INTRODUCTION

For years, Defendant U.S. Bureau of Land Management (BLM) recognized that South Shale Ridge in western Colorado contained wilderness resources that deserved protection and special status. Although these resources have remained unchanged, BLM recently reversed its position on wilderness and hastily proceeded with an effort to lease the area for oil and gas. In doing so, BLM and the U.S. Fish and Wildlife Service (FWS) violated the Endangered Species Act (ESA), National Environmental Policy Act (NEPA), and Federal Land Management and Policy Act (FLPMA).

Defendants violated the ESA in three ways. First, BLM failed to consult under ESA section 7(a)(2) on impacts to the Uinta Basin hookless cactus from its September 2005 land use decision for South Shale Ridge (the "Planning Decision"). Second, in determining that the November 2005 decision to lease parcels on South Shale Ridge (the "Leasing Decision") is "not likely to adversely affect" the cactus, BLM and FWS failed to follow required procedures and consider relevant factors. Third, FWS violated its mandatory duty to "emergency list" the DeBeque phacelia under ESA section 4 despite finding that oil and gas activities pose a significant risk to this plant.

BLM violated NEPA with both its Planning and Leasing Decisions. The only alternative to leasing that BLM considered – deferring leasing – was an action that, according to BLM, it could not implement. BLM's justifications for dismissing reasonable alternatives that could protect wilderness resources – "no surface occupancy" and "wilderness study area" designation – were unsupported and contrary to law. Further, BLM's conclusion that significant impacts to wilderness resources will be mitigated is contrary to law and unsupported by the record. BLM also failed to evaluate and disclose to the public impacts to three imperiled plants.

Last, BLM violated FLPMA by failing to ensure the Leasing Decision conformed to the 1987 Resource Management Plan (RMP) and by failing to determine whether either Decision would cause unnecessary or undue degradation to South Shale Ridge's resources. Accordingly,

Plaintiffs' Petition for Review should be granted and the challenged decisions vacated.[1]

FACTUAL BACKGROUND

I. SOUTH SHALE RIDGE AND ITS WILDERNESS CHARACTERISTICS

In 1994, Plaintiffs submitted a citizen wilderness proposal for certain BLM lands across Colorado, including South Shale Ridge. Exh. 1 at BLM AR 805-14.[2] The proposal described South Shale Ridge as "Colorado's Bryce Canyon," with over forty miles of twisting arroyos carved into a colorful landscape. Id. at BLM AR 813. It requested BLM consider South Shale Ridge for "wilderness study area" or "WSA" designation. Id. at 815. A WSA is a land use designation that temporarily protects public lands from activities that would destroy wilderness until Congress makes a final wilderness decision. Exh. 31 at SAR 8.

The citizen proposal prompted BLM to conduct its own wilderness analysis of South Shale Ridge. In 1998, BLM determined South Shale Ridge contained 32,364 contiguous roadless acres. Exh. 32 at BLM AR 849, Exh. 3 at BLM AR 852-58. BLM's 1999 preliminary Wilderness Inventory found 27,632 of the roadless acres exhibited wilderness characteristics, such as providing opportunities for solitude or primitive recreation and retaining its natural appearance. Exh. 3 at BLM AR 1501-05. The inventory rejected 4,712 acres of the roadless area because they did not exhibit wilderness characteristics due, in large part, to oil and gas activities. Id. at 1503. Oil and gas activities cause "substantially noticeable and extensive impacts" to wilderness characteristics. Id.

BLM announced in its 2001 Final Wilderness Inventory that 27,631 acres at South Shale Ridge were eligible for wilderness designation. Exh. 5 at BLM AR 946; Exh. 6 at BLM AR 952-

---

[1] Plaintiffs submit exhibits one through four to demonstrate standing to challenge these agency actions.

[2] The following abbreviations are used for citations to the administrative record: (1) “BLM AR” for the Bureau of Land Management Administrative Record; (2) “FWS AR” for the Fish and Wildlife Service Administrative Record; and (3) “SAR” for the first Supplemental Administrative Record.

56. BLM determined "[t]he majority of [South Shale Ridge's] (27,631 acres) appears to have been affected primarily by the forces of nature and retains its natural character. Human impacts are substantially unnoticeable in this portion of the unit." Exh. 6 at BLM AR at 953. According to BLM, the area "offers visitors outstanding opportunities for solitude in many locations throughout the portion of the unit retaining its natural character." Id. at 954. BLM further found the area provides "prime habitat for a host of plants of interest," including the Uinta Basin hookless cactus, DeBeque phacelia and DeBeque milkvetch. Id. BLM excluded four specific areas totaling 4,712 acres that were "unnatural" in character because "gas production infrastructure [] dominates much of the landscape." Id. BLM also omitted one additional acre that was included in the preliminary inventory due to oil and gas activities. Exh. 5 at BLM AR 946.

II. SOUTH SHALE RIDGE'S RARE PLANTS

BLM found South Shale Ridge qualified for wilderness designation, in part, because of native plants. Exh. 6 at BLM AR 955 (finding "plants of interest" and "unique botanical values"). South Shale Ridge provides prime habitat for the Unita Basin hookless cactus, DeBeque phacelia, and DeBeque milkvetch. Id. Energy development threatens each of these plants. Exh. 7 at FWS AR 10; Exh. 8 at FWS AR 265.

The Uinta Basin hookless cactus, a plant with purplish flowers that blooms from May to June, is restricted to portions of Colorado and Utah because it has special habitat needs -- alluvium soils found at elevations of between 4,500 and 5,900 feet. Exh. 7 at FWS AR 5, 8-9. The cactus has only three remaining population centers, including South Shale Ridge. Id. at 5, 8; Exh. 9 at BLM AR 2502. FWS listed the cactus under the ESA in 1979 because energy development threatened the species. Exh. 7 at FWS AR 5, 11. The cactus' 1990 Recovery Plan[3]

[3] The ESA requires FWS to develop recovery plans for listed species. 16 U.S.C. § 1533(f)(1). A recovery plan describes site-specific management actions necessary for survival and recovery of the species. Id. § 1533(f)(1)(B).

identifies "mineral and energy development activities" as "having the possibility of devastating local populations [] through all the ground disturbing phases of oil and gas development." Id. at 10, 11. These activities cause the loss of seedlings, young plants and dormant plants. Exh. 34 at 14. Because individual plants may lay dormant in any given year, several years of surveys are required before locating oil and gas development activities in cactus habitat. Id. at 8-9, 14.

Both DeBeque plants are unique to the South Shale Ridge area, near DeBeque, Colorado. The DeBeque phacelia is a low-growing plant, with red stems and leaves and yellow or cream colored flowers, which blooms from April to June. First Amended Complaint (Docket #4) (FAC) ¶ 39; Answer (Docket #8) ¶ 39. This plant is a "narrow endemic" – it lives only in an area seventeen by seventeen miles near DeBeque. Id.; Exh. 10 at FWS AR 125, 131-32. Because in any given year there may be no plants in a population, three consecutive years of surveys are necessary to determine plant locations. Exh. 10 at FWS AR 126; Exh. 11 at FWS AR 320; FAC ¶ 39; Answer ¶ 39. Oil and gas activities threaten the DeBeque phacelia; surface disturbing activities – pipelines, well pads, holding tanks, access roads, and off-road vehicle use – "destroy[] seed banks that are crucial to the survival of this species." Exh. 8 at FWS AR 265; Exh. 11 at FWS AR 319; Exh. 12 at FWS AR 347.

FWS designated the DeBeque phacelia a "candidate species" in 1975. Exh. 11 at FWS AR 317. Candidate species warrant ESA listing, but must wait until FWS completes other listing actions. Exh. 12 at FWS AR 252. In April 2004, after the DeBeque phacelia had languished on the candidate list for almost three decades, Plaintiff Center for Native Ecosystems petitioned FWS to list this flower under the ESA. Exh. 13 FWS AR 160. In response, FWS declared listing "warranted but precluded" by other, higher-priority species. Exh. 14 at FWS AR 250. In a May 2005 review, FWS determined that "a dramatic increase in the intensity of energy exploration and development" posed an "imminent" threat and warranted elevating the species from eleven to eight in FWS's priority system. Exh. 8 at FWS AR 265. FWS refused to emergency list the

phacelia.

The DeBeque milkvetch is a desert wildflower that shows pure white flowers in the spring. Exh. 35 at BLM AR 2338. Because it is a long-lived perennial plant, it does not reproduce often. Id. at 2343. In some years, it may remain dormant, making one-time surveys inadequate. Id. Seventy percent of the plants are within fifteen miles of DeBeque, including populations found on South Shale Ridge. Id. at 2344, 2352. The DeBeque milkvetch is also threatened by oil and gas activities at South Shale Ridge. Id. at 2338, 2364-73.

III. BLM'S DECISIONS

A. 1987 Resource Management Plan

In 1987, BLM's Grand Junction Field Office finalized a Resource Management Plan (RMP) for the Grand Junction Resource Area, which includes South Shale Ridge. Exh. 15 at BLM AR 695-804.[4] The RMP, still in effect thirty years later, identifies permitted uses for the Resource Area. Id. The RMP classified South Shale Ridge open to energy development and identified stipulations applicable to oil and gas leases. Exh. 29 at BLM AR 871. The RMP was developed in conjunction with an environmental impact statement (EIS). FAC ¶ 31; Answer ¶ 31. In the EIS, BLM did not consider impacts from oil and gas on South Shale Ridge's wilderness character because, in 1987, the agency did not believe the area contained wilderness resources. Exh. 3 at BLM AR 857.

In the late 1990s, BLM recognized an amendment to the RMP for South Shale Ridge was necessary to account for the area's wilderness characteristics. Exh. 16 at BLM AR 816. BLM announced it would defer additional leasing in this area until it prepared an amendment. Exh. 3 at BLM AR 855; Exh. 36 at BLM AR 966-67. BLM based these decisions on the 1994 Citizen Wilderness Proposal, BLM's 1998 roadless review, and BLM's 1999 Wilderness Inventory. Exh.

