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

CENTER FOR BIOLOGICAL DIVERSITY,)

Plaintiff,)

v.)

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.)

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

PLAINTIFFS WHITE PINE
COUNTY, ET AL.'S
MEMORANDUM
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

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INTRODUCTION

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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”) seek summary judgment
6 pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56-1 of the Local
7 Rules of Practice for the United States District Court for the District of Nevada against
8 Defendants (collectively “BLM”) who have granted to Defendant-Intervenor Southern Nevada
9 Water Authority (“SNWA”) a right of way (“ROW”) for construction of a pipeline to serve
10 SNWA’s Clark, Lincoln, and White Pine Counties Groundwater Development Project (“GWD
11 Project”) in contravention of BLM’s duties under the National Environmental Policy Act
12 (“NEPA”), 42 U.S.C. §§ 4321 et seq., the Federal Land Policy and Management Act
13 (“FLPMA”), 43 U.S.C. §§ 1701 et seq., the National Historic Preservation Act (“NHPA”), 16
14 U.S.C. §§ 470 et seq.,¹ and their implementing regulations.
15
16

JURISDICTION AND STANDING

17
18 This Court has jurisdiction pursuant to 28 U.S.C. § 1331, because this action arises under
19 the laws of the United States, including NEPA, FLPMA, NHPA, and the Administrative
20 Procedure Act (“APA”), 5 U.S.C. §§ 701 et seq. An actual, justiciable controversy exists
21 between the parties, and the requested relief therefore is proper under 28 U.S.C. §§ 2201–2202
22 and 5 U.S.C. § 701–06. Plaintiffs’ claims are justiciable because they challenge final agency
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27 ¹ Tribal Plaintiffs Confederated Tribes of the Goshute Reservation, Ely Shoshone Tribe, and
28 Duckwater Shoshone Tribe have prepared a separate brief that addresses claims twelve, thirteen,
and fourteen of the jointly filed complaint. Plaintiffs hereby incorporate that brief by reference.
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1 action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
2 law, and therefore actionable pursuant to 5 U.S.C. § 706(2)(A).

3 Plaintiffs have standing to challenge Bureau of Land Management's ("BLM's") actions.
4 A plaintiff has constitutional standing if the Plaintiff has suffered an injury in fact that is fairly
5 traceable to the challenged action; and which is likely to be redressed by a favorable court ruling.
6 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Cantrell v. City of Long Beach*, 241
7 F.3d 674, 679 (9th Cir. 2001) (quoting *Friends of the Earth v. Laidlaw Env'tl. Servs.*, 528 U.S.
8 167, 180-81 (2000)). Plaintiffs' interest must be "concrete and particularized," and the injury
9 "actual and imminent" as opposed to "conjectural or hypothetical." *Lujan*, 504 U.S. at 560
10 (citation omitted). "The 'injury in fact' requirement in environmental cases is satisfied if [the
11 plaintiff] adequately shows that she has an aesthetic or recreational interest in a particular place,
12 or animal, or plant species and that that interest is impaired by a defendant's conduct."
13 *Ecological Rights Found. v. Pac. Lumber*, 230 F.3d 1141, 1147 (9th Cir. 2000). A plaintiff may
14 also suffer from a procedural injury, such as those that arise from a federal agency's violations of
15 procedural requirements under NEPA. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341
16 F.3d 961, 971 n.6 (9th Cir. 2003). In cases of procedural injury, the immediacy of injury to the
17 underlying concrete interest is relaxed, requiring only a "reasonable probability" of injury.
18 *Lujan*, 504 U.S. at 573, n.7. Thus, the plaintiff need only show "the procedures in question are
19 designed to protect some threatened concrete interest of his that is the ultimate basis of his
20 standing." *Lujan*, 504 U.S. at 573 n.8; *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 779
21 (9th Cir. 2006). In the context of NEPA violations, a "procedural injury would be redressed if
22 the [agency] followed proper procedures." *Pit River*, 469 F.3d at 779 (citation omitted); *Ocean*
23 *Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 860-61 (9th Cir. 2005) (NEPA violations
24 redressable by order to conduct EIS).
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1 Plaintiffs' standing in this action is evident from the administrative record produced by
2 the BLM and in the Plaintiffs' standing declarations, attached hereto as Exhibits A through H.
3 As a direct result of BLM's actions approving SNWA's GWD Project and ROW, Plaintiffs have
4 suffered a procedural injury because BLM failed to comply with their duties pursuant to NEPA
5 which will result in concrete injury to Plaintiffs' aesthetic, recreational, business, and
6 environmental interests in the GWD Project area. As explained in their declarations, Plaintiffs'
7 injuries would be redressed by a favorable Court decision ordering BLM to comply with NEPA,
8 FLPMA, NHPA, and implementing regulations promulgated thereunder.
9

10 **LEGAL BACKGROUND**

11 **I. National Environmental Policy Act**

12 NEPA is our "basic national charter for the protection of the environment." 40 C.F.R. §
13 1500.1. It was enacted to ensure that the federal government uses all practicable means to
14 "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing
15 surroundings," and to "attain the widest range of beneficial uses of the environment without
16 degradation, risk to health or safety, or other undesirable and unintended consequences," among
17 other policies. 42 U.S.C. § 4331(b). NEPA's primary purposes are to insure fully informed
18 decision-making and to provide for public participation in environmental analyses and decision-
19 making. 40 C.F.R. § 1500.1(b), (c). To accomplish this purpose, NEPA requires that all federal
20 agencies prepare a "detailed statement" regarding all "major federal actions significantly
21 affecting the quality of the human environment." 42 U.S.C. § 4332(C). This statement, known
22 as an environmental impact statement ("EIS"), must, among other things, describe the
23 "environmental impact of the proposed action," and evaluate alternatives to the proposal. *Id.*
24 Agencies must "study, develop, and describe alternatives to recommended courses of action in
25 any proposal which involves unresolved conflicts concerning alternative uses of available
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28 Plaintiffs White Pine County, et al.'s Memo in Support of Mtn For Summary Judgment
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1 resources” 42 U.S.C. § 4332(E). CEQ regulations provide that the alternatives evaluation
2 “is the heart of the environmental impact statement.” 40 C.F.R. § 1502.14.

3 NEPA requires that an agency’s record of decision “[s]tate whether all practicable means
4 to avoid or minimize environmental harm from the alternative selected have been adopted, and if
5 not, why they were not.” 40 C.F.R. § 1505.2(c). Further, “[a] monitoring and enforcement
6 program shall be adopted and summarized where applicable for any mitigation.” *Id.* NEPA also
7 requires agencies to prepare a supplemental EIS if substantial changes are made to an action that
8 are relevant to environmental concerns or there are significant new circumstances or information
9 relevant to environmental concerns. 40 C.F.R. § 1502.9(c)(1)(i) & (ii).
10

11 **II. Federal Land Policy And Management Act**

12 The Federal Land Policy Management Act requires that:

13 [T]he public lands be managed in a manner that will protect the quality of the
14 scientific, scenic, historical, ecological, environmental, air and atmospheric,
15 water resource, and archeological values; that, where appropriate, will
16 preserve and protect certain public lands in their natural condition; that will
17 provide food and habitat for fish and wildlife and domestic animals; and that
will provide for outdoor recreation and human occupancy and use.

18 43 U.S.C. § 1701(a)(8). Thus, FLPMA obligates BLM to “take any action necessary to prevent
19 unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b).

20 FLPMA also requires that “management [of public lands] be on the basis of multiple use
21 and sustained yield unless otherwise specified by law,” 43 U.S.C. § 1701(a)(7), and obligates
22 BLM to “[m]anage the public lands under principles of multiple use and sustained yield, in
23 accordance with the land use plans developed . . . when they are available,” 43 U.S.C. § 1732(a).
24

25 FLPMA requires BLM to limit any ROW with terms and conditions that will, inter alia:
26 “minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise
27 protect the environment”; “require compliance with applicable air and water quality standards
28

1 established pursuant to applicable Federal or State law”; “protect the other lawful users of the
2 lands adjacent to or traversed by such right-of-way”; “protect lives and property”; “protect the
3 interests of individuals living in the general area traversed by the right-of-way who rely on the
4 fish, wildlife, and other biotic resources of the area for subsistence purposes.” 43 U.S.C. § 1765.
5 FLPMA further requires that a ROW “be limited to a reasonable term in light of all the
6 circumstances concerning the project,” and “specify whether it is or is not renewable and the
7 terms and conditions applicable to the renewal,” 43 U.S.C. § 1764(B), and permits BLM to grant
8 a ROW “only when . . . satisfied that the applicant has the technical and financial capability to
9 construct the project for which the right-of way is requested,” 43 U.S.C. § 1764(j).

11 **III. Lincoln County Conservation, Recreation, And Development Act**

12 Section 301(b)(1) of the Lincoln County Conservation, Recreation, and Development Act
13 of 2004, Pub. L. 108-424, (“LCCRDA”) directs the Secretary to grant to SNWA and the Lincoln
14 County Water District “nonexclusive rights of way to Federal land in Lincoln County and Clark
15 County, Nevada, . . . for the construction and operation of a water conveyance system”²
16 LCCRDA provides that a ROW granted under that paragraph “shall be granted in perpetuity and
17 shall not require the payment of rental.” LCCRDA does not make any similar provision with
18 regard to any ROW granted in White Pine County. While providing for the grant of a ROW for
19 water conveyance facilities in Lincoln County, LCCRDA also explicitly provides that before
20 BLM may grant such a right of way they “shall comply with [NEPA], including the
21 identification and consideration of potential impacts to fish and wildlife resources and habitat.”
22 Pub. L. 108-424 § 301(b)(3). Although Section 301(b)(1) of LCCRDA provides relief from the
23 requirements of sections 202 and 503 of FLPMA with regard to a ROW in Lincoln County, the
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27
28 ² The Southern Nevada Public Land Management Act of 1998 (“SNPLMA”) also applies to
SNWA’s ROW request in Clark County. P.L. 105-263.

1 granting of a ROW to SNWA and the Lincoln County Water District for water conveyance
2 facilities is otherwise subject to the requirements of FLPMA.

3 In enacting LCCRDA, Congress found that:

4 (1) public land in [Lincoln] County contains unique and spectacular natural
5 resources, including – (A) priceless habitat for numerous species of plants
6 and wildlife; and (B) thousands of acres of land that remain in a natural state;
7 and (2) continued preservation of those areas would benefit the County and
8 all of the United States by – (A) ensuring the conservation of ecologically
9 diverse habitat; (B) protecting prehistoric cultural resources; (C) conserving
10 primitive recreational resources; and (D) protecting air and water quality.

11 Pub. L. 108-424, § 201 (Findings). Similarly, Title III of LCCRDA, which relates to utility
12 corridors, provides that: “[n]othing in this title shall . . . preempt Nevada or Utah State water law;
13 or . . . limit or supersede existing water rights or interest in water rights under Nevada or Utah
14 State law.” *Id.* at § 301(d)(2)-(3). Thus, through these provisions, LCCRDA requires that action
15 taken pursuant to the Act be in accord with the requirements of Nevada and Utah state law, and
16 that the ROW components of LCCRDA be applied in a manner that does not negatively affect
17 existing water rights or any interest in water rights under both Nevada and Utah State law.

