Natalie J. Havlina (ISB # 7498)
Advocates for the West
P.O. Box 1612
Boise, ID 83701
(208) 342-7024
(208) 342-8286 (fax)

Deborah A. Sivas (Cal. Bar No. 135446)
Alicia Thesing (Cal. Bar No. 211751)
Leah Russin (Cal. Bar. No. 225336)
ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School
559 Nathan Abbott Way
Stanford, California 94305-8610
Telephone: (650) 723-0325
Facsimile: (650) 723-4426

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WESTERN WATERSHEDS PROJECT and WILDEARTH GUARDIANS, Plaintiffs, vs. BUREAU OF LAND MANAGEMENT, an agency of the United States, Defendant, _____ R.N. FULSTONE COMPANY, a Nevada corporation and the FLYING M. RANCH, Defendant-Intervenors. ----------	Case No. 2:10-CV-02896-KJM-KJN **PLAINTIFFS' SEPARATE STATEMENT OF UNDISPUTED FACTS**

Pursuant to Local Rule 260(a), the Plaintiffs hereby submit this Separate Statement of Undisputed Facts in support of their Motion for Summary Judgment.

Greater Sage-Grouse.

1. The sagebrush steppe is an ecosystem unique to western North America that once covered an estimated 155 million acres in sixteen western states and three Canadian provinces. Answer, Docket No. 12 ¶ 18 ("Ans."); Connelly, J. W. et al. Conservation Assessment of Greater Sage-grouse and Sagebrush Habitats. Unpublished Report of the Western Association of Fish and Wildlife Agencies (2004) (A.R. 142, 3796-97)("Conservation Assessment"); [1] Greater Sage-Grouse Conservation Plan for Nevada and Eastern California1 1 (2004)(A.R. 143, 4705-4822)(the "Bi-State Plan").

2. The Greater Sage-grouse is a chicken-sized bird that depends on sagebrush for essential biological needs, including both cover and food throughout the year and as a primary component of their diet in late fall, winter, and early spring. Ans. ¶ 30; Conservation Assessment at 3-1; Bi-State Plan at 11.

3. Sage-grouse are known for the elaborate strutting displays male sage-grouse perform on communal breeding grounds called leks. Conservation Assessment at 3-7; Ans. ¶ 18. Leks are located on open areas adjacent to nesting habitat and surrounded by tall sagebrush used for escape and feeding cover. Conservation Assessment at 3882.

4. After mating, female sage-grouse establish nests, which are typically located in larger, intact patches of sagebrush. Conservation Assessment at 3885. Sage-grouse rely

[1] The administrative record consists of 295 documents and thirty-one supplemental documents, provided on three CDs. The citations in this Separate Statement of Undisputed Facts give first the number of the document, then the page number(s) where the relevant information can be found. Since not all documents are internally paginated, all page numbers here refer to the Bates Stamp numbers in the lower right-hand corner of each document. Except where otherwise noted, all citations refer to the original administrative record on the first CD.

on adequate sagebrush, grasses, and forbs during nesting to provide cover, shelter, and food sources. Connelly, J.W. et al. Guidelines to Manage Sage Grouse Populations and their Habitats. 28 Wildlife Society Bulletin 967 (2000)(A.R. 190, 5911, 5914-15)("Connelly Guidelines"). Forbs are an important source of nutrition for sage-grouse hens during nesting and early brood-rearing. *Id.* at 5914. *And see* Conservation Assessment at 3884-3888 (describing sage-grouse nesting habitat needs).

5. After the chicks hatch, sage-grouse hens continue to depend on forbs and insects around the nest to replenish their bodies. Sage-grouse chicks also depend on insects, found on forbs and grasses, for survival. Connelly Guidelines at 5915.

6. During the late brood-rearing season in summer and early fall, mothers and juvenile sage-grouse typically move to areas featuring more abundant forbs, grasses and insects, such as seeps, springs, wet meadows and other wet areas. Mothers and their broods continue to rely on sagebrush and grass for cover and hiding from predators. Connelly Guidelines at 5915; Conservation Assessment at 3888-3889.

7. During winter, sage-grouse depend on sagebrush for food, shelter, and cover. Connelly Guidelines at 5916; Conservation Assessment at 3893-3895.

8. In 2004, the Western Association of Fish and Wildlife Agencies released a rangewide Conservation Assessment whose "primary objective was to document the current status and the potential factors that influence the long-term conservation of greater sage-grouse populations and the sagebrush ecosystems on which they depend." Conservation Assessment at 3768-4377. The Conservation Assessment was written by wildlife biologists and ecologists with expertise in sage-grouse. *Id.* at 3771-76.