[4] An RMP is a planning document where BLM decides the appropriate uses of the public lands in the resource area. 43 U.S.C. § 1601.0-5(k).

16 at BLM AR 816; Exh. 5 at 946; Exh. 37 at BLM AR 987. Through the amendment, BLM intended to consider a range of land use alternatives that would protect South Shale Ridge's wilderness characteristics. Exh. 16 at BLM AR 818.

B. September 2005 Planning Decision

Subsequently, BLM changed direction on amending the RMP's land use designation and deferring leasing on South Shale Ridge based on a 2003 settlement between BLM and the State of Utah concerning BLM's ability to designate WSAs ("Settlement"). The Settlement resulted in new agency policy that prevents BLM from designating South Shale Ridge, or any other area, a WSA.

Notwithstanding this reversal, BLM recognized it still had to consider amending the 1987 RMP as a result of its wilderness inventory. This Planning Decision also required a new EIS because the 1987 EIS never considered, disclosed to the public, or mitigated impacts from oil and gas activities on wilderness resources. Exh. 39 at BLM AR 1027 ("If areas are determined not to contain adequate NEPA, a Plan Amendment will be initiated").

Despite publicly stating an EIS was required, BLM changed course and, in 2004, released a draft environmental assessment (EA) – a less comprehensive analysis than an EIS. Exh. 17. The July 2004 draft EA identified three alternatives: a proposed action of oil and gas leasing, the "no action" alternative of not leasing, and a "no surface occupancy" (or NSO) alternative. Problems with the 2004 draft caused BLM to issue a revised draft EA in April 2005. The 2005 draft EA contained only the proposed leasing action and a no action alternative. BLM eliminated the NSO alternative. After receiving public comment, on September 26, 2005, BLM issued its final EA and finding of no significant impact ("EA/FONSI") for its decision to open the area to leasing (“Planning Decision”). BLM did not engage in ESA section 7 consultation on this Planning Decision.

C. November 2005 Leasing Decision

Two months later, BLM offered a statewide oil and gas lease sale (the "Leasing Decision"). Exh. 40 at BLM AR 1737. As part of that sale, BLM leased sixteen parcels on South Shale Ridge. FAC ¶ 46, 62; Answer ¶ 46, 62. For the Leasing Decision, BLM relied upon the EA/FONSI prepared for the Planning Decision to fulfill NEPA. FAC ¶ 62; Answer ¶ 62; Exh. 41 at BLM AR 2423. In contrast to its failure to consult on the Planning Decision, BLM engaged in "informal" ESA section 7 consultation with FWS for nine of the sixteen leases due to impacts to the Uinta Basin hookless cactus. FAC ¶ 46; Answer ¶ 46.

STANDARD OF REVIEW

Courts review BLM and FWS's actions under NEPA, the ESA, and FLPMA under the Administrative Procedure Act (APA). Davis v. Mineta, 302 F.3d 1104, 1110 (10th Cir. 2002). Agency actions shall be set aside when they are "arbitrary, capricious [or] an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Applying this standard, a court must determine whether the agency "considered the relevant factors, [and] articulated a rational connection between the facts found and the choice made." Balt. Gas & Elec. v. Natural Res. Defense Council, 462 U.S. 87, 105 (1983); Olenhouse v. Commodity Credit, 42 F.3d 1560, 1573-76 (10th Cir. 1994). Courts review whether the agency:

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

Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto., 463 U.S. 29, 43 (1983); Friends of the Bow v. Thompson, 124 F.3d 1210, 1215 (10th Cir. 1997). An agency's conclusion or findings must be supported by substantial evidence in the administrative record. Colo. Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1167 (10th Cir. 1999).

ARGUMENT

I. BLM AND FWS VIOLATED THE ENDANGERED SPECIES ACT

A. BLM Violated The ESA By Not Consulting On Its Planning Decision

BLM must consult on its Planning Decision because that action may affect the Uinta Basin hookless cactus. Plaintiffs challenge BLM's failure to consult.

1. ESA Section 7 Duty To Consult

Congress enacted the ESA as "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). As the Supreme Court observed, the statute "afford[s] endangered species the highest of priorities." TVA v. Hill, 437 U.S. 153, 194 (1978). To achieve its objectives, Congress directed FWS to list species that are "threatened" or "endangered," as defined by the ESA. 16 U.S.C. § 1533; § 1532(6) & (20).

Section 7 of the ESA mandates that every federal agency "consult" with FWS when taking "any action" that "may affect" listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a); Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 422 F.3d 782, 790 (9th Cir. 2005). The purpose of the consultation process is to ensure agency actions do not "jeopardize the continued existence" of listed species. Id.

To facilitate the consultation process, the agency proposing an action ("action agency") prepares a "biological assessment" that identifies listed species in the action area and evaluates the proposed action's effect on the species. 16 U.S.C. § 1536(c); 50 C.F.R. §§ 402.02, 402.12. Through a biological assessment, the agency determines whether "formal" or "informal" consultation is necessary. 50 C.F.R. § 402.13(a). When formal consultation is necessary, FWS prepares a "biological opinion" that determines whether the agency's action will jeopardize the species and, if appropriate, identifies "reasonable and prudent alternatives" that avoid jeopardy. 16 U.S.C. § 1536(b)(3)(A). Informal consultation is sufficient if the action agency finds its action "may affect" but "is not likely to adversely affect" the listed species," and FWS concurs.

50 C.F.R. §§ 402.14(a) & (b); 402.13(a). During either consultation process, both agencies must "use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2).

2. BLM's Planning Decision Constitutes Agency Action

The ESA defines agency action broadly. 16 U.S.C. § 1536(a)(2); Lane County Audubon Soc'y v. Jamison, 958 F.2d 290, 294 (9th Cir. 1992). It includes "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies." 50 C.F.R. § 402.02 (emphasis added). Agency actions include "actions directly or indirectly causing modifications to the land, water, or air." Id. § 402.02.

Courts have consistently recognized that land use planning decisions are agency actions under section 7. For example, the Ninth Circuit considered a BLM management plan – the Jamison Strategy – designed to determine where logging may occur on BLM lands in Washington, Oregon, and California. Lane County, 958 F.2d at 291. BLM did not consult on the Jamison Strategy, although it did consult on individual timber sales proposed under the Jamison Strategy. Id. at 292. The Ninth Circuit held that because the Jamison Strategy was a land use management decision, it was "without a doubt" agency action and required BLM to consult. Id. at 294. In another case, the U.S. Forest Service adopted two Land and Resource Management Plans ("LRMPs") without consulting. Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1052 (9th Cir. 1994). Similar to RMPs, LRMPs determine suitable land uses in national forests. Id. The court held the LRMPs were agency actions requiring consultation because they establish resource and land use policies, and govern individual projects. Id. at 1053, 1055; see also Ky. Heartwood v. Worthington, 20 F. Supp. 2d 1076, (E.D. Ky. 1998); Silver v. Babbitt, 924 F. Supp. 976, 983-84 (D. Ariz. 1995).

BLM's Planning Decision determined the land uses for South Shale Ridge. Just as the Lane County and Pacific Rivers plans established land use and resource policies, BLM's Planning Decision did the same. The Planning Decision governs individual lease sales and

development projects in the same way the planning decisions in Lane County and Pacific Rivers governed individual timber sales and road projects. In sum, BLM's Planning Decision falls within the broad definition of "agency action."

BLM's preparation of an EA/FONSI further confirms the Planning Decision is agency action. NEPA requires federal agencies to prepare EISs for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Notably, "[t]he standards for 'major federal action' under NEPA and 'agency action' under the ESA are much the same. If there is any difference, case law indicates 'major federal action' is the more exclusive standard." Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1075 (9th Cir. 1996); People ex rel Lockyer v. U.S. Dep't of Agric., 2006 WL 3006489 *30 (N.D. Cal. Oct. 11, 2006). Thus, agency action that qualifies as "major federal action" under NEPA is necessarily "agency action" under the ESA. Because BLM prepared an EA, thereby acknowledging the Planning Decision is major federal action, the Planning Decision must also constitute agency action under section 7 of the ESA.

3. BLM's Planning Decision "May Affect" The Uinta Basin Hookless Cactus

Federal agencies must consult on "any action [that] may affect listed species." 50 C.F.R. § 402.14(a) (emphasis added). "Th[is] threshold for triggering the ESA consultation process is low." Lockyer, 2006 WL 3006489 at *30. An action "may affect" a listed species if it has "[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character" on the species. 51 Fed. Reg. 19,926, 19,949 (June 3, 1986). The ESA Consultation Handbook[5] notes proposed actions may affect as species when they "may pose any effects on listed species." ESA Consultation Handbook xvi. As FWS stated in this case, "[w]here [listed] species exist within a project area, it is appropriate for the BLM to find that the proposed activities may affect the species, and to consult with the Service." Exh. 25 at FWS AR 92; see also Pac. Rivers, 30 F.3d at

[5] The Handbook is at http://www.fws.gov/endangered/consultations/s7hndbk/s7hndbk.htm.

1055 (holding "may affect" threshold met because salmon existed within planning area).

BLM's Planning Decision – opening South Shale Ridge to oil and gas – may affect the Uinta Basin hookless cactus. BLM acknowledged South Shale Ridge contains the cactus. Exh. 18 at BLM AR 1251. BLM found the cactus to be the most imperiled plant within the Grand Junction Resource Area. Exh. 44 at BLM AR 271-73. According to FWS, oil and gas activities may "devastat[e] local populations" of the cactus. Exh. 7 at FWS AR 10-11. Given the cactus' presence, status, and sensitivity to oil and gas activities, the Planning Decision "may affect" the cactus.

4. BLM's Excuse For Not Consulting Violates The ESA

BLM's reason for not consulting on the Planning Decision is not because the Planning Decision is not an agency action that may affect the cactus. Rather, BLM claims it need not consult now because it will consult when individual development projects arise. Exh. 26 at BLM AR 1667. This argument is contrary to the ESA.[6] Section 7 requires consultation for all agency actions that may affect listed species. TVA, 437 U.S. at 173 (section 7 "admits of no exception"). Further, agencies must consult at both the plan level and the individual project level. Lane County, 958 F.2d at 293. Indeed, only by consulting on plan-level decisions can agencies ensure they are considering threats to listed species comprehensively and making decisions that ensure a species' survival.