18 LCCRDA does not permit any interbasin transfer of water from “ground-water basins
19 located within both the State of Nevada and the State of Utah” until those two states have
20 reached “an agreement regarding the division of water resources of those interstate ground-water
21 flow system(s) from which water will be diverted and used by the project.” *Id.* at § 301(e)(3).

22 **FACTUAL BACKGROUND**

23 **I. Introduction**

24 The Clark, Lincoln and White Pine Counties Groundwater Development and Utility
25 Right-of-Way Project proposed by SNWA (“Proposed Action” or “GWD Project”) stretches
26 through three counties and numerous hydrographic basins in eastern rural Nevada. The Proposed
27 Action would transport up to 176,655 acre-feet of groundwater per year through a system of
28

1 pipelines from Spring, Snake, Cave, Dry Lake, and Delamar Valleys in central-eastern rural
2 Nevada south to the Las Vegas Valley and includes the construction and operation of a system of
3 regional water facilities, including 306 miles of a buried water pipeline and related water
4 transport and electrical power infrastructure.³ AR Doc 47277 at 188126, 42; AR Doc. 12413 at
5 129536. The ROW applied for by SNWA extends beyond the northern boundary of the corridor
6 designated in the LCCRDA into White Pine County in Spring and Snake Valleys and deviates
7 from the corridor in a few locations in Clark and Lincoln Counties. AR Doc 47277 at 188127.
8

9 Alternative F, the Alternative selected by BLM in the FEIS and approved in the ROD,
10 approves the GWD Project without the Snake Valley portion of the project, for which no water
11 rights have been permitted yet by the Nevada State Engineer and as to which the states of Utah
12 and Nevada have not yet reached an agreement as required by the LCCRDA. AR Doc. 12413 at
13 129539. Alternative F represents the lion's share of the Proposed Action, authorizing the
14 pumping and transport of 114,129 acre-feet of groundwater per year from Spring, Cave, Dry
15 Lake and Delamar Valleys. AR Doc. 47277 at 188145. If it were to move forward, the GWD
16 Project likely would be the largest groundwater development project in the country and perhaps
17 in the world, covering an area roughly the size of New England and pumping all of the
18 groundwater that supposedly is available from the affected area in rural eastern Nevada. *White*
19 *Pine County v. King*, CV-1204049 (NV Dist. Ct., Dec. 13, 2013), at 3-4, attached hereto as
20 Exhibit I. The FEIS impacts analysis confirms that environmental, cultural, and social impacts
21 would be widespread and significant. *See infra*.
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28 ³ In its more expansive original iteration, SNWA's GWD Project included pumping and export of groundwater from 26 rural valleys in eastern Nevada. AR Doc. 12665 at 139353; *see also, infra*. Plaintiffs White Pine County, et al.'s Memo in Support of Mtn For Summary Judgment
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II. Federal Environmental Review Process History

1
2 On August 19, 2004, SNWA requested a ROW from BLM to construct and operate the
3 GWD Project. AR Doc. 47277 at 188128. Subsequently, BLM initiated two scoping periods for
4 the GWD Project Draft Environmental Impact Statement (“DEIS”) which ran from April 8, 2005
5 through August 1, 2005. AR Doc. 10907 at 061984-85. AR Doc. 2077 at 4499-4500. During the
6 scoping periods, 210 oral comments and 6,168 written comments were submitted to the BLM.⁴
7
8 Among these comments were those of Plaintiffs White Pine County (“WPC”), Great Basin
9 Water Network (“GBWN”), Central Nevada Regional Water Authority (“CNRWA”), Sierra
10 Club, and Baker Water & Sewer General Improvement District (“Baker GID”). AR Docs. 139,
11 372, 879, 1154, 1157, 1390, 2334, 2544, & 2553. Additionally, Plaintiffs WPC and CNRWA
12 participated as cooperating agencies in the EIS process. AR Docs. 1013 & 2705.
13

14 On June 10, 2011, the BLM published the notice of availability for the Draft EIS and
15 Draft Programmatic Agreement for the GWD Project. AR Doc. 47227 at 188168. The BLM
16 received more than 460 comments from individuals, governmental entities, organizations, and
17 businesses, 20,000 action alert comment letters, as well as many oral public comments
18 transcribed at public meetings held in various locations in the GWD Project area. AR Doc.
19 12413 at 129520; 537. The vast majority of the comments on the DEIS were critical of the
20 GWD Project. Plaintiffs WPC, GBWN, CNRWA, Sierra Club, Baker GID, Utah Physicians for
21 a Healthy Environment, Utah Rivers Council, Utah Audubon Council, and League of Women
22 Voters of Salt Lake, Utah all submitted comments on the DEIS. AR Docs. 9064, 9113-9117,
23 9147, 9272, 9386, 9318, 9335, 9345, 9347, 9355, 9357 9383, 9437, 10496.
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http://www.blm.gov/nv/st/en/prog/planning/groundwater_projects/snwa_groundwater_project/public_scoping.html.

1 On August 3, 2012, the BLM published the notice of availability for the FEIS for the
2 GWD Project, which provided for a 60 day comment period. AR Doc. 12413. The FEIS
3 included the addition of a new alternative, Alternative F, which was designated as the Agency's
4 preferred alternative. *Id.* Numerous comments were submitted to the BLM requesting that the
5 BLM withdraw the FEIS and issue a Supplemental EIS ("SEIS") to properly provide for public
6 analysis of and comment on the newly included Alternative F because it was outside the scope of
7 previous analysis in violation of NEPA. AR Docs. 13431, 13434, 13445. In addition, WPC's
8 September 27, 2012, submission alerted the BLM to new information that triggered the need for
9 the preparation of an SEIS. Specifically, White Pine County pointed to the USGS's an
10 upcoming geohydrological report on the potential impacts of the GWD Project on resources in
11 and around Great Basin National Park, a June 2012 Natural Resources Defense Council report
12 which analyzed large water pipeline projects with specific references to the GWD Project and
13 pipeline alternatives, critical evidence submitted at the Nevada State Engineer's 2011 hearing on
14 SNWA's water rights applications in the subject valleys, and updated population forecasts. AR
15 Doc. 13434. Despite these submissions, the BLM declined to issue an SEIS and instead moved
16 forward with the preparation of the ROD.
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18

19 The ROD approving the granting of a ROW to SNWA and authorizing the GWD Project
20 was signed by the BLM on December 18, 2012, approved by the Department of the Interior
21 ("DOI") on December 19, 2012, and published in the Federal Register on December 28, 2012.
22 AR Docs. 47276 & 47277 at 18177-78. DOI approval constituted a final decision, which was
23 effective as of that date and not subject to administrative appeal. AR at 1888178. Plaintiffs filed
24 a complaint challenging the ROD on February 12, 2014, which was later consolidated with a
25 complaint challenging the ROD filed by the Center for Biological Diversity. Dkt. No. 1 in Case
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1 No. 2:14-228; Dkt. No. 9. On May 23, 2013, the BLM issued a ROW to SNWA for the
2 construction of the GWD Project. AR Doc 47363 at 192246.

3 **III. GWD Project EIS**

4 A. GWD Project EIS Purpose and Need

5 The purpose and need is described in the EIS as a need to consider SNWA's ROW
6 request for use of federal land managed by the BLM for construction and operation of a
7 groundwater conveyance system. AR Doc. 12413 at 129671. As justification for its narrow
8 definition of the purpose and need for action, BLM relies on LCCRDA and SNPLMA's direction
9 to BLM to grant a ROW to SNWA for groundwater development conveyance infrastructure in
10 Clark and Lincoln Counties. AR Doc. 12413 at 129671.

11
12 SNWA's stated purpose for the project is to convey groundwater rights that were
13 permitted by the Nevada State Engineer. AR Doc. 12413 at 129761; *see also, infra*. All of those
14 water rights have since been invalidated. *See infra*. SNWA's stated need for the GWD Project
15 is to diversify its water resources portfolio, to provide additional protection for southern Nevada
16 from potential Colorado River shortages and to help supply increased future projected water
17 demands in the long term, and to fulfill its contractual obligation to provide conveyance capacity
18 in Lincoln County to the Lincoln County Water District. *Id.* In evaluating SNWA's stated need
19 for the GWD Project, BLM relied on SNWA's population projections without further analysis
20 based on the justification that BLM has no authority over SNWA's demand projections. AR
21 Doc. 12413 at 129682. However, SNWA's EIS population projection of 3.65 million people,
22 AR Doc. 12413 at 129682, AR Doc. 12415 at 131407 was based on a 2008 University of Nevada
23 Las Vegas Center for Business and Economic Research ("CBER") population projection with
24 only a short term adjustment to take into account the economic downturn. *Id.* A more recent
25 2014 CBER population projection, which does take into account that economic downturn,
26 Plaintiffs White Pine County, et al.'s Memo in Support of Mtn For Summary Judgment
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1 projects a Clark County population of only 2.72 million people in 2035. UNLV Center for
2 Business and Economic Research, Population Forecasts: Long Term Projections for Clark
3 County, Nevada 2014-2050 (June 11, 2014) (attached hereto as Exhibit J). This adjusted
4 population projection is reflected in SNWA's recently released 2015 Water Resources Plan.
5 SNWA, Water Resources Plan (2015), at 56 (Attached hereto as Exhibit K).

6 B. Range of Alternatives

7
8 Based on its narrow statement of purpose and need, BLM initially considered the
9 proposed action, five groundwater pumping and conveyance alternatives, and a no action
10 alternative. AR Doc. 12413 at 125536-37. BLM refused to consider conservation, efficiency,
11 Colorado River water supply management, and desalination alternatives for meeting the current
12 and future needs of SNWA's service area, which were raised as reasonable feasible alternatives
13 in comments, because according to BLM they were not feasible and would not fulfill the project
14 purpose, which BLM defined as simply "to provide the SNWA with legal access for a water
15 conveyance system across federal land managed by the BLM." AR Doc. 12413 at 129791-94.

17 As a result of its narrowly defined purpose and need and related limited range of
18 alternatives, the EIS includes only a brief discussion of SNWA's conservation measures with no
19 independent analysis, despite the undisputed fact that conservation represents the least
20 environmentally harmful and most economical alternative to any of the pipeline alternatives
21 examined. AR Doc. 9386 at 35963; AR Doc. 12413 at 129682-83. In its comments on the
22 DEIS, WPC pointed out that the BLM failed to independently analyze SNWA's conservation
23 goals and information and failed to compare SNWA's goals with the conservation achievements
24 of other comparable western cities. AR Doc. 9386 at 35962-63. Similarly, the Center for
25 Biological Diversity ("CBD") pointed out in its DEIS comments, "[i]f SNWA reduced per capita
26 demand to about 166 gpcd – higher than Los Angeles's *current* rate, and comparable to *current*

1 delivery rates of Albuquerque and Phoenix, and the population within Clark County grows to
2 3.13 million people instead of 3.65 million, total water demand in SNWA's service area would
3 be about the same as it is now." AR Doc. 9040 at 34290. Given that the 2014 CBER Clark
4 County population projection for 2035 has shrunk to 2.72 million residents, if SNWA were to
5 reduce its per capita demand to 166 gpcd by 2035, total water demand in the service area would
6 actually be far less than it is today. Additionally, revised population projections combined with
7 SNWA's modest conservation goals have led SNWA itself to project that it now will not need
8 GWD Project water for at least another 20 years even under the worst case scenario. SNWA
9 Water Resources Plan (2015), at 40, attached hereto as Exhibit K).