9. The Conservation Assessment found that human development has altered, fragmented, and degraded the sage-grouse's sagebrush habitat. Conservation Assessment at ES-1. *And see* Chapters 5, 7, 12 & 13 (describing human activities and their impacts on the sagebrush ecosystem). The sagebrush ecosystem is now considered one of the most imperiled ecosystems on the continent and the sage-grouse occupies little over half of its historic range. *Id*. at 13916-17. The alteration and loss of the bird's sagebrush habitat has contributed to a long-term decline in the sage-grouse population. Conservation Assessment at ES-1, 3979-80 (summarizing documentation of sage-grouse declines over from 1985-2004).

10. The Conservation Assessment examined sage-grouse populations and identified five "core" populations made up related subpopulations. It also identified about a dozen smaller populations that are more isolated from each other, particularly around the edges of the bird's historic range. *Id.* at 4024-27.

11. BLM has designated the sage-grouse as a sensitive species. Bodie EA at 1238-1343.

12. Between 2002 and 2005, the United States Fish and Wildlife Service received three petitions to list the greater sage-grouse under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* ("the ESA"). *See* A.R. 136, 3593 (summarizing listing petitions received).

The Bi-State Population of the Greater Sage-Grouse.

13. The Bi-State population of the greater sage-grouse occupies the western fringe of the greater sage-grouse's range on the border between California and northwest Nevada in the vicinity of the Mono Lake basin. Conservation Assessment at 6-24; Bi-

State Plan at 15-17. The Greater sage-grouse within the Bi-State population have been variously described and referred to as the Western, Mono/Lyon, Mono, Mono Basin, and Bi-State populations of Greater Sage-grouse. Ans. ¶ 20.

14. The Bi-State population is genetically distinct from all other populations of sage-grouse. Environmental Assessment: Livestock Grazing Authorization, EA Number CA 170-08-18, 86 (September 2008)(A.R. 49; 1323)("the Bodie EA"). *See also* Conservation Assessment at 3859, 4172-73, 4182-83 (describing and illustrating "the significant divergence of the Lyon/Mono population from other sage-grouse populations.")

15. The Conservation Assessment identified four subpopulations of the Bi-State sage-grouse population. Conservation Assessment at 4025-27. Reliable population data was available for two of these subpopulations, the North Mono Lake population and the South Mono Lake populations. Conservation Assessment at 4025. "The [Conservation Assessment] authors reported that the North Mono Lake population displayed a significant negative trend from 1965 to 2003, and the South Mono Lake population displayed a non-significant positive trend over this same period." 12-Month Findings for Petitions to List the Greater Sage-Grouse (Centrocercus urophasianus) as Threatened or Endangered, Fed. Reg. (March 23, 2010)(A.R. 9, 143). *See also* Conservation Assessment at 4033-34 (tables showing population trends).

16. In 2004, the Nevada Governor's Sage-Grouse Conservation Team released "The Greater Sagegrouse Conservation Plan for the Bi-State Planning Area of Nevada and Eastern California." The purpose of this document was to "report the conservation strategies developed by the Bi-State Planning group," which was made up of "local

biologists, land managers, land users, and others who share a common concern for the Greater Sage-Grouse in western Nevada and Eastern California." Bi-State Plan at 4385.

17. The Bi-State Plan divided the Bi-State population into six Population Management Units (PMUs). A separate committee of the Bi-State Planning group formulated conservation strategies for each area. The area described as the Bodie PMU contains one of the largest breeding complexes in the Bi-State Population. Ans. ¶ 24; Bi-State Plan at 4451.

18. The authors of the Bi-State Plan evaluated livestock grazing as both a habitat and a population risk in the Bodie PMU. They found, "[B]reeding and summer habitats are most likely to be affected by domestic livestock grazing. Grazing by domestic livestock has occurred in the Bodie PMU since the late 1800s and is expected to continue into the foreseeable future. Permitted livestock grazing is characterized as a past, current and future risk to multiple sites and multiple birds in the Bodie PMU." *Id.* at 4466.

19. The Bi-State Plan also found, "Additional habitat assessments are needed to determine the extent to which permitted livestock grazing is influencing the quality of breeding habitats in the Bodie PMU." *Id.* at 4468.

Factors Contributing to the Decline of the Sage-Grouse.

20. Numerous factors are contributing to the decline of the greater sage-grouse, including the loss and degradation of its sagebrush habitat. Conservation Assessment at 3965. *And* see *generally* Conservation Assessment Chapters 5, 7, 12, and 13. Human activities that affect the sagebrush ecosystem include agriculture, *Id.* at 4065, energy development, *id.* at 4082-83, the construction of infrastructure such as power lines and roads, *Id.* at 4066-67, and livestock grazing. *Id.* at 4068-77.

21. Grazing by large, hoofed mammals was rare in the Western part of the sagebrush biome for the 10-12,000 preceding European colonization. Conservation Assessment at 4072. Grazing by settlers during the latter part of the 19th and early 20th centuries was largely unregulated and seriously depleted native forbs and grasses needed by sage-grouse. *Id.* at 4069-71. Historic grazing practices also facilitated invasions by non-native plants, including cheatgrass. Conservation Assessment at 4069-71.