Moreover, when an agency has some information about future development scenarios – even if "the precise location and extent of future oil and gas activities" is unknown – it must use that information. Conner v. Burford, 848 F.2d 1441, 1453 (9th Cir. 1988). Here, the record indicates BLM knew how development would proceed at the time of the Planning Decision. Exh. 24 at BLM AR 1039 (forecasting number and concentration of future wells); Exh. 28 at BLM

[6] BLM's argument is further undermined by the fact it consulted on its Leasing Decision, before any individual project was proposed. Exh. 19 at FWS AR 105.

AR 1102 (suggesting removal of site-specific information from EA); Exh. 18 at BLM AR 1244 (describing details of future activities). BLM cannot ignore this available information about "oil and gas activities which may indicate potential conflicts between development and the preservation of protected species." Conner, 848 F.2d at 1454. Accordingly, BLM's purported lack of knowledge was not a valid excuse to forego consultation.

In sum, because the Planning Decision is "agency action" that "may affect" the cactus, BLM violated its ESA duty to consult.

B. The Agencies' Informal Consultation On The Leasing Decision Was Unlawful

Whereas BLM did not consult on the Planning Decision, it did consult on nine South Shale Ridge parcels in the Leasing Decision. FAC ¶ 46; Answer ¶ 46. BLM and FWS concluded the Leasing Decision was "not likely to adversely affect" the cactus. This consultation process, which was "informal" and limited to an exchange of letters a day apart, violated the ESA.

As an initial matter, BLM's decision to engage in informal consultation is contrary to its prior conclusion that "formal" consultation, a process providing a more thorough review, is necessary. In the 1987 RMP, BLM committed to "Formal Section 7 consultation" whenever an EA "shows a may affect situation exists." Exh. 15 at BLM AR 650 & 670. Here, the Leasing Decision resulted in a "may affect" finding, as evidenced by BLM engaging in consultation, yet BLM ignored its own RMP requirement without explanation. See Motor Vehicle, 463 U.S. at 41-42.

1. BLM Violated ESA Procedures By Not Preparing A Biological Assessment

The ESA imposes a mandatory duty on BLM to prepare a biological assessment for actions that may affect a listed species. 16 U.S.C. § 1536(c). When a listed species may be present in the area affected by a proposed action, preparation of a biological assessment is mandatory. Forest Guardians v. Johanns, 450 F.3d 455, 457 (9th Cir. 2006) ("If . . . listed species may be present in the affected area, the agency preparing to act must produce a 'biological assessment'"); Sierra Club v. U.S. Army Corps of Eng'rs, 295 F.3d 1209, 1212 (11th Cir. 2002).

The Leasing Decision required a biological assessment. BLM and FWS agreed the Leasing Decision may affect the cactus, which is why they undertook informal consultation. FAC ¶ 46, 48; Answer ¶ 46, 48. Cactus habitat is found on at least nine of the sixteen leases offered in the Leasing Decision, and oil and gas activities will cause harmful impacts to the plant. FAC ¶ 51; Answer ¶ 51; Exh. 19 at FWS AR 105; Exh. 18 at BLM AR 1251. BLM violated the ESA by not preparing a biological assessment.

2. BLM Failed To Consider Relevant Section 7 Requirements

Not only must BLM follow basic section 7 procedures, both BLM and FWS must also consider all relevant factors during the consultation process and support their "not likely to adversely affect" conclusions with substantial evidence in the administrative record. See Balt. Gas & Elec., 462 U.S. at 105; Friends of the Bow, 124 F.3d at 1215; see also Bensman v. U.S. Forest Serv., 984 F. Supp. 1242, 1246, 1249 (W.D. Mo. 1997) (applying standards to not likely to adversely affect finding); House v. U.S. Forest Serv., 974 F. Supp. 1022, 1026, 1029 (E.D. Ky. 1997).

The scope of analysis during consultation is broad. The effects of agency actions include direct effects, indirect effects, and effects from "other activities that are interrelated or interdependent with that action." 50 C.F.R. § 402.2. "Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur." Id. Interrelated actions are "those that are part of a larger action and depend on the larger action for their justification." Id. Interdependent actions "have no independent utility apart from the action under consideration." Id. Applying these terms, the Tenth Circuit concluded that possible future reductions in downstream water flows were indirect effects of a dam. Riverside Irrigation Dist. v. Andrews, 758 F.2d 508, 513 (10th Cir. 1985). To determine whether activities are interrelated or independent, courts employ a "but for" causation test, asking whether the activities would occur but for the proposed action. Sierra Club v. Marsh, 816 F.2d 1376, 1387 (9th Cir. 1987).

BLM's not likely to adversely affect conclusion fails because BLM did not consider all relevant impacts of the Leasing Decision.[7] Pursuant to its duty to consider indirect effects and interrelated and interdependent actions, BLM should have, but failed to, consider impacts from future development activities. Because surface disturbance associated with future oil and gas development is "reasonably certain to occur," it is an indirect effect of BLM's Leasing Decision. Because future surface-disturbing activities would not occur but for BLM's Leasing Decision, development activities are interrelated or interdependent and must be addressed.

BLM admitted as much. According to BLM, the Leasing Decision will result in the construction of well pads, reserve pits, roads, and pipelines in previously undeveloped areas. Exh. 18 at BLM AR 1244, 1257. The best available information confirms that BLM knows how development will likely proceed. Id. at 1244 (surface disturbance of 3.2 acres for each well pad, 3.8 acres for related infrastructure of roads and pipelines; road and pipelines 35-feet wide). BLM could even estimate the number and concentration of wells at South Shale Ridge. Exh. 24 at BLM AR 1039. Moreover, as a matter of law, once BLM sells a lease parcel, the lessee has the right to explore and develop oil and gas resources on that parcel, subject to certain conditions. 43 C.F.R. § 3101.1-2. Thus, issuing leases is a necessary first step to oil and gas activities on public lands and post-leasing exploration and development is reasonably foreseeable. Conner, 848 F.2d at 1453; N. Slope Borough v. Andrus, 642 F.2d 589, 608 (D.C. Cir. 1980); see also Riverside Irrigation, 758 F.2d at 513.

Moreover, BLM violated ESA procedures by defining the "action area" too narrowly and ignoring seven of the leased South Shale Ridge parcels. The ESA defines "action area" expansively. 50 C.F.R. § 402.02; Defenders of Wildlife v. Babbitt, 130 F. Supp. 2d 121, 129 (D.

[7] Only truly benign actions qualify for informal consultation -- those where there will be no adverse effect on the listed species. FWS's Consultation Handbook explains a "likely to adversely affect" finding is "the appropriate conclusion if any adverse effect to a listed species may occur as a direct or indirect result of a proposed action or its interrelated or interdependent actions." ESA Consultation Handbook § 3.5 at 3-13 (emphasis added).

D.C. 2001). "In designating an 'action area' for analysis, the agency must consider 'all areas to be affected directly or indirectly by the Federal Action and not merely the immediate area involved in the action.'" Native Ecosystems Council v. Dombeck, 304 F.3d 886, 902 (9th Cir. 2002) (quoting 50 C.F.R. § 402.02). Here, of the sixteen leased parcels, BLM consulted on only nine. Exh. 19 at FWS AR 105; Exh. 20 at FWS AR 111 (FWS noting its concurrence applies "only to the nine parcels identified" by BLM). The record shows surveys must be rigorously performed because this species is frequently dormant. Exh. 34 at 8-9, 14 (BLM Seismic BA) (noting problem with limited surveys). FWS made this clear to BLM: "other parcels in the South Shale Ridge may also have suitable habitat and populations that have not been documented previously." Exh. 20 at FWS AR 111. BLM violated the ESA by failing to consult on all cactus habitat and narrowly defining the action area.

BLM's violations of ESA procedures during consultation are significant because the best available science shows the Leasing Decision will have serious consequences for the cactus. FWS's cactus Recovery Plan cautions that "mineral and energy development activities" threaten the cactus. Exh. 7 at FWS AR 10. The Recovery Plan warns oil and gas activities "devastat[e] local populations of [the cactus] through all the ground-disturbing phases of oil and gas development." Id. at 11; Exh. 34 at 8 (seismic exploration "could result in the loss of plants that are dormant, on unstable slopes, of small size and missed in surveys, or obscure in the spring in seedling stages, or covered in the winter."). Further, development leads to "increased access to previously roadless areas which encourages off-highway vehicle traffic." Exh. 11 at FWS AR 319; see also Exh. 8 at FWS AR 265 (linking oil and gas to OHV access). Off-highway vehicles destroy cacti directly and adversely modify cactus habitat. Exh. 7 at FWS AR 12; Exh. 34 at 8 (Seismic EA) (observing seismic exploration of oil fields can "leave tracks that could lead to travel by recreation[al] ATVs").

3. The Stipulations Do Not Excuse BLM's Failure To Consider Impacts Or Support The Not Likely To Adversely Affect Finding

BLM asserted that two lease stipulations permit it to ignore all effects of the Leasing Decision and justify its not likely to adversely affect finding. Exh. 19 at FWS AR 106. BLM's reliance on lease stipulations for these two purposes is untenable.

Mitigation measures do not excuse the failure to analyze all impacts. In Conner, FWS argued it need not evaluate post-leasing activities because the oil and gas leases contained a no-surface occupancy stipulation that reserved the right to preclude any activity likely to jeopardize a listed species. Conner, 848 F.2d at 1455. The Ninth Circuit rejected this argument, concluding the stipulation "cannot be substituted for comprehensive biological opinions." Id. at 1458 & n.41. "Although agencies may include in their leasing programs additional safeguards which protect threatened and endangered species, such safeguards cannot substitute for an initial, comprehensive biological opinion" that evaluates all impacts. Id. at 1458 n.41. Absent a comprehensive analysis that identifies all effects, agencies cannot ensure imperiled species are protected through mitigation measures and jeopardy is avoided. Id. at 1453-54; Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985) ("the [ESA's] procedural requirements are designed to ensure compliance with the substantive provisions"). Accordingly, BLM cannot rely on stipulations to ignore indirect effects and effects of interrelated, and interdependent activities.