11 WPC and CBD comments also urged the BLM to consider desalination as an alternative
12 to the GWD Project. AR Doc. 9040 at 34290-91; AR Doc. 9386 at 35963. "Desalinization is
13 operational around the globe, and most recently is being tied to renewable energy sources to
14 reduce costs and its carbon footprint. Plans for a desal plant at Dana Point in Orange County,
15 California estimate the total annualized cost of capital and operations to be approximately \$20
16 million, producing an acre foot of water for around \$1287, while stating that such cost is
17 conservative and is decreasing as new and better technologies become available; it also does not
18 have an associated renewable power source which would further decrease costs." AR Doc. 9040
19 at 34290-91. Since the issuance of the ROD, desalination has been demonstrated to be an active
20 alternative. *See* Carlsbad Desalination Project Homepage, <http://carlsbaddesal.com/> (attached
21 hereto as Exhibit L).

1 Additionally, since the issuance of the ROD, Colorado River management alternatives
2 have been put into place, including the water banking or leasing agreement with southern
3 California recently entered into by SNWA to lease 150,000 acre feet of Colorado River water to
4 California for the coming year, reflecting the fact that changes in Colorado River Management
5 combined with desalination, as proposed in WPC's comments, represent a viable alternative to
6 the GWD Project that was not considered by the BLM in the EIS. AR Doc. 9386; Press Release,
7 Southern Nevada Water Authority, Board approves California Water Bank agreement (Sept. 17,
8 2015) (attached hereto as Exhibit M).

10 C. A New Alternative: Alternative F

11 Alternative F, which authorizes distributed pumping of 114,129 acre feet of water per
12 year in Spring, Cave, Dry Lake, and Delamar Valleys, was added to the EIS following the close
13 of public comment on the DEIS. AR Doc. 12413 at 129537. Despite the fact that the public had
14 no opportunity to comment on Alternative F, the FEIS adopted it as the Preferred Alternative.
15 AR Doc. 12413 at 129536, 39. For this reason, Plaintiffs and others submitted comments on the
16 FEIS requesting that BLM issue an SEIS for comment. AR Doc. 13431 at 149290; AR Doc.
17 13434 at 149311; AR Doc. 13445 at 149532. Despite those requests, BLM issued the ROD
18 approving the GWD Project and ROW under Alternative F. AR Doc. 47277 at 188132.

21 The BLM justified this lack of opportunity for public comment on Alternative F by
22 stating that it was within the scope of the already analyzed alternatives. AR Doc. 12413 at
23 129537. However, Alternative F effectively deferred any decision regarding a large component
24 of the project (Snake Valley), while at the same time drastically increasing the water withdrawn
25 from the valleys included in Alternatives D and E, the other alternatives that also exclude Snake
26 Valley. AR Doc. 12413 at 129692. In addition, Alternative F's predicted Spring Valley impacts
27 exceed the area of impact in Spring Valley for Alternatives A through E and are almost identical
28

1 to the Proposed Action's predicted impacts with the exception of the Snake Valley component.
2 AR Doc. 12414 at 130196-201. Alternative F also includes much more water than was ever
3 permitted by the State Engineer in Cave, Dry Lake, and Delamar Valleys. *Id.*

4 D. Project Financial Feasibility

5 The FEIS includes only a brief discussion of the GWD Project's capital costs, which was
6 added following the comment period on the DEIS. AR Doc. 12413 at 129538, 129552-53,
7 129786-87. SNWA's estimated cost for the GWD Project has increased consistently over time.
8 Initially, in the fall of 2011, SNWA asserted that the Proposed Action would cost an estimated
9 \$3.22 billion to build, for a total of \$15.46 billion with financing costs (in 2007 dollars). AR
10 Doc. 12413 at 129552, 129786-87. This estimate did not include any provision for
11 contingencies, for ordinary operating and maintenance costs, or for any of the potentially
12 enormous monitoring, management, and mitigation costs associated with the GWD Project. The
13 FEIS discloses that a more recent estimate prepared by SNWA for the EIS, which still fails to
14 include any of the above-listed neglected costs, puts the base cost of the Proposed Action at
15 \$3.87 billion in 2007 dollars – a 20% increase in only one year. *Id.* According to SNWA, in
16 order to finance construction alone, the commodity charge for water in its service area would
17 more than double. *Id.* at 129787. Evidence presented at the Nevada State Engineer's 2011
18 hearing on SNWA's GWD Project water rights applications and introduced into the EIS
19 administrative record showed that SNWA's ability to finance construction of the project alone,
20 much less operate and provide for monitoring and mitigation, is doubtful even at the first
21 estimate of \$15.46 billion. AR Doc. 9386 at 36459-64. Additional testimony presented by the
22 Long Now Foundation at the State Engineer's 2011 hearing that was introduced to the EIS
23 administrative record indicates that the unconsidered costs of monitoring and mitigation are
24 likely to be extremely high. AR Doc. 13434 at 149361-67.

1 E. Tiering

2 Throughout the environmental review process, the BLM relied on a tiered approach to its
3 NEPA and FLPMA analyses of the GWD Project. The FEIS states that groundwater
4 development impacts analyzed at the programmatic level for the EIS will be analyzed at a site
5 specific level at later stages in subsequent tiered NEPA documents. AR Doc. 12413 at 129545.

6 F. Groundwater Model

7 A regional groundwater flow model was prepared by SNWA for the EIS to evaluate
8 potential hydrologic impacts on the area that will be most directly and predictably impacted by
9 the GWD Project. AR Doc. 12413 at 129572; AR Doc. 12678. This area, the “hydrologic study
10 area” includes the ROW applied for by SNWA, and also encompasses 35 hydrographic basins, as
11 defined by the Nevada Division of Water Resources. AR Doc. 12414 at 129999. Results of that
12 model were evaluated at full build out, full build out plus 75 years, and at full build out plus 200
13 years, despite the fact that WPC DEIS comments demonstrated that impacts will continue to
14 worsen beyond 200 years post-build out and despite the fact that BLM in Nevada routinely
15 analyzes the effects of open-pit mines that will take more than 200 years to fill with
16 groundwater. AR Doc. 9386 at 35966-67, 35969; AR Doc. 12413 at 129572. In its presentation
17 of predicted impacts of various pumping scenarios, the EIS does not disclose when equilibrium
18 would be reached, or if it ever would be reached. The EIS does not consider the significance of
19 this missing information. A report prepared by hydrologist Dr. Tom Myers and submitted as an
20 attachment to WPC’s DEIS comments demonstrates that equilibrium is not even approached
21 after model runs of 200 years, and that equilibrium would not be reached for at least 10,000
22 years. AR Doc. 9386 at 36263, 66. Moreover, at 200 years water levels are declining almost as
23 rapidly as several years after full build out. *Id.* Thus, as WPC’s uncontroverted comments
24 demonstrate, pumping under any of the evaluated alternatives would, in effect, amount to
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1 groundwater mining on a massive scale. AR Doc. 9386, at 36263.

2 Results of the groundwater development model were evaluated based on a 10 foot
3 drawdown threshold, and a 5% decrease in spring flow threshold. AR Doc. 12413 at 129538,
4 129586. Impacts that would occur at less than a 10 foot drawdown or less than a 5% decrease in
5 spring flow were not evaluated, despite comments submitted by WPC and others demonstrating
6 that areas affected by less than a 10 foot drawdown may cover hundreds of square miles,
7 including springs, wetlands, sub-irrigated meadows, wells, and vegetation, and despite the fact
8 that a drawdown of less than 10 feet or a decrease in spring flow of less than 5% could lead to
9 disastrous environmental impacts, including a loss of critical habitat for threatened and
10 endangered species. AR Doc. 9386 at 36265, 36621-34.

11 According to the FEIS, the regional nature of the groundwater model makes it inherently
12 uncertain. *Id.* at 129572. Notwithstanding this limitation, the FEIS asserts that “the calibrated
13 model is a reasonable tool for estimating probable regional-scale drawdown patterns and trends
14 over time resulting from the various pumping alternatives.” *Id.*

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17 G. Groundwater Development Project Impacts

18 All models, including the model prepared for the EIS, predict that the GWD Project will
19 have profound hydrologic and biological impacts across a vast area spanning eastern Nevada and
20 western Utah. AR Doc. 9386 at 36977-781; AR Doc. 12414 at 130196-202. The models predict
21 dramatic impacts to water levels in basins from which SNWA plans to pump directly and down-
22 gradient hydrologically connected basins. AR Doc. 12414 at 130196-202. Even within the
23 truncated time period BLM examined, SNWA’s proposed pumping will lower the water table by
24 hundreds of feet over an extensive, continually expanding area, AR Doc. 12414 at 130196-201,
25 causing devastating environmental, social, and economic consequences in eastern Nevada and
26 western Utah. *See* AR Doc. 12413 at 129588-94; AR Doc. 9386 at 36932. Comments submitted
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28 Plaintiffs White Pine County, et al.’s Memo in Support of Mtn For Summary Judgment
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1 by WPC confirm that EIS model simulations of groundwater drawdown from the Project will
2 exceed 1000 feet at the points of diversion and impact 18 nearby basins in addition to the
3 targeted five basins. AR Doc. 9386 at 36264.

4 Alternative F pumping is predicted to cause drawdowns that likely to result in reductions
5 in and long term changes to groundwater dependent terrestrial wildlife habitat and affect
6 terrestrial wildlife species. AR Doc. 12414 at 130487; 515. Specifically, pumping under
7 Alternative F would cause at least a 10 foot drawdown across 130,591 acres of iconic Great
8 Basin shrubland and 5,519 acres of wetlands, reducing the flow rate of over 203 springs by at
9 least 5%, and adversely impacting over 33 miles of perennial streams all of which sustain a
10 variety of wildlife species. AR Doc. 12414 at 130350. It is predicted that this lowering of the
11 water table would cause a reduction in ET discharge of 80% in Spring Valley. AR Doc. 12413 at
12 129587. Along with the springs and wetlands, riparian areas would be dried out and
13 phreatophytes would be killed off, destroying additional crucial wildlife habitat. AR Doc. 12414
14 at 130317. “Reduction or loss of habitats associated with water sources would impact terrestrial
15 wildlife dependent on these sources, resulting in a possible reduction or loss of cover, breeding
16 sites, foraging areas, and changes in both plant and animal community structure.” AR Doc.
17 12414 at 130487. “[L]oss of these habitat features would alter the available habitat for species
18 that depend on these areas, resulting in: 1) a reduction of available water for consumption; 2) a
19 reduction in amount or quality of groundwater dependent vegetation types for breeding, foraging,
20 and cover; 3) a reduction in the regional carrying capacity; 4) displacement and loss of animals;
21 5) a reduction in the overall biological diversity; 6) a potential long-term impact to the
22 population numbers of some species; and 7) reduction in prey availability.” *Id.* “Given the
23 limited amount of these habitat types within the study area, it is assumed that species dependent
24 on these areas are currently at carrying capacity. As a result, any individuals displaced as a result
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1 of reduction in amount or quality of these habitats could be lost, concentrating the remaining
2 animals within smaller habitat areas.” *Id.* at 130515.

