated this 1st day of June, 2016.

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