Furthermore, the stipulations BLM relies upon do not support the not likely to adverse affect conclusion. BLM's stipulations are discretionary, vague, and lack any specific trigger. Courts have held that mitigation measures "must be reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species." Ctr. for Biological Diversity v. Rumsfeld, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002); Ctr. for Biological Diversity v. Bureau of Land Mgmt., 422 F. Supp. 2d 1115, 1133 (N.D. Cal. 2006); Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 254 F. Supp. 2d 1196, 1207 (D. Or. 2003).

In Rumsfeld, for example, FWS determined that mitigation measures -- to-be-developed management plans -- would compensate for impacts caused by groundwater pumping operations near Arizona's San Pedro River. Rumsfeld, 198 F. Supp. 2d at 1151. The court rejected reliance on future management plans because without the details of such plans, "there is no factual basis" for a conclusion. Id. at 1154. Agencies must identify the specific measures to compensate for known adverse impacts to listed species. Id.; see also Sierra Club, 816 F.2d at 1386 (concluding uncertainty surrounding agency's ability to implement mitigation measures meant agency could not insure against jeopardy); Nat'l Wildlife Fed'n, 254 F. Supp. 2d at 1213 (determining FWS's no jeopardy determination was arbitrary because it relied upon mitigation measures that were not reasonably certain to occur).

Here, like the measures in Rumsfeld, BLM's stipulations are vague, unidentified, and BLM makes no firm commitment to implement them. For example, BLM's "Endangered Species Act Section 7 Consultation Stipulation" provides that the agency "may recommend modifications to exploration and development proposals" and "may require modifications to or disapprove proposed activity" to protect listed species. Exh. 19 at FWS AR 108 (emphasis added). The stipulation does not detail when BLM "may" take such steps, the specific modifications, or how modifications will protect the cactus. Similarly, BLM's "Threatened and Endangered Species Habitat Stipulation" informs lessees that they must submit a plan for avoidance and mitigation of impacts to listed species, and that BLM "may require additional mitigation measures." Id. at 108. Again, there are no plans or mitigation measures to evaluate. Although this stipulation authorizes BLM to prohibit surface occupancy "[w]here impacts cannot be mitigated to the satisfaction of the authorized officer," it fails to specify when BLM may do so. Id. BLM also notes "notifications" will warn lessees that surveys and design and construction measures may be necessary. Id. at 106. However, nowhere does BLM describe when surveys or design and construction measures could be imposed, or how surveys and design

and construction measures will protect the cactus.[8] In short, BLM's proposed measures are vague and not certain to occur. As a result, there is "no factual basis and no rational basis" to support for BLM's "not likely to adversely affect" determination. See Rumsfeld, 198 F.Supp.2d at 1154.

By failing to analyze all impacts associated with its Leasing Decision and by relying on speculative stipulations, BLM and FWS's "not likely to adversely affect" conclusion violates the ESA and is arbitrary.

C. FWS Violated Its Mandatory Duty to Emergency List the DeBeque Phacelia

1. Emergency Listing Of Warranted-But-Precluded Species

The ESA authorizes FWS to emergency list any imperiled fish, wildlife, or plant species where there is a significant risk to the species' well-being. 16 U.S.C. § 1533(b)(7). Emergency listing allows FWS to bypass normal procedures and timelines to quickly protect imperiled species. Id.

Whether to emergency list a species is generally discretionary, though subject to APA review standards. Id.; City of Las Vegas v. Lujan, 891 F.2d 927 (D.C. Cir. 1989); Institute for Wildlife Protection v. Norton, 2005 WL 2250718 * 2 (9th Cir. 2005). However, in the case of certain species lacks discretion. Under the ESA section 4 listing process, FWS may find a species warrants listing but listing is "precluded by pending proposals" of higher priority. 16 U.S.C. § 1533(b)(3)(B)(iii). The ESA imposes a special obligation on FWS to protect these "warranted but precluded" species through emergency listing, mandating that the agency "shall make prompt use" of this authority "to prevent a significant risk to the well being of" warranted-but-precluded species. Id. § 1533(b)(3)(C)(iii) (emphasis added). "Congress's use of 'shall'

[8] Previously, BLM concluded surveying for and avoiding plant locations was insufficient to protect cacti and instead required companies to "delineate[] suitable habitat and populations rather than simply individual plants." Exh. 34 at 14 (Seismic EA) ("Simply avoiding plants through surveys, especially in a drought year[,] would not be adequate to protect either the habitat or the loss of individual plants."); id. at 9.

indicates that it imposed a legal duty -- not a discretionary power -- upon FWS." Friends of the Wild Swan, Inc. v. U.S. Fish & Wildlife Serv., 945 F. Supp. 1388, 1395 (D. Or. 1996); Forest Guardians v. Babbitt, 174 F.3d 1178, 1187 (10th Cir. 1999) ("The Supreme Court and this circuit have made clear that when a statute uses the word 'shall,' Congress has imposed a mandatory duty"). In reviewing this emergency listing mandate, the D.C. Circuit observed that Congress "specifically directed [FWS] to use the emergency power preemptively with regard to 'warranted but precluded' species." City of Las Vegas, 891 F.2d at 934; compare Fund for Animals v. Hogan, 428 F.3d 1059, 1063-64 (D.C. Cir. 2005) (concluding emergency listing decision for species not designated as warranted but precluded is within FWS's discretion).

2. Because FWS Found Oil And Gas Activities Present A Significant Risk, FWS Violated Its Mandatory Duty To Emergency List The DeBeque Phacelia

The DeBeque phacelia is a "warranted but precluded" species. Exh. 14 at FWS AR 250. The record demonstrates FWS determined an imminent and significant risk to the DeBeque phacelia from oil and gas development on South Shale Ridge, which imposed a mandatory duty on FWS.

FWS found "gas field development and associated construction and transportation activities, as well as increased access to all-terrain vehicles" constitute the "primary threats" to the species. Exh. 8 at FWS AR 265. The agency noted "[s]ubstantial surface disturbance alters the unique soil structure and destroys seed banks that are crucial to the survival of this species." Id. In 2005 and 2006, FWS described these threats to the DeBeque phacelia as "imminent." Id. It elevated the plant's listing priority from eleven to eight "in response to a dramatic increase in the intensity of energy exploration and development." Id.; Exh. 38 at 5-9 (100% of plants' locations overlap with gas reserves; number of development projects doubled in 2005 and will increase 40% more in 2006). Because BLM's oil and gas activities on South Shale Ridge could affect a significant portion of the entire range of the DeBeque phacelia, FWS determined that

"[o]il and gas development in the [South Shale Ridge] area as described in th[e] EA will contribute to the need to list" the species. Exh. 25 at FWS AR 93.

FWS declined to emergency list the DeBeque phacelia because it anticipated BLM would prohibit surface disturbance on South Shale Ridge. Exh. 14 at FWS AR 250. However, this assumption proved false when BLM did not commit to no surface occupancy provision and FWS found alternative protections – a 200-meter relocation provision – insufficient. Exh. 25 at FWS AR 92-93; Exh. 26 at BLM AR 1668. As such, the significant risk to the DeBeque phacelia remains and FWS has a mandatory duty to emergency list this plant. FWS's failure to comply with this mandate violates the ESA.

II. BLM VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT

BLM prepared one NEPA document – an EA/FONSI – to comply with NEPA for both the September 2005 Planning Decision and November 2005 Leasing Decision. Exh. 18 at BLM AR 1241-96. The Leasing Decision relies on the Planning Decision's NEPA review. FAC ¶ 62; Answer ¶ 62; Exh. 19 at FWS AR 105. The EA/FONSI violated NEPA requirements in two ways. First, BLM violated its duty to evaluate and disclose to the public a reasonable range of alternatives. Second, BLM's FONSI is unsupported by substantial evidence in the record.[9]

A. BLM Failed To Consider A Reasonable Range Of Alternatives In Its Land Use Planning Decision

1. Statutory Scheme: NEPA Alternatives

The alternatives analysis is the "heart" of NEPA. Colo. Envtl. Coal., 185 F.3d at 1174. NEPA requires federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E). The purpose of studying

[9] Because all agencies are regulated by NEPA, NEPA findings are not entitled to judicial deference. Park County Res. Council v. U.S. Dept. of Agric., 817 F.2d 609, 620 (10th Cir. 1987); Grand Canyon Trust v. FAA, 290 F.3d 339, 341-42 (D.C. Cir. 2002).

alternatives is to address "unresolved conflicts" and determine if there is another way of accomplishing the same action with, presumably, less environment impact. Id.; Greater Yellowstone Coal. v. Flowers, 359 F.3d 1257, 1277 (10th Cir. 2004) (noting agencies must "gather information sufficient to permit a reasoned choice of alternatives"). The alternatives analysis includes assessing and disclosing the environmental impacts of the alternative action. 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9(b). The duty to consider and disclose a range of alternatives applies to EAs as well as EISs. Davis, 302 F.3d at 1120; Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988); see also River Rd. Alliance v. Army Corps of Eng'rs, 764 F.2d 445, 452 (7th Cir. 1985).

The range of alternatives must be within the scope of the action's purpose. Davis, 302 F.3d at 1119. However, agencies can "not define the project so narrowly that it foreclose[s] a reasonable consideration of alternatives." Id.; City of Carmel by the Sea v. Dep't of Transp., 123 F.3d 1142 (9th Cir. 1997); Simmons v. U.S. Army Corps of Eng'rs, 120 F.3d 664, 666 (7th Cir. 1997). Further, "appropriate alternatives" are those that are "non-speculative . . . and bounded by some notion of feasibility." Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1172 (10th Cir. 2002); Airport Neighbors Alliance v. U.S., 90 F.3d 426, 432 (10th Cir. 1996) (infeasible alternatives need not be fully analyzed).