3 Special status wildlife species that are known to occur along the ROW and in the Project
4 area include desert tortoise, southwest willow flycatcher, pygmy rabbit, greater sage-grouse,
5 yellow billed cuckoo, western burrowing owl, other special status raptors (golden eagle, bald
6 eagle, ferruginous hawk,), other special status birds, ten bat species, dark kangaroo mouse,
7 reptiles, and Mojave poppy bee. *See* AR Doc. 12414 at 130419, 431-33; AR Doc. 12416 at
8 132199-437. In addition, at least 25 species of native springsnails, 37 species of fish, 4 species
9 of amphibians, pronghorn antelope, mule deer and elk, plus many other species are threatened by
10 the predicted impacts to habitat caused by the GWD Project. *Id.* Some of these species already
11 are protected by the Endangered Species Act (“ESA”) such as the Moapa dace, White River
12 spinedace, Pahrnagat roundtail chub, White River springfish, Hiko White River springfish and
13 Pahrump poolfish, Big Springs spinedace, southwestern willow flycatcher, Yuma clapper rail,
14 and desert tortoise; other species have been found to be warranted for protections under the ESA,
15 including the greater sage grouse and relict leopard frog; other species such as 25 springsnails
16 and the northern leopard frog have been found warranted for a 12-month review under the ESA.
17 *See id.*; AR Doc. 12414 at 130431-33. Still others such as over 11 new or undescribed species of
18 cave fauna or dozens of other aquatic or terrestrial species depend on the conditions of the Great
19 Basin ecosystems and its ties to the groundwater systems, but have not received extensive
20 inventory or scientific study. *Id.*

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24 For example, the Southwestern Willow Flycatcher, Yellow-billed Cuckoo, and Yuma
25 Clapper Rail depend on riparian habitat, which would be severely impacted by the Project. AR
26 Doc. 12414 at 130490. “A reduction in groundwater dependent vegetation communities would
27 affect the amount of nesting, brooding, and foraging habitat available for these species.” *Id.* The
28 Plaintiffs White Pine County, et al.’s Memo in Support of Mtn For Summary Judgment
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1 FEIS confirms there is a “high risk” that Project pumping could reduce or dry up flows that
2 sustain Shoshone Ponds, a refugium for the federally listed Pahrump poolfish. AR Doc. 12414 at
3 130144, 546. Other threatened and endangered wildlife species also would be impacted.⁵

4 The predicted drawdown caused by SNWA’s pumping would have a devastating impact
5 on grazing activities, which are critical to the economy and culture of rural Nevada and Utah.
6 Impacts to grazing would track predicted impacts to vegetation on which cattle depend, AR Doc.
7 9386 at 36932; AR Doc. 12413 at 129593, and changes in water sources and forage likely will
8 result in reductions to the carrying capacity of grazing allotments. AR Doc. 12413 at 129588.

9
10 The drawdown caused by SNWA’s proposed pumping also would create an increased
11 risk of dust emissions from both presently moist playa areas in valleys and other areas where
12 current vegetation is killed off. AR Doc. 12413 at 129589. The FEIS discloses that for the
13 whole GWD Project, which BLM still ultimately may approve, at least 21,518 tons of new,
14 cumulative increased PM10 emissions will be generated per year as a result of 10-foot or greater
15 drawdown due to the GWD Project’s groundwater pumping. AR Doc. 12413 at 129915. The
16 FEIS also discloses that for Alternative F, which BLM has approved, at least 15,434 tons of new,
17 cumulative increased PM10 emissions will be generated per year as a result of 10-foot or greater
18 drawdown due to the GWD Project’s groundwater pumping. AR Doc. 12413 at 129924. The
19 EIS also indicates that windblown dust emissions from groundwater drawdown could impair
20 visibility conditions at GBNP, which has some of the best visibility in the country. AR Doc.
21 12413 at 129607, 821, 827, 851, 891. The EIS confirms that mitigation would not prevent all of
22 these air quality impacts. AR Doc. 12413 at 129891. The analysis of air quality impacts, like
23 the analyses of impacts to other resources, is limited by the BLM’s model, which only
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28 ⁵ The EIS does not analyze impacts to predatory mammals such as coyotes, cougar, bobcats, and badgers, which are critical to the continued health of the affected ecosystem.
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1 acknowledges impacts based on the 10 foot drawdown and 5% spring flow reduction thresholds
2 and only within a 200 year timeframe. *See* AR Doc. 12413 at 129905.

3 In addition, the drawdown from SNWA's proposed pumping will give rise to conflicts
4 with existing water rights in Spring Valley and in downgradient valleys. AR Doc 12413 at
5 129584. In particular, 132 surface water rights and 131 groundwater rights exist within the 10
6 foot drawdown area for Alternative F at buildout plus 200 years.⁶ *Id.* Five of these groundwater
7 rights are in areas with a drawdown that is predicted to be greater than 100 feet. *Id.* WPC
8 submitted comments on the DEIS demonstrating that these conflicts will grow ever worse
9 beyond 200 years as the drawdown increases and eventually will become so severe that the prior
10 existing rights will be destroyed for all practical purposes. AR Doc. 9386 at 36263, 66.

11
12 In addition to causing potentially catastrophic environmental impacts, the GWD Project's
13 groundwater pumping is largely predicated on extracting water that already is allocated
14 downgradient and therefore not available for appropriation. Cave, Dry Lake, and Delamar
15 Valleys are part of the upgradient portion of the White River Flow System ("WRFS"), a system
16 of hydrologically interconnected geographic basins. Records of the State Engineer show that
17 many of the basins in the WRFS that are hydrologically connected to and down-gradient from
18 the targeted basins already are fully appropriated. SNWA's proposed points of diversion in the
19 targeted valleys are all up-gradient of these fully appropriated basins. These fully appropriated
20 basins include White River Valley, the center of significant ranching activity and the location of
21 the Kirch Wildlife Management Area; Pahranaagat Valley, home to the Pahranaagat Valley
22 National Wildlife Refuge and Key Pittman Wildlife Management Area; Lake Valley; Muddy
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28 ⁶ Although drawdown of less than 10 feet could have a devastating impact on water rights, those impacts were not modeled.

1 River Springs Valley; Lower Moapa Valley; and Coyote Spring Valley.⁷ Thus, as two separate
2 consecutive Nevada State District Court rulings have concluded, the water on which the Cave,
3 Dry Lake, and Delamar Valley portions of the GWD Project are premised already is subject to
4 prior appropriations in the downgradient basins, and therefore is unavailable for what would
5 amount to double appropriation in those upgradient valleys in the WRFS. AR Doc. 6762
6 (*Carter-Griffin v. Taylor*, CV-830008 (NV Dist. Ct., Oct. 19, 2009)); *White Pine County v.*
7 *King*, CV-1204049 (NV Dist. Ct., Dec. 13, 2013) (attached hereto as Exhibit I).

9 H. The COM Plan

10 BLM approved the GWD Project and ROW in reliance on SNWA's proposed
11 Construction, Operation, Monitoring, Maintenance, Management, and Mitigation Plan ("COM
12 Plan"). According to the FEIS, "[t]he intent of the COM Plan is to protect federal resources and
13 federal water rights that may be impacted by construction, operation, and maintenance, and
14 abandonment of the project." AR Doc. 12415 at 131194. Thus, the COM Plan is not designed to
15 mitigate impacts to any of the non-federal resources, likely to be impacted. In addition,
16 comments on the DEIS submitted by GBWN and WPC, indicated that the monitoring and
17 mitigation approach on which the COM Plan is based will, by nature, be ineffective for a project
18 of this scale. AR Doc. 9386 at 35969, 36270, 36978-80.

19 Although BLM approved the GWD Project and ROW in reliance on the implementation
20 of a COM Plan to mitigate predicted impacts, BLM did not develop or require SNWA to develop
21 a detailed, comprehensive monitoring and mitigation plan that includes concrete quantified
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26 ⁷ Nevada State Engineer Order No. 1219 (July 5, 2012) (White River Valley); Nevada State
27 Engineer Order No. 1199 (Apr. 20, 2009) (Pahranagat Valley); Nevada State Engineer Order No.
28 1023 (Apr. 24, 1990) (Muddy River Springs Valley); Nevada State Engineer Order No. 798
(Sept. 16, 1982) (Lower Moapa Valley); Nevada State Engineer Order No. 726 (June 11, 1979)
(Lake Valley); Nevada State Engineer Order No. 905 (Aug. 21, 1985) (Coyote Spring Valley).
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1 triggers or thresholds and action forcing mechanisms. *See* AR Doc. 9386 at 36270. Nor did
2 BLM identify acceptable levels of impacts under the proposed COM Plan. AR Doc. 12415 at
3 131175-200. Consequently, the proposed COM Plan includes no quantified targets or goals by
4 which to judge either the environmental soundness of the GWD Project or the adequacy of the
5 COM Plan as a safeguard against unreasonable impacts. *Id.*

6 In addition, the COM Plan adheres to the processes established the stipulated agreements
7 entered into between the federal agencies and SNWA during the State Engineer's hearings on
8 SNWA's water rights applications in Spring, Cave, Dry Lake, and Delamar Valleys. AR Doc.
9 12415 at 131177. Those stipulations set up a system in which mitigation decisions would have
10 to be made on the basis of consensus among the members of two committees containing
11 representatives from SNWA. AR Doc. 12415 at 131446, 131454. Thus, the COM Plan gives
12 SNWA an effective veto over decisions related to acknowledging environmental impacts and
13 deciding how to respond to such impacts.
14
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16 **IV. Nevada State Engineer GWD Project Water Rights Administrative Review Process**

17 The Nevada water rights applications for the GWD Project were filed in 1989 and lay
18 essentially dormant for approximately 16 years. Over a period of five years, between 2006 and
19 2011, the Nevada State Engineer held a series of hearings on SNWA's GWD Project
20 applications in Spring, Cave, Dry Lake, and Delamar Valleys ("SCDD Valleys"). On October
21 19, 2009, a Nevada state district court vacated all water rights permitted by the State Engineer
22 for the GWD Project in Cave, Dry Lake, and Delamar Valleys, finding that the permits for the
23 GWD Project were arbitrary and capricious, not supported by substantial evidence, would result
24 in unsustainable groundwater mining and were predicated on an undeveloped monitoring and
25 mitigation program to protect against impacts. AR Doc. 6762. The State Engineer and SNWA
26 appealed the district court's order, AR Doc. 12413 at 129678, but before those appeals reached
27
28 Plaintiffs White Pine County, et al.'s Memo in Support of Mtn For Summary Judgment
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1 the merits stage, the Nevada Supreme Court invalidated all permits for SNWA's GWD Project
2 on procedural grounds. *See* AR Doc. 12413 at 129547.