2. Because BLM Declared The No Action Alternative Impermissible, BLM Did Not Consider A Range Of Alternatives

The purpose of BLM's Planning Decision was to determine the allowable uses of South Shale Ridge. Exh. 18 at BLM AR 1241. BLM's 2005 EA limited its analysis to two alternatives – the proposed leasing action and a "no action" alternative. BLM describes its no action alternative as "continu[ing] the current management of not leasing parcels in South Shale Ridge. All leasing in South Shale Ridge would be deferred until the Grand Junction Field Office Resource Management Plan is formally revised or amended to withdraw South Shale Ridge from energy development." Exh. 43 at BLM AR 1158; Exh. 18 at BLM AR 1244. However, as

detailed below, BLM determined that deferring leasing was impermissible. Therefore, it could not implement the no action alternative. Absent the no action alternative, BLM failed to consider and disclose to the public any alternative to the proposed action -- let alone a reasonable range of alternatives.

Management of South Shale Ridge has oscillated over the last twenty years between oil and gas activities and wilderness protection. As discussed above, the 1987 RMP identified oil and gas as the permissible use for South Shale Ridge. At that time, BLM did not believe South Shale Ridge possessed wilderness characteristics and, therefore, did not consider protecting the area as wilderness. Exh. 44 at BLM AR 659.

In 1997, BLM changed direction. Spurred by the 1994 citizen wilderness proposal for Colorado, BLM deferred leasing at South Shale Ridge. Exh. 3 at BLM AR 855 ("due to current policy, no new leases have been issued"). The leasing deferral did not amend BLM's original 1987 planning decision. However, after BLM formally recognized South Shale Ridge's wilderness qualities in 2001, it decided to "initiate an amendment" of the Grand Junction RMP. Exh. 5 at BLM AR 946; see also Exh. 32 at BLM AR 849; Exh. 15 at BLM AR 698 ("we will begin a plan amendment process to look at options for land management, including the possibility of a wilderness study area designation."). BLM announced the amendment would "consider a full range of alternatives, including continuation of existing management [as set forth in the 1987 RMP] and management of the areas as administrative Wilderness Study Areas." Exh. 5 at BLM AR 946.

Then, in 2003, BLM revoked its policy of deferring oil and gas leasing. Exh. 23 at BLM AR 984-85; Exh. 21 at BLM AR 971-73; Exh. 22 at BLM AR 974-79. The basis of this change was the April 2003 Utah Settlement. Exh. 22 at BLM AR 974.

As a result, when BLM initiated its Planning Decision and corresponding NEPA analysis in 2004, deferring leasing at South Shale Ridge was not the "current management." Rather,

according to BLM, current management means South Shale Ridge is available for leasing, as provided in the 1987 RMP. Exh. 23 at BLM AR 984-85. As BLM admitted, "[w]e cannot keep deferring the leasing parcels from the lease sale because of Bureau policy (WO-IM-2004-110)." Exh. 27 at BLM AR 1085). According to its own decision, BLM could not therefore implement the "no action" alternative.

Courts have consistently ruled that infeasible alternatives are not reasonable alternatives. Utahns, 305 F.3d at 1172; Airport Neighbors, 90 F.3d at 432. Further, an agency's no-action alternative must accurately reflect the status quo. Friends of Yosemite Valley v. Scarlett, 439 F.Supp.2d 1074, 1104-05 (E.D. Cal. 2006). In Friends of Yosemite Valley, the court found the National Park Service's no action alternative was based on an invalidated 2000 management plan. The court held "NPS cannot properly include elements from that [invalid] plan in the no action alternative" and the appropriate status quo alternative was the prior 1980 management plan. Id. at 1105. Here, BLM itself declared its no action alternative – deferring leasing – is no longer possible or the status quo. Accordingly, the no action alternative is "meaningless," as it was in Friends of Yosemite Valley. Its absence means BLM considered no alternatives to leasing.

3. BLM Failed To Consider Any Alternatives To Protect South Shale Ridge's Wilderness Characteristics

a. BLM Arbitrarily Eliminated The "No Surface Occupancy" Alternative

NEPA regulations require that an agency "explain" and "briefly discuss the reasons" an alternative was eliminated from detailed study. 40 C.F.R. § 1502.14 (a); Utahns, 305 F.3d at 1167; Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1246 (9th Cir. 2005). An agency's reasons for dismissing an alternative from detailed study must be fully articulated, supported by the record, and not contrary to law. Davis, 302 F.3d at 1122.

Here, BLM failed to explain or support its summary dismissal of the "no surface occupancy" (NSO) alternative. In the 2004 version of its draft environment assessment, BLM

contemplated an NSO alternative. Exh. 17 at BLM AR 1052. A NSO alternative would prevent development from impacting the surface of South Shale Ridge and would thereby protect most of the area's wilderness character and native plants. Id. at 1063 ("New acreage leased under NSO, in the interior of SSR, would show no evidence of development and would continue to contain at least 5,000 acres of contiguous roadless area."). Under this alternative, "[n]aturalness values would generally still be present throughout the SSR area…." Id.

However, BLM failed to include the NSO alternative in either the draft or final 2005 EA. BLM provided no explanation for eliminating this alternative from consideration. BLM simply noted that "[t]he [2004] Draft EA analyzed two alternatives – The Proposed action to offer the parcels located in South Shale Ridge for leasing and the No Surface Occupancy Alternative." Exh. 43 at BLM AR 1156; Exh. 18 at BLM AR 1243. The decision to withdraw consideration of the NSO alternative was arbitrary and capricious because BLM offered no explanation, let alone a "satisfactory explanation," to jettison the alternative. See Ayers v. Espy, 873 F.Supp. 455, 473 (D. Colo. 1994) (invalidating EA for failing to consider reasonable alternative, reasoning "discussion of alternatives in the EA need not be exhaustive, but it must be sufficient to demonstrate reasoned decisionmaking.") (quotations and citations omitted).

Internal agency documents suggest BLM dismissed the NSO alternative for economic reasons. Exh. 28 at BLM AR 1101. A BLM document summarily states "directional drilling is not considered economic." Exh. 17 at BLM AR 1070. However, BLM admitted there was no evidence to support this statement and that some evidentiary basis was necessary – "More discussion is needed on why directional drilling isn't economically feasible. There isn't any data to support this statement." Exh. 30 at BLM AR 1098 (emphasis added). BLM recognized this defect, but never corrected it. Nothing in the record explains why directional drilling at South Shale Ridge is not feasible. Exh. 45 at SAR 432 (noting "directional drilling has not been attempted by the current operators" in South Shale Ridge area). As the Tenth Circuit found in

similar circumstances, there is nothing "in the record to establish that it is such a remote, speculative, impractical or ineffective alternative that it did not need to be studied as a viable alternative in the EA. There are no cost studies, cost/benefit analyses or other barriers that would warrant" such a conclusion. Davis, 302 F.3d at 1122.

Moreover, BLM never explained in a publicly available document why the NSO alternative was infeasible, even though public comments questioned the basis for dropping this alternative. Exh. 46 at BLM AR 1337 ("The 2005 EA dismisses out of hand, without any citations, sources or explanation the use of directional drilling or other new technologies."). As such, one of NEPA's primary purposes was negated because the public did not have an opportunity to comment on the alleged infeasibility of directional drilling.

In sum, BLM's dismissal of the no surface occupancy alternative from detailed study in not supported by substantial evidence in the record. Olenhouse, 42 F.3d at 1574.

b. BLM Arbitrarily Eliminated The Wilderness Study Area Alternative From Review

BLM also violated NEPA by arbitrarily rejecting an alternative that would have designated South Shale Ridge a WSA. According to BLM, the Utah Settlement established an interpretation of FLPMA that prohibits BLM from designating any BLM lands, including South Shale Ridge, a WSA. Based on the Utah Settlement, BLM drafted the 2003 Instruction Memoranda that reversed decades of FLPMA interpretation and BLM's prior commitment to establish a WSA at South Shale Ridge. Exh. 18 at BLM AR 1289; Exh. 21 at BLM AR 971-73; Exh. 22 at BLM AR 974-83. According to the BLM's new interpretation of FLPMA, the authority to designate WSAs is found only in the expired FLPMA provision section 603 and "[i]t is no longer BLM policy to [] designate new WSAs through the [section 202] land use planning process." Id. As detailed below, BLM's claim that the Utah Settlement precludes WSA designation at South Shale Ridge is contrary to FLPMA and decades of agency precedent prior

to the Settlement.[10]

i. BLM's New Position Is Contrary To FLPMA

FLPMA does not limit BLM's options for wilderness designation, but instead provides BLM with discretion to designate South Shale Ridge a WSA.

BLM can designate and manage its lands as a WSA under FLPMA in two ways: under section 603 or section 202. Section 603 of FLPMA grants BLM authority to designate WSAs and imposes a deadline to complete the task. 43 U.S.C. § 1782. Specifically, by 1991, BLM could designate WSAs on lands with more than 5000 contiguous roadless acres and wilderness characteristics. Id. § 1782(a).[11] This provision also requires that BLM manage qualifying lands under a non-impairment standard to safeguard Congress' prerogative to designate the land as wilderness. Id. § 1782(c). BLM established management guidelines to fulfill the non-impairment requirement. 44 Fed. Reg. 72,014 (Dec. 12, 1979).

BLM's position in the Utah Settlement is that its authority under section 603 expired. However, this position conflicts with the statutory construction principle that the mere presence of a deadline does not eliminate an agency's power to act after the deadline. Brock v. Pierce County, 476 U.S. 253, 258-265 (1986); Gallagher v. NTSB, 953 F.2d 1214, 1220-24 (10th Cir. 1992) (applying Brock and finding agency's failure to meet deadline did not divest it of authority to act); Idaho Farm Bureau v. Babbitt, 58 F.3d 1392 (9th Cir. 1995). In Idaho Farm Bureau, plaintiffs argued that because FWS missed a statutory deadline for listing species under the ESA, it lost authority to list a species. Idaho Farm Bureau, 58 F.3d at 1399. Relying on Brock, the court held the "failure of an agency to act within a statutory time frame does not bar subsequent agency action absent a specific indication that Congress intended the time frame to serve as a

[10] A Utah district court has upheld a facial challenge to the Settlement, although it has been appealed to the Tenth Circuit. Utah v. Norton, 2006 WL 2711798 (D. Utah September 20, 2006).

[11] Congress made the Wilderness Act (16 U.S.C. §§ 1131 et seq.) applicable to BLM through section 603 of FLPMA because the Wilderness Act did not expressly apply to BLM lands.

bar." Id. at 1400-01 (noting deadline was intended to be impetus to act, rather than limit on authority). The Idaho Farm Bureau court found Congress was concerned about the lack of ESA listings and intended to ensure listings occurred by imposing deadlines. Id. Similarly, in FLPMA, Congress imposed a fifteen-year deadline on BLM because it believed that there was an "[u]rgent need" for the "inclusion of BLM lands in the Wilderness System." Legislative History of the Federal Land Policy and Management Act of 1976, at 433 (1978). Because the passing of the deadline did not eliminate BLM's authority under section 603, BLM cannot base its decision to not consider the WSA alternative on the Utah Settlement.

In addition to section 603, section 202 provides BLM with authority to protect roadless areas containing wilderness characteristics from development. Section 202 requires BLM to prepare RMPs to determine appropriate land uses. 43 U.S.C. § 1712(c)(5)-(7); 43 C.F.R. §§ 1610.1-8. RMPs must account for the "long term needs of future generations for . . . non-renewable resources," including, "recreation, . . . wildlife and fish, and natural scenic, scientific and historical values." 43 U.S.C. § 1702(c). Congress explicitly declared that BLM may "preserve and protect certain public lands in their natural condition." Id. § 1708(a)(8). Further, BLM must manage its lands for "multiple use and sustained yield," which includes consideration of long-term versus short-term benefits of potential uses, the relative scarcity of the values involved, and the present and potential uses of lands. Id. § 1712(c)(5)-(7); 43 C.F.R. §§ 1610.1-8. Section 201 of FLPMA requires BLM to "inventory" its lands to determine what resources are under its control, including wilderness resources. 43 U.S.C. § 1711(a); Exh. 47 at SAR 106 ("The authority for the inventory and study of the areas is vested in Sections 201 and 202 of FLPMA."). The inventory duty is ongoing with no deadlines, so as to "reflect changes in conditions and [] identify new and emerging resources and other values." 43 U.S.C. § 1711(a).

Based on this authority, BLM may designate -- and has designated -- areas WSAs under Section 202 to preserve and protect wilderness-quality lands, as identified in section 201

inventories, "in their natural condition." Exh. 30 at BLM AR 1098 (BLM noting it has "always been able to protect wilderness character in areas less that 5000 acres" under sections 201 and 202).

BLM's authority to designate WSAs under section 202 was explicitly recognized in Sierra Club v. Watt, 608 F. Supp. 305, 340-41 (E.D. Cal. 1985) (holding BLM "correctly" concluded it had discretion to create WSAs under section 202). The Watt case arose when BLM withdrew WSA status from 158 areas that were smaller than the 5000-acre minimum set out in section 603 and declared them open to development. Watt, 608 F. Supp. at 312 & n.9, 338-339 & n.67. The court vacated BLM's decision because, even if section 603 did not apply, section 202 authorized WSA designation. Id. at 340-41. The court reasoned "nothing in the law precluded the Secretary from recommending that [roadless areas under 5000 acres] be designated for permanent wilderness status" because, "pursuant to sections 202 and 302 of FLPMA, the Secretary of Interior had discretion to determine the management protocol for these lands." Id. at 340; id. at 341 (finding section 202 WSA designation was "an exercise of the discretion given [BLM] by sections 202 and 302, a discretion [it] clearly had").

Accordingly, contrary to the position crafted in the Utah Settlement and 2003 Instruction Memoranda, FLPMA does not constrain BLM's discretion.

ii. BLM's Changed Position Contradicts Decades Of Prior Interpretation

BLM's longstanding use of FLPMA section 202 to designate WSAs further demonstrates that the agency's dismissal of the WSA alternative for its Planning Decision was arbitrary. For decades, BLM has recognized its authority under section 202, as is evident from the Watt case. In 1979, BLM adopted an Interim Management Policy for Lands under Wilderness Review (Exh. 31 at SAR 1) that sets out how WSAs are to be managed and also "clearly demonstrated Secretary Andrus' reliance on his section 202 and 302 authority to designate [] lands for wilderness review." Watt, 608 F.Supp. at 339. BLM used this authority in every administration

since the enactment of FLPMA to create section 202 WSAs. GAO, Federal Land Management: Status and Uses of Wilderness Study Areas at 16, 18-40 (1993) (listing 148 § 202 WSAs created in the Carter, Reagan, and first Bush administrations); 58 Fed. Reg. 45,528 (August 30, 1993) (Final RMP for New Mexico's Mimbres Resource Area including four section 202 WSAs); 48 Fed. Reg. 11,346 (March 17, 1983) (designating fifteen Colorado section 202 WSAs); see also Exh. 48 at SAR 107 ("The specific BLM policy, direction, general procedures, and guidance for wilderness inventories under provisions of Section 201 of FLPMA and the designation of WSAs under Section 202 of FLPMA" is established in BLM manual). As the record makes clear, BLM specifically relied on sections 201 and 202 in contemplating designating South Shale Ridge a WSA. Exh. 49 at BLM AR 962 (stating "[t]he authority" for BLM's 1999 wilderness inventory of South Shale Ridge "comes from Section 201"); Exh. 50 at SAR 177 (after 1999 and 2001 Wilderness Inventories, BLM planned "EIS to examine alternative management strategies for [South Shale Ridge], including the designation of these inventory areas as wilderness study areas (WSA) under the authority of Section 202").

Accordingly, BLM's longstanding legal position has been that section 202 provides authority to designate WSAs. The Utah Settlement, however, rejected this position without any legal analysis to support a change. See Motor Vehicle, 463 U.S. at 41-42, 57 (to change "settled course of behavior [that] embodies the agency's informed judgment," agency must provide "a reasoned analysis for the change").[12] Further, the Utah Settlement is not entitled to deference. A closed-door settlement "present[s] a case far removed" from circumstances that would warrant judicial deference. Ala. Power v. U.S. Dep't of Energy, 307 F.3d 1300, 1306, 1312-13 (11th Cir. 2002); see also Barnhart v. Walton, 535 U.S. 212, 219-222 (2002). In contrast, the BLM's

[12] BLM attorneys informed the head of the agency's wilderness program that they were unaware of any legal opinion that supported the Settlement and that "[a] legal opinion may or may not be developed in the future." Exh. 60.

original interpretations of its authority to designate WSAs, contemporaneous with the passage of FLPMA, are deserving of deference. Udall v. Tallman, 380 U.S. 1, 16 (1965); Rosette v. United States, 277 F.3d 1222, 1230 (10th Cir. 2002). Lastly, BLM made clear the "settlement is only legally binding on Utah" (Exh. 60). To the extent it was made applicable elsewhere by BLM policy documents, those policies expired before BLM made its Planning Decision. Exh. 21 at BLM AR 971; Exh 22 at BLM AR 974 .

c. BLM Failed To Consider Other Alternatives To Protect Wilderness

BLM must consider a reasonable range of alternatives for its Planning Decision, including one that could protect the wilderness characteristics at South Shale Ridge. BLM made clear that wilderness protection was an appropriate land use alternative. Exh. 5 at BLM AR 946 ("The amendment will consider a full range of alternatives, including continuation of existing management [as set forth in the 1987 RMP] and management of the areas as administrative Wilderness Study Areas."); Exh. 27 at BLM AR 1086 (BLM noting " the plan amendment would look at a range of alternatives to protect individual wilderness characteristics").

As discussed above, BLM rejected the no surface occupancy alternative and the WSA alternative, both of which would have protected South Shale Ridge's wilderness characteristics, while the no action alternative – deferring leasing – was, according to the agency, impossible. Nonetheless, there are other means to protect wilderness resources aside from WSA designation that the BLM identified both prior and subsequent to the Utah Settlement. Exh. 16 at BLM AR 818 (identifying alternatives to protect wilderness in 1997); Exh. 22 at BLM AR 975 ("can make a variety of land use plan decisions to protect wilderness characteristics, including establishing conditions of use to be attached to . . . leases" and designating "Areas of Critical Environmental Concern."); Exh. 52 at BLM AR 1511 ("Wilderness characteristics can be protected by imposing a variety of designations and management prescriptions that are available to BLM as part of its resource management planning process."); Exh. 53 at BLM AR 1428; Exh. 46 at BLM AR 1335-

39; Exh. 54 at SAR 211-12 (noting other means are available besides WSA designation). BLM did not consider these other alternatives even though it deemed them reasonable. Accordingly, BLM violated NEPA by failing to consider a reasonable range of alternatives. See Simmons, 120 F.3d at 670.

B. BLM's Conclusion That Impacts From Both The Planning And Leasing Decisions Will Be Insignificant Was Arbitrary And Capricious

1. NEPA's Duty To Evaluate And Disclose Environmental Impacts

In reviewing environmental impacts, NEPA's goal is twofold. First, Congress sought to ensure that all federal agencies evaluate the environmental impacts of their actions. 42 U.S.C. § 4331; Marsh v. Ore. Natural Res. Council, 490 U.S. 360, 371 (1989); Sierra Club v. Hodel, 848 F.2d 1068, 1088 (10th Cir. 1988). NEPA requires agencies to make informed decisions, which result in environmentally wise decisions. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). Second, NEPA provides a mechanism for the public to learn about and comment on the environmental impacts of a proposed agency action. Marsh, 490 U.S. at 371; Hodel, 848 F.2d at 1088.