3 Following a subsequent rehearing, in the spring of 2012 the State Engineer once again
4 issued permits for the GWD Project in the SCDD Valleys. In December of 2013, a separate
5 Nevada state district court reversed all of the Nevada State Engineer's 2012 rulings granting
6 SNWA's water rights applications in those four valleys for the GWD Project, holding that the
7 evidence did not support a finding of sufficient groundwater available in these basins to support
8 the applications without causing impermissible, unsustainable groundwater mining and that
9 SNWA's monitoring and mitigation plan was inadequate to support a reasoned decision about
10 the Project's impacts due to its lack of quantitative standards, thresholds, or triggers. *White Pine*
11 *County v. King*, CV-1204049 (NV Dist. Ct., Dec. 13, 2013) (attached hereto as Exhibit I).
12

13
14 Once again, the State Engineer and SNWA appealed the district order voiding the GWD
15 Project water rights, but on February 6, 2014, the Nevada Supreme Court dismissed those
16 appeals, ruling that the State Engineer and SNWA were obliged to address the deficiencies
17 identified by the district court on remand. *King, et al. v. Corporation of the Presiding Bishop, et*
18 *al.*, No. 64815 (NV S. Ct., Feb. 6, 2015) (attached hereto as Exhibit N). As a result, SNWA
19 currently has no water rights to support the GWD Project and may never obtain them.
20

21 The BLM's evaluation of the GWD Project was based on the assumption that the amount
22 of groundwater SNWA proposed to pump and export from the target valleys was validly
23 permitted by the Nevada State Engineer as sustainable appropriations. According to the ROD,
24

25 [t]he Preferred Alternative carried forward in this ROD includes a pumping
26 scenario for future groundwater production limited to annual volume
amounts (83,988 afy) authorized by the NSE's March 2012 rulings.

27 AR Doc. 47277 at 188148. The Nevada courts' decisions invalidating these permits is a
28 significant new circumstance and new information that the BLM has not considered in the

1 environmental review process. The Center for Biological Diversity sent a letter in December of
2 2013 notifying the BLM of this new information and requesting the BLM to prepare an SEIS.
3 See CBD Opening Summary Judgment Brief. However, to date, the BLM has taken no action in
4 response to the *White Pine County* decision.

5 Additionally, on September 18, 2015, the Nevada Supreme Court decided the *Kobeh*
6 *Valley Ranch* case, holding that a monitoring and mitigation plan like the COM Plan that did not
7 yet have any quantified standards or triggers could not support a reasoned assessment of the
8 ability to effectively mitigate adverse impacts. *Eureka County, et al. v. State Engineer* 131 Nev.
9 Adv. Op. 84 (October 29, 2015).

11 STANDARD OF REVIEW

12 Summary judgment is appropriate if “there is no genuine dispute as to any material fact
13 and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Anderson v.*
14 *Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Facts are considered material only if they would
15 affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248. The
16 substantive law governing a claim determines whether a fact is material. *Id.*

17 BLM’s actions under NEPA and FLPMA are subject to de novo review. *Oregon Natural*
18 *Resources Council Fund v. Brong*, 492 F.3d 1120, 1124 (9th Cir. 2007). Review of agency
19 decision-making is governed by the judicial review provision of the Administrative Procedure
20 Act (“APA”), which requires a Court to hold unlawful and set aside agency action that was
21 “arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law,” or was
22 adopted “without observance of procedure required by law.” 5 U.S.C. § 706(2); *Native*
23 *Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005). The APA defines
24 “agency action” to include a failure to act and also provides that a “reviewing court
25 shall...compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. §
26

1 551(13); 5 U.S.C. § 706(1). In determining whether an agency decision is arbitrary and
2 capricious, courts consider “whether the decision was based on a consideration of the relevant
3 factors and whether there has been a clear error of judgment.” *Marsh v. Or. Natural Res.*
4 *Council*, 490 U.S. 360, 378 (1989). Additionally, a decision is arbitrary and capricious if the
5 agency has “relied on factors which Congress has not intended it to consider, entirely failed to
6 consider an important aspect of the problem, offered an explanation for its decision that runs
7 counter to the evidence before the agency, or is so implausible that it could not be ascribed to a
8 difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm*
9 *Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A court’s inquiry must be “searching and careful,”
10 and an agency must articulate a rational connection between the facts found and the conclusions
11 made. *Marsh*, 490 U.S. at 378.

12 **ARGUMENT**

13 **I. BLM’s Approval of the GWD Project Violated NEPA**

14 NEPA requires a reviewing agency to take a “hard look” at the environmental impacts of
15 a proposed project before approving the project in order to promote informed agency decision-
16 making and informed public participation. *South Fork Band v. U.S. Dep’t of Interior*, 588 F.3d
17 718, 725-27 (9th Cir. 2009). To satisfy this requirement, an agency must engage in a “reasoned
18 evaluation of the relevant factors” to ensure that its ultimate decision is truly informed.
19

20 *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992). An agency’s failure to
21 include and analyze information that is important, significant, or essential renders an EIS
22 inadequate. 40 C.F.R. § 1500.1 (“The information must be of high quality”). Here, BLM’s
23 failure to fulfill its duty to take the requisite “hard look” at SNWA’s GWD Project began with
24 BLM’s misinterpretation of the direction provided in LCCRDA.
25

26 **A. Improper Construction of LCCRDA:**

1 BLM failed to thoroughly evaluate SNWA's proposed GWD Project's likely effects on
2 the human environment or a reasonable range of alternatives under NEPA, failed to ensure the
3 Project would comply with the requirements of FLPMA, and failed to adequately consult with
4 the affected Indian Tribes under NHPA, because the BLM misinterpreted LCCRDA as
5 establishing a mandate requiring BLM to approve the Project essentially as proposed by SNWA
6 without the genuine, rigorous and thorough analysis generally required under those statutes. In
7 fact, LCCRDA merely directs the BLM to issue a right of way in Lincoln and Clark Counties for
8 some form of water conveyance facilities, not for SNWA's proposed GWD Project or any
9 particular project, and only after compliance with NEPA. *See* Pub. L. 108-424 § 301(b)(3).
10 With regard to FLPMA, LCCRDA only provides a limited exemption from sections 202 and 503
11 of FLPMA and only within Lincoln County. Pub. L. 108-424 § 301(b)(1). Further, LCCRDA
12 provides no exemption whatsoever from the NHPA for any portion of any right of way.
13
14

15 Given these facts, the BLM's expansive construction of LCCRDA to require approval of
16 the GWD Project essentially as proposed by SNWA and to authorize issuance of a ROW in
17 perpetuity in White Pine County violates the long-established canon of statutory construction
18 that statutory exemptions are to be strictly and narrowly construed in favor of the general rule or
19 requirement. *See Comm'r v Clark*, 489 U.S. 726, 739 (1989). Thus, BLM's fundamental
20 statutory premise for approving the GWD Project in the form SNWA presented it without the
21 rigorous, thorough analysis required under NEPA, FLPMA, and NHPA was erroneous and
22 unlawful in violation of 5 U.S.C. §706(2).
23

24 **B. Improperly Narrow Definition of Purpose and Need:**
25

26 The purpose and need statement is a critical component of the EIS, as it provides the
27 foundation from which the alternatives at "the heart" of NEPA derive, *see* 40 C.F.R. § 1502.14;
28 *see also Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 865 (9th Cir. 2004).

1 Courts will invalidate an EIS predicated on a purpose and need statement that is “too narrowly
2 drawn” and thus creates too narrow a set of alternatives for the agency to consider, and
3 preordains the outcome of the NEPA review process. *Nat’l Parks Conservation Association v.*
4 *BLM*, 606 F.3d 1058, 1062-63, 1070 (9th Cir. 2010). The Ninth Circuit has consistently declared
5 that agency discretion “is not unlimited,” *Westlands Water Dist.*, 376 F.3d at 865-66, and an
6 agency “cannot define its objectives in unreasonably narrow terms.” *Friends of Southeast’s*
7 *Future v. Morrison*, 153 F.3d 1059, 1066-1067 (9th Cir.1998) (quoting *City of Carmel-By-The-*
8 *Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir.1997)). Specifically, “[a]n agency
9 may not define the objectives of its action in terms so unreasonably narrow that only one
10 alternative from among the environmentally benign ones in the agency's power would
11 accomplish the goals of the agency's action, and the EIS would become a foreordained
12 formality.” *League of Wilderness Defenders v. USFS*, 689 F.3d 1060, 1069 (9th Cir. 2012)
13 (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)).⁸

16 As a result of BLM’s improperly expansive interpretation of the LCCRDA’s narrow
17 exceptions as requiring approval of the GWD Project essentially as proposed by SNWA, BLM
18 treated approval of the GWD Project as a predetermined given and defined the purpose and need
19 of the Project unreasonably narrowly as merely the granting of the ROW for the GWD Project.
20 See AR Doc. 12413 at 129671. Notwithstanding the narrowness of its statement of purpose and
21 need, BLM seems to have recognized that it was obliged to consider the actual underlying
22 project that it was authorizing along with the ROW, and the EIS does include passages that go
23
24
25

26
27 ⁸ Other Circuits similarly have held that an agency may not “slip past the strictures of NEPA” by
28 “contriv[ing] a purpose so slender as to define competing ‘reasonable alternatives’ out of
consideration (and even out of existence).” *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d
664, 666 (7th Cir.1997); *Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002).
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1 through the motions of addressing proposed alternatives to and the impacts of the GWD Project
2 itself. AR Doc. 12413 at 129833-998; AR Doc. 12414; AR Doc. 12415 at 130831-1174.

3 C. Inadequate Consideration of Alternatives:

4 NEPA obligates Federal agencies to provide a “detailed statement” addressing
5 alternatives to a proposed action and “study, develop, and describe appropriate alternatives to
6 recommend courses of action in any proposal which involves unresolved conflicts concerning
7 alternative uses of available resources.” 42 U.S.C. §§ 4332(2)(C)(iii), 4332(2)(E). These
8 alternatives provide the “heart” of environmental assessments under NEPA and “sharply defin[e]
9 the issues and provid[e] a clear basis for choice among options by the decisionmaker and the
10 public.” 40 C.F.R. § 1502.14.