To achieve these purposes, each federal agency must circulate for public review a detailed EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. Federal agencies may first prepare an EA to determine whether actions may "significantly affect" the environment. 40 C.F.R. § 1501.4. An EA must "provide sufficient evidence and analysis for determining whether to prepare an [EIS]." Id. §§ 1501.4(c), (e), 1508.9(a). If the agency determines an EA is sufficient, it must issue a "finding of no significant impact" (FONSI) that provides a convincing statement of reasons why the action "will not have a significant effect on the human environment." Id. § 1508.13.

NEPA requires federal agencies to consider and disclose to the public all direct, indirect, and cumulative impacts of its actions. 42 U.S.C. § 4332(2); 40 C.F.R. § 1508.9. Direct effects

are those "which are caused by the action and occur at the same time or place." 40 C.F.R § 1508.8(a). Indirect effects are those "caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable." Id. § 1508.8(b). Cumulative impacts are impacts from "past, present and reasonably foreseeable future actions regardless of what agency (federal or non-Federal) or person undertakes such other action." Id. § 1508.7. "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." Id. Among the factors agencies are required to evaluate are impacts -- including cumulative impacts -- to "ecologically critical areas," and threatened and endangered species. Id. at § 1508.27(b)(3), (7), & (9).

When agencies rely on mitigation measures to support a FONSI, those measures must satisfy certain minimum standards. The agency must fully analyze and evaluate the mitigation measures. 40 C.F.R § 1508.9 (EA must "provide sufficient evidence and analysis for . . . a finding of no significant impact"). A perfunctory description or mere listing of the measures is insufficient to support a FONSI based on mitigation measures. Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998) (rejecting conclusory statement that mitigation measures were sufficient where analytical data was lacking). Further, mitigation measures cannot be speculative, but instead there must be record support concerning their efficacy. 40 C.F.R. § 1508.27(b)(5) (significance likely under NEPA regulations when impacts unknown due to unproven mitigation measures); Davis, 302 F.3d at 1125 ("agencies . . . should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement"); Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1332, 1251-52 (D. Wyo. 2005) (requiring Corps' reliance on mitigation measures to be supported by evidence and data); see also Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 734, 735 (9th Cir. 2001); Nat'l Audubon Soc'y v. Hoffman, 132 F.3d 7, 17 (2nd Cir. 1997).

2. BLM's Conclusion That Impacts To Wilderness Are Insignificant Is Unsupported

Here, BLM violated NEPA by concluding that oil and gas activities at South Shale Ridge – as authorized in BLM's Planning and Leasing Decisions – would cause no significant impact to wilderness resources. That conclusion is contrary to record evidence and unsupported.

a. South Shale Ridge's Wilderness Resources Are Not Already Adversely Impacted

BLM suggests that because South Shale Ridge's wilderness characteristics have already been destroyed, neither the Planning Decision nor the Leasing Decision will cause significant environment impacts. Exh. 18 at BLM AR 1257. The EA states there are thirteen producing wells and twelve non-producing wells, miles of roads, rights-of-ways, and thirty-six reservoirs, dams, and catchments within South Shale Ridge's wilderness core. Id. at 1257 & 1273. Based on those assumptions, the EA claims "[a]dditional intrusions are not likely to affect the naturalness of the entire South Shale Ridge on a landscape level." Id. at 1258.

This claim is fundamentally false. The record demonstrates that none of the impacts BLM identifies are within the 27,631 acres of wilderness-quality lands. The 1999 Inventory determined no oil and gas activities occur in this core area. Exh. 33 at BLM AR 1501-05. Rather, the 1999 Inventory found "four specific areas" outside of the core 27,631 acres were "unnatural in appearance due to the presence of gas wells and their associated structures, machinery and equipment, continuously used roads/ways, and livestock developments," which is why these areas were eliminated from wilderness consideration. Id. at 1503. BLM's 2001 Final Wilderness Character Inventory Evaluation found.

> The majority of the inventory unit (27,631 acres) appears to have been affected primarily by the forces of nature and retains its natural character. Human impacts are substantially unnoticeable in this portion of the unit and, for the most part, the unit's rugged eight-mile long ridgeline and steep slopes, canyons and valleys extending north and south from it have not experienced much surface disturbance.

Exh. 6 at BLM AR 953-54.

After the EA was completed, BLM admitted its mistake. When questioned about the

inconsistency between the Wilderness Inventory and the EA, the agency's wilderness specialist refuted the EA's statements: "You can see from the maps that although there is a lot of development around and outside the area, the interior, especially the unleased portion as of now, is relatively free of developments, which is why the inventory found it to be predominantly natural in character." Exh. 55 at BLM AR 1310; Exh. 56 at BLM AR 1205-06.

In short, record evidence contradicts BLM's unsubstantiated claim that wilderness resources have already been impacted. BLM cannot base its insignificant impact finding on data known to be flawed. See Motor Vehicle, 463 U.S. at 43.

b. The Record Does Not Support BLM's Claim That Stipulations Will Mitigate Significant Impacts to Wilderness Resources

i. BLM's Significant Impact Determinations

As BLM admits and the administrative record demonstrates, oil and gas activities will have significant impacts on wilderness resources at South Shale Ridge. These impacts are not only significant, but, according to BLM, they completely eliminate the resource.

BLM's wilderness inventories confirm that impacts to wilderness are significant. BLM's 1999 inventory determined 32,364 acres in South Shale Ridge were contiguous roadless acres, but only 27,632 roadless acres exhibited wilderness characteristics. The difference was due primarily to oil and gas activities. These activities cause "substantially noticeable and extensive impacts" to wilderness characteristics and eliminate opportunities for solitude or primitive recreation and the retention of the area's natural appearance. Exh. 4 at BLM AR 944. Notably, in 2001, BLM's final inventory omitted one additional acre "to exclude a gas well and associated facilities and access route." Exh. 5 at BLM AR 946.[13]

Moreover, BLM initiated NEPA for its Planning Decision because oil and gas activities

[13] BLM similarly concluded in its draft EIS for the nearby Roan Plateau that "surface-disturbing activities or activities that involve permanent placement of structures are not consistent with the maintenance of wilderness characteristics." Exh. 46 at BLM AR 1519.

significantly impact wilderness resources. In a 2003 Instruction Memorandum, BLM provided guidance on when additional NEPA review was required. "If the new information is sufficient to show that the action will affect the quality of the human environment in a significant manner or to an extent not already considered, then a supplemental NEPA document shall be prepared." Exh. 23 at BLM AR 985; Exh. 22 at BLM AR 982. Notably, BLM relied on NEPA's regulations to determine if the significance threshold was met – "To help determine whether the new information or circumstances are significant, the BLM should look at the definition of 'significantly' at 40 C.F.R. § 1508.27." Exh. 23 at BLM AR 985. Applying these criteria, BLM prepared a new NEPA document and, in preparing the EA, explicitly acknowledged that "the 'significant' threshold was crossed by the finding of the BLM Wilderness Inventory." Exh. 43 at BLM AR 1082.

Similarly, BLM's 1999 Instruction Memorandum established criteria for a RMP amendment that was also based on a significant impact finding. "If the proposed actions will have irreversible or irretrievable impacts, or would disqualify an area from further consideration as wilderness, . . . the need for amending current planning decisions will be considered." Exh. 57 at BLM AR 873 (emphasis added). Based on this criteria, BLM committed to amending the 1987 RMP. Exh. 5 at BLM AR 946.

ii. BLM's Stipulations Do Not Support A FONSI

Faced with this evidence of significant impacts, BLM relied on stipulations to justify a finding of no significant impact to wilderness resources. Exh. 18 at BLM AR 1259; Id. at 1276. The stipulations are those that were developed with the 1987 RMP and "[o]ther stipulations [that] are developed and applied as part of the NEPA analysis and also are attached to the NEPA decision record for each APD." Id. Based on these stipulations, the agency concluded that "[i]n most parts of SSR the values associated with wilderness would be preserved." [14] Id. at 1279. The

[14] BLM also offers the incoherent conclusion that "[w]hile these [wilderness] values would

relied-upon stipulations violate NEPA's minimum requirements.

BLM's stipulations do not identify actual measures. Rather, the stipulations "make the potential leasees aware of possible restrictions." Id. at 1288 (emphasis added); id. ("oil and gas stipulations provide the BLM with the ability to place rigorous conditions") (emphasis added). Whereas merely listing measures violates NEPA, the speculative stipulations relied upon here are worse because they do not even list specific measures. Moreover, the stipulations themselves are purely discretionary. Exh 15 at BLM AR 785 (Steep Slope Stipulation says measures "may" be imposed and also "may" be waived or reduced in scope); id. at 786 (Threatened and Endangered Habitat stipulation "may" result in relocating development activities). The possibility of future restrictions cannot support a FONSI. Davis, 302 F.3d at 1125. Because BLM fails to identify proposed measures, the EA could not evaluate them and the public could not comment on them. See SEC v. Chenery, 332 U.S. 194, 196 (1947) (courts cannot guess at basis for agency decision); Utahns, 305 F.3d at 1165.