11
12 "The `touchstone' for courts reviewing challenges to an EIS under NEPA `is whether an
13 EIS's selection and discussion of alternatives fosters informed decisionmaking and informed
14 public participation." *Or. Natural Desert Ass'n v. BLM* (“ONDA”), 625 F.3d 1092, 1122 (9th
15 Cir. 2008) (quoting *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 872 (9th Cir.
16 2004) (quoting *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982)). “Consideration of
17 reasonable alternatives is necessary to ensure that the agency has before it and takes into account
18 all possible approaches to, and potential environmental impacts of, a particular project.” *N.*
19 *Alaska Env'tl. Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006). “The existence of a viable
20 but unexamined alternative renders an environmental impact statement inadequate.” *ONDA*, 625
21 F.3d at 1122 (quoting *Westlands Water Dist.*, 376 F.3d at 868 (quoting *Morongo Band of*
22 *Mission Indians v. F.A.A.*, 161 F.3d 569, 575 (9th Cir. 1998)). Courts do not hesitate to reverse
23 or invalidate an agency’s approval of a project when they find that the EIS failed to consider a
24 sufficient range of alternatives to allow the agency and the public to make an informed
25 comparison of alternatives for meeting the underlying need for the proposed project. *See Se.*
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1 *Alaska Conservation Council v. Fed. Highway Admin.*, 649 F.3d 1050, 1056-58 (9th Cir. 2011);
2 *ONDA*, 625 F.3d at 1123; *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038-40
3 (9th Cir. 2008); *Ilio'ulaokalani*, 464 F.3d at 1095, 1098, 1101-02.

4 In this case, BLM's improperly narrow framing of the purpose and need underlying the
5 EIS led the BLM to give only the scantest of cursory consideration to any of the alternatives that
6 were proposed by the Plaintiffs and other commenters for achieving the actual purpose and
7 satisfying the actual need that supposedly justify the GWD Project. AR Doc. 12413 at 129791-
8 94. These alternatives include Colorado River management measures, increased conservation
9 measures, and desalination facilities that could be used to free up additional Colorado River
10 water for SNWA's use. *Id.* Despite the fact that information was presented that indicated other
11 alternatives were available and widely considered feasible, less environmentally harmful, and
12 more cost effective and reliable means of meeting the projected future water demand and
13 potential water shortages that SNWA has presented as the actual purpose and need for the GWD
14 Project, BLM summarily dismissed all such alternatives. *Id.*; *see also* AR Doc. 9386 at 35963;
15 AR Doc. 9040 at 34290-91. The BLM summarily dismissed all such alternatives without
16 meaningful consideration on the basis of SNWA's naked assertion that those alternatives were
17 infeasible, without any consideration of actual information pertaining to their feasibility. AR
18 Doc. 12413 at 129791-94. As a consequence the only alternatives considered in any substantive
19 way in the EIS are versions of the GWD Project proposed by SNWA which involve variations in
20 the quantity of groundwater proposed to be pumped and some variation in the complete or partial
21 extent of the proposed Project to be approved at this time. AR Doc. 12413 at 129536.

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26 D. Improper Tiering or Segmentation of the NEPA Analysis:

27 The EIS and ROD are fundamentally deficient on a basic analytical level because BLM
28 improperly invoked a "tiered" approach to the environmental analysis that unlawfully segmented
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1 the required analysis and deferred actual meaningful substantive consideration of the GWD
2 Project's environmental impacts and the effectiveness of SNWA's proposed plan to monitor and
3 mitigate those impacts until an unspecified future time, even though the Project as a whole
4 already is clearly defined and approved in the EIS and ROD. In effect, BLM's invocation of
5 "tiering" in the context of this single unified, well-defined project for which the EIS confirms
6 widespread and significant environmental effects is a form of improper segmentation of the
7 environmental analysis that NEPA requires be conducted before a project is approved and
8 resources are committed to it.

10 BLM's approval of the GWD Project through what it characterizes as a Programmatic
11 EIS is in fact an example of improper segmentation because it defers actual consideration of the
12 Project's site-specific effects to an uncertain number of anticipated highly localized piecemeal
13 analyses to be performed on individual components of the Project, such as particular wells and
14 lateral gathering lines within the overall pipeline system, at unspecified points in the future. *See*
15 AR Doc. 12413 at 129532, 129544-45, 49, 68. While BLM characterizes this approach as
16 tiering, by deferring consideration of the GWD Project's site-specific environmental effects until
17 after the agency has committed itself to the Project and a course of action to implement the
18 Project, the BLM's approach violates NEPA's fundamental requirement that the significant
19 effects and aspects of a proposed project be analyzed before the project is approved. 40 C.F.R. §
20 1500.1(b); *Native Village of Point Hope v. Jewell*, 740 F.3d 489, 493 (9th Cir. 2014).

23 There was no justification for deferring detailed analysis of the impacts from the GWD
24 Project's groundwater pumping because, as reflected in the uniform results of BLM's and
25 SNWA's and every other groundwater model that has been used to examine the long-term
26 overall impacts of the Project, the dimensions of the Project's probable environmental
27 consequences already are "crystallized." *See 'Ilio 'ulaokalani Coal.*, 464 F.3d at 1096; *see also*
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1 AR Doc. 9386 at 36977-781; AR Doc. 12414 at 130196-202. “Tiering may never be used to
2 ‘avoid consideration of reasonable alternatives by making a binding site-specific decision at the
3 programmatic stage without analysis, deferring consideration of site-specific issues to a
4 [subsequent Supplemental Environmental Impact Statement].’ And the dividing line between
5 illegal segmentation and permissible tiering is an agency’s proposal ‘to make an irreversible and
6 irretrievable commitment of the availability of resources to a project at a particular site.’”
7
8 *Defenders of Wildlife v. N.C. Dep’t of Transp.*, 762 F.3d 374, 396 (4th Cir. 2014) (quoting
9 *Ilio‘ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1101 (9th Cir.2006); *California v. Block*, 690
10 F.2d 753, 761 (9th Cir.1982) (citing 42 U.S.C. § 4332(2)(C)(v))).

11 The BLM acknowledges that approval of the GWD Project as described in the FEIS and
12 ROD will make an irreversible and irretrievable commitment of resources to the Project in the
13 targeted and affected region. AR Doc. 12415 at 131202. The problem with BLM’s FEIS and
14 ROD for the GWD Project is that it commits the BLM to a course of action and a project that has
15 not been fully analyzed. By categorizing the EIS as a programmatic EIS and deferring analysis
16 of the GWD Project’s groundwater pumping effects on the basins that will be affected, BLM has
17 violated the basic principle of NEPA analysis that requires that “[p]roposals or parts of proposals
18 which are related to each other closely enough to be, in effect, a single course of action shall be
19 evaluated in a single impact statement.” 40 C.F.R. § 1502.4(a); *see Defenders of Wildlife.*, 762
20 F.3d at 397.

23 E. Failure to Take the Required Hard Look at the GWD Project’s Environmental Effects:

24 The EIS leaves no doubt about the fact that the GWD Project’s large scale pumping of
25 groundwater from the targeted valleys will progressively draw down not only the aquifers within
26 those valleys but also the regional groundwater systems, or interbasin flow systems, that they are
27 a part of in a patently unsustainable way. AR Doc. 12414 at 130196-202; AR Doc. 9386 at
28

1 36977-81. The EIS further confirms that this will inevitably lead to harmful environmental
2 effects that will grow progressively worse and more widespread throughout an expanding region
3 as the project is operated over time. *Id.*

4 Where, as here, the BLM is asked to authorize a project like the GWD Project that will be
5 permanent and operate in perpetuity, and which will produce steadily worsening drawdowns
6 through the regional groundwater system as pumping continues, there is no reasoned, or rational,
7 basis for the BLM to have truncated its consideration of any effects to a 200 year horizon. *See*
8 AR Doc. 12414 at 130196-202.; AR Doc. 9386 at 36977-81. Indeed, when SNWA's and
9 BLM's model, and other models, are run beyond 200 years they show that the affected
10 groundwater systems do not reach a new equilibrium even after 2,000 years of pumping. AR
11 Doc. 9386 at 36263, 266, 977-81. This means that the effects of the pumping will continue to
12 grow steadily worse during all of two millennia and beyond. *See id.* The fact that the models do
13 not allow one to predict with precision exactly how bad an effect will be at exactly what point in
14 time at every specific location that will be affected simply does not alter the clear evidence of the
15 constant overall, region-wide drawdowns that will occur. Accordingly, it is arbitrary and
16 irrational to refuse to consider any of this permanent GWD Project's environmental effects that
17 may accrue after the first 200 years of proposed pumping.

18 The EIS and ROD also assume without reasoned analysis or justification that there is no
19 need to identify or evaluate environmental effects that will result from groundwater pumping
20 induced drawdowns of the water table that are less than 10 feet, even though the EIS itself
21 confirms that significant impacts to flora and fauna, wildlife habitat, and dust emissions could
22 result from such drawdowns. AR Doc. 12414 at 130088-89; *see also* AR Doc. 9386 at 36265.
23 Indeed, the evidence in the record indicates that drawdowns of even one or two feet could
24 eliminate some seeps and wetlands in the affected area. AR Doc. 9386 at 36265. The same

1 holds true for the BLM's arbitrary limitation of its consideration of any environmental impacts
2 associated with spring flow reductions of less than 5% below current rates. *See* AR Doc. 12413
3 at 129538, 129586. Uncontroverted evidence in the record suggests that in pools fed by springs
4 that serve in some cases as the only habitat for endemic sensitive and listed aquatic species a
5 reduction of spring flow by less than 5% could have significant effects on temperature, turbidity
6 and other qualities of the aquatic habitat for those species. AR Doc. 9386 at 36265; *see also id.*
7 at 36621-36634. BLM's limitation of its consideration of the GWD Project's effects with these
8 arbitrary parameters obscured significant environmental impacts and resulted in a failure to take
9 the required hard look at the Project's environmental effects.
10

11 BLM justified its decision not to meaningfully identify or evaluate the impacts of the
12 GWD Project that will result from drawdowns of less than 10 feet or spring flow reductions of
13 less than 5%, or that will occur more than 200 years in the future on the ground of uncertainty.
14 *See* AR Doc. 12413 at 129572. NEPA, however, requires agencies to engage in reasonable
15 forecasting when preparing EISs, as speculation is implicit in NEPA. *N. Plains Res. Council v.*
16 *Surface Transp. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011); *Mid States Coal. for Progress v.*
17 *Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003); *Foundation on Economic Trends v.*
18 *Heckler*, 756 F.2d 143, 160 (D.C. Cir. 1985). BLM's failure to identify and adequately assess
19 certain and plainly significant impacts of the GWD Project or to assess whether those will be
20 mitigable simply because they will occur in the future, despite the fact that the Project will
21 operate in perpetuity, is an arbitrary and capricious failure to consider a "significant aspect" of
22 the Project. *Native Village of Point Hope v. Jewell*, 740 F.3d 489, 493-95 (9th Cir. 2014).
23
24

25 Additionally, in lieu of an actual, thorough analysis of the Project's predicted
26 environmental effects, the BLM accepted SNWA's underdeveloped COM Plan as a means of
27 monitoring to potentially avoid harmful environmental effects and mitigating such effects when
28
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1 they occur. However, SNWA's plan contains no quantitative standards, thresholds, or triggers
2 for determining whether an effect is significant enough to warrant mitigation or for determining
3 whether mitigation measures are effective, and does not identify with specificity or certainty
4 which mitigation measures will be implemented to respond to harmful effects when they occur.
5 AR Doc. 9386 at 36270; AR Doc. 12415 at 131175-200. To satisfy the hard look requirement an
6 EIS must discuss a mitigation plan and proposed mitigation measures thoroughly enough to
7 ensure that the environmental effects of a project have been meaningfully analyzed. *Okanogan*
8 *Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000); *Neighbors of Cuddy Mt. v.*
9 *U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998); *see* 40 C.F.R. §§ 1508.20, 1508.25(b)(3).
10 Merely listing potential mitigation measures without analyzing or evaluating their effectiveness,
11 as the BLM did here, is not sufficient to fulfill the requirements of NEPA. *South Fork Band*
12 *Council of Western Shoshone v. U.S. Dept. of Interior*, 588 F.3d 718, 727 (9th Cir. 2009)
13 (requiring "an assessment of whether the proposed mitigation measures can be effective");
14 *Okanogan Highlands*, 236 F.3d at 473; *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146,
15 1151 (9th Cir. 1998).