Moreover, nothing in the record demonstrates that where the 1987 RMP stipulations have been used, they have mitigated significant impacts to wilderness resources. Instead, the opposite is true. As detailed above, BLM decided to conduct additional NEPA and undertake an RMP amendment despite the existence of the five stipulations. Exh. 3 at BLM AR 855-58 (describing stipulations seven years before 2005 Planning Decision). Similarly, notwithstanding the stipulations, BLM determined that over 4,712 acres of BLM-approved oil and gas activities at South Shale Ridge did not qualify as wilderness because of oil and gas activities. Further, prior to the challenged decision, BLM admitted the stipulations did not protect South Shale Ridge's wilderness characteristics. "The current [1987] RMP provides limited protection of natural

---

not remain 100% intact, neither would they be 100% impacted." Exh. 18 at BLM AR 1278-79. The basis for this statement is not revealed. Uncertain or unknown risk counsels for a finding of significance and preparation of an EIS. 40 C.F.R. § 1508.27(5).

values that contribute to the area's potential for wilderness study area status." Exh. 29 at BLM AR 871. Indeed, the 1987 RMP stipulations were not adopted with an eye toward protecting South Shale Ridge's wilderness resources and cannot be relied upon for this purpose. See S. Utah Wilderness Alliance v. Norton, 2006 WL 2222359 * 12 (D. Utah Aug. 1, 2006) ("BLM cannot reasonably rely on its outdated planning to documents to argue that [wilderness] values were previously identified or that impacts of oil and gas development on them were previously evaluated."). These stipulations were developed before BLM even recognized wilderness resources were present at South Shale Ridge. Exh. 3 at BLM AR 857 (wilderness "[n]ot mentioned in RMP").[15]

In sum, BLM cannot rely on the stipulations for its FONSI because there is no evidence they mitigate the significant impacts to wilderness. BLM violated NEPA by unlawfully speculating about the efficacy of the unidentified measures. See Davis, 302 F.3d at 1125; Olenhouse, 42 F.3d at 1574.[16]

3. BLM's Analysis and Conclusion Regarding Impacts To Three Native Plants Was Arbitrary

BLM is required to consider impacts on native plants. NEPA's regulations mandate that agencies analyze all impacts, including cumulative impacts, to threatened and endangered species and "[u]nique characteristics of the geographic area such as . . . ecologically critical

---

[15] The Tenth Circuit has admonished agencies for predetermining the outcome of a NEPA process. Davis, 302 F.3d at 1112 ("The decision whether to prepare a FONSI should be based on the EA, of course, not the other way around."); id. at 1113 (fact "that a FONSI had already been prepared prior to an evidently pro forma public opportunity to comment on the revised EA" demonstrated agency violated NEPA). Here, BLM appears to have predetermined its NEPA review. In preparing a schedule for the Planning Decision, BLM indicated a "finding of no significant impact" would conclude the process and set a date to issue the FONSI. Exh. 42 at BLM AR 1030-40.

[16] BLM notes 27,049 of the 27,635 wilderness acres at South Shale Ridge are covered by the stipulations, seemingly to imply the area is protected from oil and gas. However, only 127 acres are protected from ground-disturbing activities via no-surface occupancy stipulations.

In addition, notwithstanding BLM's claims (Exh. 18 at BLM AR 1276), BLM did not attach "[o]ther stipulations" to protect South Shale Ridge's wilderness-quality lands. Exh. 40 at BLM AR 1757-69.

areas." 40 C.F.R. § 1508.27(b)(3), (7) & (9). There are three rare and sensitive plants found at South Shale Ridge. Two of them (phacelia and milkvetch) are endemic to the area and found nowhere else, and the third (cactus) is listed under the ESA. BLM concluded both the Planning and Leasing Decisions will not impact the plants. Exh. 18 at BLM AR 1251-52. However BLM's review and conclusion regarding the plants violated NEPA.

BLM never reveals impacts to the plants, but merely notes the plants are present and applicable stipulations. Nothing in the EA evaluates and discloses to the public how oil and gas activities authorized in the Planning and Leasing Decisions will impact these species. BLM implicitly acknowledges there are impacts by relying on stipulations to protect these plants, but it is impossible to determine if the stipulations mitigate the impacts to a level below significance without knowing the impacts. BLM's duty to analyze and disclose the impacts is particularly important for the two DeBeque plants because "[a] significant portion of the entire range for both species is included in the South Shale Ridge area" and "[o]il and gas development in the SSR area as described in this EA will contribute to the need to list" both plants. Exh. 25 at BLM AR 1659; Exh. 20 at BLM AR 1700 (FWS further noting two plants' entire range includes "adjacent leased parcels"); Exh. 38 at 4-7; Exh. 59 (map).

Despite not identifying impacts to the plants, BLM relied upon two stipulations to conclude any impacts are not significant – the "Threatened and Endangered Habitat Stipulation, #13," derived from the 1987 RMP, and the ESA Section 7 Consultation Stipulation (CO-34). However, the mitigation measures in these stipulations fail to support the agency's conclusions. First, the relied-upon stipulations are limited to species listed as "threatened and endangered" or identified as candidate species. Exh. 58 at BLM AR 1729-30. Neither stipulation justifies a FONSI for the DeBeque milkvetch, which is neither listed nor a candidate. Second, the stipulations speak to future and unknown measures that may be imposed to protect listed species. Id. at 1729-30. BLM cannot rely on such speculative measures for a FONSI because measures

that might flow from the stipulations are not identified, let alone analyzed. See Davis, 302 F.3d at 1125; Wyo. Outdoor Council, 351 F. Supp.2d at 1251-52. Moreover, FWS found the "Threatened and Endangered Habitat Stipulation" was inadequate to protect the cactus because it did not prevent all "ground disturbance for habitat known to be occupied" and, as applied, did not "include the entire distribution of listed . . . plant species as reported from other sources." Exh. 25 at BLM AR 1659; Exh. 35 at BLM AR 2372 (FWS also found "200-meter relocations" inadequate).

III. BLM VIOLATED THE FEDERAL LAND POLICY AND MANAGEMENT ACT

A. BLM Failed To Ensure Its Leasing Decision Is Consistent With The RMP

FLPMA directs the BLM to develop RMPs that govern all uses and management of its public lands. 43 U.S.C. § 1712. FLPMA also requires BLM to ensure that site-specific actions are consistent with and conform to the governing RMP. Id. § 1732(a); 43 C.F.R. §§ 1601.0-5(b) & (c); W. Watersheds Project v. Bennett, 392 F. Supp. 2d 1217, 1227-28 (D. Idaho 2005).

BLM violated FLPMA's consistency requirement because its Leasing Decision is not consistent with the 1987 RMP's requirements applicable to the three plants at South Shale Ridge. First, the RMP requires BLM to engage in "formal section 7 consultation" under the ESA when an action "may affect" the cactus. Exh. 44 at BLM AR 650 & 670. As detailed above, BLM only engaged in "informal" consultation for its Leasing Decision.

Second, the RMP prohibits surface disturbing activities in all Uinta Basin hookless cactus sites year-round. Exh. 15 at BLM AR 723. BLM is to implement this prohibition through "no surface disturbance stipulations . . . placed on projects proposed in these areas." Id. at 724. Yet, as shown above, the Leasing Decision did not include "no surface disturbance stipulations" in known cactus sites.

Third, the RMP prohibits "surface disturbance" on "significant known sites" of "sensitive plant species," which includes the DeBeque milkvetch and DeBeque phacelia. Id. at 723; Exh. 44

at BLM AR 670 (adding DeBeque milkvetch to sensitive species list); BLM's Sensitive Species List (listing both DeBeque plants).[17] As with the cactus, BLM did not include a no surface occupancy stipulation for areas with these plants. As discussed above, nothing in the stipulations ensures oil and gas activities will avoid surface disturbance.

BLM did not comply with any of these RMP requirements and did not explain how that failure is consistent with the RMP, in violation of FLPMA, 43 U.S.C.§ 1732(a).

B. BLM Failed To Consider Whether Its Planning And Leasing Decisions Would Cause Undue Or Unnecessary Degradation

FLPMA imposes a mandatory duty on BLM to "take any action necessary to prevent unnecessary or undue degradation of the lands" it manages. 43 U.S.C. § 1732(b); Soda Mountain Wilderness Council v. Norton, 424 F.Supp.2d 1241, 1269 (E.D. Cal. 2006). The duty is stated in mandatory terms. Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734 (10th Cir. 1983). Under this provision, BLM must determine whether its actions create unnecessary or undue degradation of its lands. Soda Mountain, 424 F.Supp.2d at 1270; Kendall's Concerned Area Residents, 129 IBLA 130, 140-41 (1994) ("A [NEPA] finding that there will be not be significant impact does not mean either that the project has been reviewed for unnecessary and undue degradation or that unnecessary or undue degradation will not occur."). If so, "FLPMA, by its plain terms, vests the Secretary of the Interior with the authority -- and indeed the obligation -- to disapprove of an otherwise permissible [activity] because the [activity] . . . would unduly harm or degrade the public land." Mineral Policy Ctr. v. Norton, 292 F.Supp.2d 30, 42 (D.D.C. 2003) (agreeing BLM can prohibit action that is necessary, but would cause undue degradation)

BLM violated §1732(b) by failing to consider whether either its Planning Decision or Leasing Decision will cause unnecessary or undue degradation to South Shale Ridge, including

[17] See http://www.co.blm.gov/botany/sens_species.htm.

the area's wilderness characteristics and native plants. BLM therefore failed to consider a relevant legal factor under FLPMA. See Hodel, 848 F.2d at 1075 (recognizing unnecessary or undue degradation standard is "law to apply" and "imposes a definite standard on the BLM"). Plaintiffs note that had the standard been applied, BLM's two decisions would likely have violated this FLPMA standard, as the NEPA discussion above demonstrates. Both the Planning and Leasing Decision would "unduly degrade" -- or significantly impact -- South Shale Ridge's wilderness characteristics and there is no legal basis to claim the stipulations mitigate impacts. Further, because alternatives that could have avoided surface disturbance were available, BLM's actions were "unnecessary."

CONCLUSION AND RELIEF REQUESTED

Plaintiffs respectfully request that their Petition for Review be granted. The Court should hold unlawful and set aside BLM's Planning and Leasing Decisions, BLM's EA/FONSI, and BLM and FWS's informal consultation conclusion of not likely to adversely affect, and order both Defendants to fully comply with NEPA, the ESA, and FLPMA prior to undertaking any actions at South Shale Ridge. Further, Plaintiffs request that the Court find FWS violated its mandatory ESA duty to emergency list the DeBeque phacelia and order the agency to promptly list this species on an emergency basis.

Respectfully submitted,

November 27, 2006

/s/ Keith Bauerle

Keith Bauerle
Neil Levine
Andrew Hartsig
Earthjustice
1400 Glenarm Place, Suite 300
Denver, CO 80202

Telephone: (303) 623-9466
Facsimile: (303) 623-8083

Attorneys for Plaintiffs

I certify that this brief contains 13,944 words, pursuant to Fed. R. App. P. 29(d) and 32(a)(7)(B).

Dated: November 27, 2006

/s/ Neil Levine
Neil Levine