16
17
18 Under the EIS and ROD, BLM has approved the GWD Project now, while relying on
19 SNWA's undeveloped COM Plan to identify triggers for mitigation in the future. AR Doc.
20 12415 at 131194; AR Doc. 12417 at 133065. Because the COM Plan here does not contain or
21 identify what mitigation measures will be taken under what circumstance, there also has been no
22 evaluation of whether the mitigation measures or the threshold or trigger standards for those
23 measures will be effective. AR Doc. 9469 at 38117. In other words, if the BLM does not
24 currently have sufficient data and information to set quantitative standards or triggers for
25 mitigation actions, then by definition the BLM does not have sufficient data and information to
26 make a reasoned, informed decision about the magnitude or severity of potential impacts or
27
28

1 whether they can be effectively mitigated. This intent to assess the effectiveness of triggers and
2 mitigation measures at some unspecified point in the future does not comply with NEPA, which
3 requires the effectiveness of monitoring thresholds or triggers and mitigation measures to be
4 assessed prior to the decision to approve a project. *South Fork Band*, 588 F.3d at 727; *Neighbors*
5 *of Cuddy Mt.*, 137 F.3d at 1381. BLM reliance on the COM Plan proposed by SNWA also is
6 inadequate under NEPA because it does not provide the data or scientific information necessary
7 to meaningfully analyze or assess the adequacy of the as yet unidentified monitoring thresholds
8 for mitigation and mitigation measures. *See Okanogan Highlands Alliance*, 236 F.3d at 473,
9 *citing Idaho Sporting Cong.*, 137 F.3d at 1151.

11 F. BLM Failed to Prepare Supplemental NEPA Analyses

12 CEQ regulations require an agency to prepare an SEIS if: (1) the agency makes
13 substantial changes in the proposed action that are relevant to environmental concerns; or (2)
14 there are significant new circumstances or information relevant to environmental concerns and
15 bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1)(i) & (ii); *Marsh v.*
16 *Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989). NEPA imposes a continuing
17 obligation upon federal agencies to gather and evaluate new information relevant of the
18 environmental impacts of its ongoing actions even after the release of an EIS. *Friends of the*
19 *Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000).

22 Despite the fact that the introduction of Alternative F after the close of notice and
23 comment on the DEIS is a substantial change in the proposed action and despite the fact that
24 there are significant new circumstances and information relevant to BLM's analysis, BLM
25 declined to prepare an SEIS in violation of NEPA and its implementing regulations.

- 27 i. Because Major Federal Action Associated with the GWD Project Has Yet
28 to Occur, the Preparation of an SEIS Is Appropriate

1 Although supplementation of an EIS is required only when major federal action is yet to
2 occur, *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989), an agency's
3 NEPA duties do not end when it completes its initial environmental analysis and approves a
4 federal project. "As the Supreme Court has explained, '[i]t would be incongruous with ... the
5 Act's manifest concern with preventing uninformed action, for the blinders to adverse
6 environmental effects, once unequivocally removed, to be restored prior to the completion of
7 agency action simply because the relevant proposal has received initial approval.'" *Southern
8 Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253, 1264 (S.D. Utah 2006) (citing
9 *Marsh*, 490 U.S. at 371). Thus, "[i]f there remains "major federal action" to occur, and if ... new
10 information is sufficient to show that the remaining action will 'affect[t] the quality of the human
11 environment' ... to a significant extent not already considered, a supplemental EIS must be
12 prepared." *Id.* (citations omitted).

15 Here, although BLM has issued the ROD for the GWD Project, construction has not yet
16 commenced and there is and will be substantial ongoing federal action related to the approval
17 and implementation of the GWD Project for many years. For example, the BLM has not yet
18 issued a notice to proceed to SNWA. AR Doc. 47363. Additionally, the ROW was issued
19 subject to future BLM approval of a final COM Plan. AR Doc. 4763 at 192250. BLM will be
20 involved in both the COM plan's development and implementation as well as being responsible
21 for its final approval. AR Doc. 47363 at 192250. Finally, BLM will consider and potentially
22 approve requests by SNWA to proceed at each phase of construction. AR Doc. 47277 at
23 188135. Thus, the issuance of the ROD is merely the first step in many actions the BLM must
24 take in the approval of the GWD Project and federal action is ongoing.

- 27 ii. Significant New Circumstances and Information Related to the GWD
28 Project Trigger the Requirement to Prepare an SEIS

1 If new information shows that remaining federal action will "'affec[t] the quality of the
2 human environment' in a significant manner or to a significant extent not already considered, a
3 supplemental EIS must be prepared." *Marsh*, 460 U.S. at 374. "The agency must be alert to new
4 information that may alter the results of its original environmental analysis, and continue to 'take
5 a 'hard look' at the environmental effects of [its] planned action, even after a proposal has
6 received initial approval.'" *Friends of Clearwater*, 222 F.3d at 556.

7
8 New information submitted during the final comment period following issuance of the
9 FEIS as well as new information and circumstances that have arisen subsequent to the issuance
10 of the ROD should have triggered the preparation of an SEIS for notice and comment. This new
11 information includes, but is not limited to: a then upcoming USGS Geo-Hydrological Report on
12 Potential Impacts to Great Basin National Park, a 2012 Natural Resources Defense Council
13 (NRDC) report titled *Pipe Dreams: Water Supply Pipeline Projects in the West*, the 2012 UNLV
14 Center for Business and Economic Research Population Estimates, and evidence introduced
15 during the fall 2011 Nevada State Engineer Hearing on SNWA's water rights applications,
16 including air quality impacts evidence and mitigation cost evidence, all of which was covered by
17 White Pine County in its comments on the FEIS. AR Doc. 13434.

18
19 Additionally, new information and circumstances that have arisen subsequent to the
20 issuance of the ROD also trigger the requirement to prepare an SEIS. Specifically, changed
21 demographics in southern Nevada represent a changed circumstance that erodes the need for the
22 GWD Project and must be analyzed by the BLM in an SEIS. As noted above, SNWA's EIS
23 population projection of 3.65 million people, AR Doc. 12413 at 129682, AR Doc. 12415 at
24 131407 was based on a 2008 UNLV Center for Business and Economic Research ("CBER")
25 population projection with only a short term adjustment to take into account the economic
26 downturn. *Id.* A more recent 2014 CBER population projection, which does take into account
27
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1 that economic downturn, projects a Clark County population of only 2.72 million people in 2035.
2 UNLV Center for Business and Economic Research, Population Forecasts: Long Term
3 Projections for Clark County, Nevada 2014-2050 (June 11, 2014) (attached hereto as Exhibit J).
4 This adjusted population projection is reflected in SNWA's recently released 2015 Water
5 Resources Plan. Southern Nevada Water Authority, Water Resources Plan (2015), at 56
6 (Attached hereto as Exhibit K). Moreover, since the issuance of the ROD, desalination has
7 become a more obviously viable, available alternative to the GWD Project, and SNWA has
8 entered into the leasing agreement discussed above, which demonstrates that even in times of
9 serious drought, leasing is a viable alternative to the pipeline project. At the time of the
10 preparation of the EIS, it was SNWA's and the BLM's position that neither leasing nor
11 desalination was a viable alternative to the GWD Project partially because Colorado River
12 management complexities foreclosed both of those options. AR Doc. 12413 at 129791. Both of
13 these developments undercut SNWA's need for the project and directly impact the viability of
14 alternatives that the BLM failed to consider in the EIS.

17 Additionally, as outlined above, since the issuance of the ROD, the water rights
18 underlying the purpose for the GWD Project have been vacated by Nevada courts yet again.
19 Thus, SNWA no longer holds water rights to support the project. Given that SNWA has gone on
20 the record stating that it would be impossible to comply with the requirements of the recent
21 Nevada court decision vacating its water rights, and given that the Nevada Supreme Court
22 remanded the applications back to the State Engineer for compliance with the district court's
23 ruling despite SNWA's arguments on that point,⁹ it is unlikely that SNWA will ever be able to
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27 ⁹ See Southern Nevada Water Authority Petition for Writ of Mandamus, or in the Alternative,
28 Prohibition, *Southern Nevada Water Authority v. Dist. Ct.*, Case No. 65775 (NV S. Ct. 2014),
<http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=33971>.
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1 secure the necessary water rights for the GWD Project. As a result of the State Court's decision,
2 the amount of pumped water analyzed by the EIS bears little relationship to any project that
3 might actually be permitted and constructed. Moreover, since the issuance of the ROD, the
4 Nevada Supreme Court decided the *Kobeh Valley Ranch* case, discussed above, which confirms
5 that monitoring and mitigation plans like SNWA's are insufficient. The *Kobeh* case further calls
6 into question whether SNWA will ever be able to demonstrate the availability of water to support
7 the GWD Project. This critical new information and circumstance must be taken into account by
8 BLM in an SEIS. Specifically, BLM must analyze the impacts of the State Court's findings on:
9 the apparent unavailability of water for the GWD Project, the period within which a groundwater
10 system must come into equilibrium and for the duration of which the effects of the proposed
11 groundwater pumping must be analyzed, and the deficiencies of SNWA's proposed COM Plan.

12
13 Accordingly, BLM's failure to prepare an SEIS constitutes agency action unlawfully
14 withheld or unreasonably delayed that is arbitrary, capricious, an abuse of discretion, and not in
15 accordance with the law and procedures required by law. 5 U.S.C. §§ 706(1), (2)(A), (D).

16
17 iii. The Addition of Alternative F to the EIS after the Close of Notice and
18 Comment on the DEIS Requires Preparation of an SEIS for Notice and
19 Public Comment

20 An SEIS is required when the agency includes a new alternative after the close of the
21 notice and comment period if "[t]he agency [made] substantial changes in the proposed action
22 that are relevant to environmental concerns...." *Russell Country Sportsmen v. U.S. Forest Serv.*,
23 668 F.3d 1037, 1045 (9th Cir.2011) (quoting 40 C.F.R. § 1502.9(c)). Consistent with this
24 requirement, an SEIS is required when the selected alternative "could not fairly be anticipated by
25 reviewing the draft EIS alternatives." *California v. Block*, 690 F.2d 753, 772 (9th Cir. 1982).

26
27 Alternative F, which was added to the EIS after the close of notice and comment on the
28 DEIS, effectively deferred any decision regarding a large component of the project (Snake
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1 Valley) while drastically increasing the water withdrawn from the valleys included in
2 Alternatives D and E, the other alternatives that also exclude Snake Valley. In other words,
3 BLM combined the footprint of Alternative E¹⁰ with the groundwater withdrawals of the
4 Proposed Action, excepting Snake Valley, to create an alternative without warning to the public
5 that has significantly different impacts than alternatives A through E.

6 Alternative F's predicted impacts in Spring Valley exceed the area of impact for
7 Alternatives A through E and are essentially identical to the Proposed Action's predicted impacts
8 in other basins with the exception of Snake Valley. AR Doc. 12414 at 130196-201. If and when
9 it is expanded to include Snake Valley, the GWD Project as authorized under Alternative F likely
10 would result in a greater impact than was predicted under any of Alternatives A through E.
11 Thus, BLM effectively has permitted the Proposed Action with the exception of the Snake
12 Valley component, which it recognizes would be premature since SNWA has never secured
13 water rights for Snake Valley and Utah and Nevada have not reached an agreement on the
14 division of Snake Valley water as required by LCCRDA. The effective approval of the Proposed
15 Action under a different guise underscores the fact that the BLM's analysis was structured to
16 reach a predetermined outcome. It also underscores the fact that Alternative F is outside the
17 scope of the other alternatives considered; thus, its inclusion should have triggered an SEIS.

21 **II. BLM Failed to Prevent Unnecessary and Undue Degradation to the Environment**

22 The cornerstone of FLPMA's multiple use and sustained yield framework requires that
23 the BLM "take any action necessary to prevent unnecessary or undue degradation" of lands it is
24 charged with managing. 43 U.S.C. § 1732(a) & (b). Neither FLPMA nor implementing
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27 ¹⁰ The pipeline footprints for the Proposed Action and Alternative E are the same with the
28 exception of Snake Valley, and thus, the BLM has essentially permitted the Proposed Action
with the exception of the deferred Snake Valley component of the GWD Project.
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1 regulations defines the term undue or unnecessary degradation in the context of rights of way for
2 projects such as SNWA's proposed GWD Project. The Department of the Interior's Board of
3 Land Appeals has interpreted "unnecessary or undue degradation" to mean the occurrence of
4 "something more than the usual effects anticipated" from appropriately mitigated development.
5 *Biodiversity Conservation Alliance, et al.*, 174 I.B.L.A. 1, 5–6 (Mar. 3, 2008).

6 BLM acknowledges its duty by stating that "[t]he ROW grant will contain appropriate
7 conditions to ensure compliance with FLPMA and to avoid unnecessary or undue degradation of
8 the public lands." AR Doc. 12413 at 129535. However, the EIS contains almost no discussion
9 of avoidance of unnecessary and undue degradation, the only condition in the ROW that relates
10 to compliance with FLPMA's avoidance of unnecessary and undue degradation requirement is
11 that it is conditioned on the COM Plan that the BLM suggests will prevent any such unnecessary
12 and undue degradation to federal resources. *See* AR Doc. 12414 at 130583, AR Doc. 12415 at
13 130888. As noted above, these mitigation measures, generally outlined in the COM Plan, are not
14 site-specific and the COM Plan contains no triggers that would require mitigation. Because
15 modeling confirms that impacts would be environmentally devastating, and because BLM did
16 not require the development of a robust monitoring and mitigation plan with actual quantified
17 goals and triggers prior to approving the GWD Project, BLM has not and cannot demonstrate
18 that the GWD Project will not cause unnecessary and undue degradation.
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22 **III. BLM Failed to Ensure Consistency of the GWD Project With the Ely District RMP**

23 FLMPA requires federal agencies to develop, maintain, and revise land use plans
24 consistent with the concepts of multiple use and sustained yield. 43 U.S.C. § 1712(a). BLM
25 must manage public lands in accordance with the relevant land use plans. 43 U.S.C. § 1732(a).
26 After a plan is developed, "[a]ll future resource management authorizations . . . shall conform to
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1 the approved plan.” 43 C.F.R. § 1610.5-3(a). The Ely District Resource Management Plan (“Ely
2 RMP”) governs BLM’s management decisions for the GWD Project. *See* AR Doc. 47482.

3 The EIS discloses that a number of GWD Project impacts almost certainly will not
4 comply with the Ely RMP’s protections of specific resources, and thus, BLM has not
5 demonstrated that, or explained how, its authorization of the GWD Project is in compliance with
6 the Ely RMP. The ROW and GWD Project, as approved under Alternative F in the FEIS and
7 ROD, are not in accordance with the Ely RMP’s provisions concerning wildlife habitat, natural
8 water sources for wildlife, livestock grazing, cultural resources, and vegetation management on
9 the public lands on which the ROW and GWD Project will be constructed and/or have effects.
10

11 Specifically, the GWD Project is inconsistent with the RMP’s goals for special status
12 species which require BLM to manage public lands to conserve, maintain, and restore special
13 status species populations and their habitats. The parameters for Great Basin riparian habitat call
14 for managing to increase vegetation cover, reduce runoff, and prevent siltation, to increase
15 habitat for the federally listed Pahrump Poolfish. AR Doc. 47482 at 197079-80. However, the
16 FEIS acknowledges that GWD Project pumping could reduce or dry up flows that sustain
17 Shoshone Ponds inhabited by the Pahrump Poolfish. AR Doc. 12414 at 130144, 546. The Ely
18 RMP’s parameters for special status species habitat include stopping conversion of native
19 sagebrush vegetation communities to annual grasslands, and restoration to native rangelands. *Id.*
20 at 197079. Despite these parameters the FEIS acknowledges that the BLM expects that the
21 “herbaceous wetland ETs (primarily associated with larger valley floor spring systems) could
22 slowly change toward dominance by phreatophytic shrubs and other species better adapted to
23 lower surface soil moisture levels. Similarly, the areas dominated by greasewood, rabbitbrush,
24 and big sagebrush may be invaded by shrubs, herbs, and grasses that are adapted to seasonal
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1 shallow soil moisture, and are capable of withstanding extended droughts, either through
2 complete or partial dormancy, or long-lived seeds.” AR Doc. 12414 at 130319.

3 The ROW and GWD Project also violate the Ely RMP’s parameter for sage-grouse
4 habitat, which requires maintenance of intact and quality sagebrush habitat. Specifically, the
5 parameter requires BLM to “1) maintain large areas of high quality sagebrush currently occupied
6 by greater sage-grouse; 2) maintain habitats which connect seasonal sagebrush habitats in
7 occupied source habitats; and 3) maintain habitats that connect seasonal sagebrush habitats in
8 occupied isolated habitats.” AR Doc. 47482 at 197084. Sagebrush provides priority and general
9 habitat for the imperiled sage grouse. GWD Project ROW construction and operation alone
10 would result in the loss of over 2200 acres of priority sage grouse habitat and over 1600 acres of
11 general sage grouse habitat, and would result in displacement and fragmentation of habitat. AR
12 Doc. 12414 at 130467; *see also* AR Doc. 12414 at 130516.

13
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15 Additionally, the ROW and GWD Project also are inconsistent with the Ely RMP’s
16 management action for mitigation of discretionary permitted activities that result in the loss of
17 aquatic and priority wildlife habitats, which requires BLM to improve two acres of comparable
18 habitat for every one acre of lost habitat as determined on a project by project basis. *See* AR
19 Doc. 47482 at 197074. While BLM acknowledges its obligation to comply with this directive
20 and provides for compliance in the area of construction activities, BLM failed to require such
21 restoration for the expansive area of likely groundwater drawdown that the modeling shows will
22 occur, relying on the statement that impacts from groundwater withdrawals are analyzed at a
23 programmatic level. AR Doc. 12415 at 131175-200. BLM’s deferral of compliance with the Ely
24 RMP in the area of groundwater development impacts is clearly inappropriate for this habitat
25 restoration provision. The BLM was obliged to require compliance with the Ely RMP by
26 requiring restoration of two acres of habitat for every destroyed acre in the area of drawdown.
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1 Finally, the predicted drawdown caused by SNWA's pumping would have a devastating
2 impact on grazing activities, which have long been critical to the economy and culture of rural
3 Nevada and Utah. Such harmful effects on longstanding livestock grazing activities in the areas
4 that would be affected by the GWD Project conflict with the Ely RMP, which provides for
5 maintaining rangeland health and for livestock grazing to continue on those affected lands. AR
6 Doc. 47482 at 197124-27.

7
8 **IV. BLM Failed Ensure Compliance with Applicable Air Quality Standards as
Mandated By the Ely RMP**

9
10 FLPMA requires land use plans to "provide for compliance with applicable pollution
11 control laws, including State and Federal air, water, noise, or other pollution standards or
12 implementation plans." *See* 43 U.S.C. § 1712(c)(8). The Ely RMP air quality objective is "to
13 ensure air quality in the Ely planning area meets all National Ambient Air Quality Standards."
14 AR Doc. 47482 at 197061. Additionally, FLPMA's implementing regulations require that each
15 land use authorization shall require compliance with air quality standards established pursuant to
16 applicable federal or state law. 43 C.F.R. § 2920.7(b)(3). Despite uncontroverted evidence that
17 drawdowns of less than ten feet could cause increased dust emissions from the area, BLM only
18 evaluated impacts to air quality based on a predicted 10 foot drawdown area. And despite the
19 fact that uncontroverted evidence that impacts will continue to worsen well beyond 200 years,
20 BLM only evaluated impacts to air quality based on a 200 year post build out timeframe. Impacts
21 are further obscured by the fact that the modeling done by the BLM was regional in nature and
22 not designed to evaluate site specific impacts. The drawdown measurement and modeling
23 timeframe limitations and the regional nature of the model combine to significantly mask the
24 GWD Project's actual air quality impacts. Thus, BLM has failed to demonstrate that the GWD
25 Project will comply with applicable air quality standards as required by the Ely RMP. Simply
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1 stating that SNWA must comply with applicable standards as required by FLPMA is insufficient,
 2 because the EIS exposes that such compliance likely will not be possible.

3 **V. BLM Failed to Determine Whether SNWA Has the Financial Capability to**
 4 **Construct and Operate the GWD Project**

5 FLPMA permits the BLM to grant a ROW “only when . . . satisfied that the applicant has
 6 the technical and financial capability to construct the project for which the right-of way is
 7 requested” 43 U.S.C. § 1764(j). The FEIS suggests that SNWA has demonstrated the
 8 financial capability to construct, operate, and maintain the GWD Project facilities, but BLM has
 9 not required SNWA to provide a cost estimate for monitoring, management, and mitigation,
 10 which undoubtedly will be necessary for continued operation of the Project. AR Doc. 12413 at
 11 129673. Therefore, the cost estimates relied on in the FEIS are not based on the Project’s actual
 12 likely costs and do not reflect a genuine, or adequate, assessment of whether SNWA actually has
 13 the financial ability to construct and operate the Project.
 14

15 **CONCLUSION**

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

26 Dated: October 30, 2015 Respectfully submitted,

27 _____
 28 /s/ Simeon Herskovits

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