22. The Conservation Assessment found that impacts attributable to historic overgrazing have not been remedied, because, "plant communities still are not given rest from grazing" and "distribution of livestock has changed because water developments have increased the area that could be grazed." *Id.* at 4072-73. Consequently, the Conservation Assessment stated, "We cannot conclude that the effect of grazing has been reduced because even reduced numbers of livestock may still exert a larger influence on those habitats." *Id.* at 4075.

23. Livestock grazing remains the most widespread use of land in the sagebrush biome. Conservation Assessment at 4071. Domestic livestock continue to alter the sagebrush steppe by consuming native grasses and forbs, trampling sagebrush, and spreading nonnative weeds like cheatgrass. The introduction of invasive plant species increases the risk and severity of wildfires, which can irreversibly alter the composition of the ecosystem. Conservation Assessment at 4072-73. Livestock grazing also compacts the soil, destroying the microbiotic soil crusts that retain moisture and limit wildfire. *Id.* In addition, grazing livestock degrade riparian areas when, during hot periods, they congregate around water sources and shady areas, damaging streams, springs, seeps, and wet meadows. Bi-State Plan at 4468.

24. The Bi-State Working Group evaluated livestock grazing as "a habitat quality risk" for the Bodie PMU. It identified trailing as a risk in the Bodie PMU, but concluded, "Additional habitat assessments are needed to determine the extent to which permitted livestock grazing is influencing the quality of breeding habitats in the Bodie PMU." Bi-State Plan at 4468-69.

25. Grazing may also increase the risk of predation on sage-grouse, "especially if nest success is compromised by inadequate herbaceous understory cover." Bi-State Plan at 4462. Trailing livestock may disturb nesting sage-grouse and even trample nests during the June nesting season. "Sage-grouse are indeterminate nesters known to abandon nests when disturbed." Bi-State Plan at 4469.

26. Another factor contributing to the decline of the greater-sage grouse is West Nile virus ("WNv"), a disease transmitted primarily by mosquitoes. Scientists have documented reductions in sage-grouse survival caused by West Nile virus since 2003. Conservation Assessment at 4205-06.

27. Sage-grouse may transmit West Nile virus to one another, either directly or through mosquitoes, when they congregate around standing water, both natural and man-made, during the hot days of late summer, the season when mosquitoes are most prevalent. Ans. ¶ 37; Conservation Assessment at 4205-4206.

28. In 2004, the U.S. Geological Survey confirmed that WNv caused three sage-grouse deaths in Mono County. Memo from E. Lorentzen, California State Office, to M. Hilliard, Division of Fish, Wildlife, & Plant Conservation, BLM (May 31, 2007)(A.R. Supp. 2, 2-3).

The pygmy rabbit.

29. The pygmy rabbit is the smallest rabbit in North America, weighing between 0.54 and 1.2 pounds in weight as an adult. 90-Day Finding on a Petition to List the Pygmy Rabbit as Threatened or Endangered, 70 Fed. Reg. 29254 (May 20, 2005)(A.R. 135, 3580). Like the sage-grouse, the pygmy rabbit is a sage-brush obligate that depends on sagebrush for food, shelter, and other essential biological needs. *Id.*

30. The BLM has designated the pygmy rabbit as a sensitive species, and the California Department of Fish and Game considers the pygmy rabbit to be a species of special concern. Ans. ¶ 44; A.R. 49, 1317.

31. In 2003, Western Watersheds Project and several other groups petitioned the United States Fish and Wildlife Service ("FWS") to list the pygmy rabbit as threatened or endangered under the Endangered Species Act. A.R. 135, 3579. Citing scientific studies,

> The petition identifie[d] livestock grazing as an important factor in sagebrush habitat destruction and alteration in pygmy rabbit habitat . . . The petition also claims that grazing disturbs pygmy rabbits, increases their vulnerability to predation, and increases stress during winter or harsh weather periods. In addition, the petition claims trampling of burrows may cause injury or death of pygmy rabbits.

Id. at 3584.

32. FWS denied the petition on May 20, 2005. A district court subsequently held that FWS had applied an improper legal standard in denying the petition and remanded FWS's 2005 finding. 90-Day Finding on a Petition To List the Pygmy Rabbit (Brachylagus idahoensis) as Threatened or Endangered, 73 Red. Reg. (Jan. 8, 2008)(A.R. 80, 2261).

33. On January 8, 2008, FWS issued a second Federal Register Notice stating, "We find that the petition presents substantial scientific or commercial information

indicating that listing the pygmy rabbit may be warranted. Therefore, with the publication of this notice, we are initiating a status review to determine if listing the species is warranted." 90-Day Finding on a Petition To List the Pygmy Rabbit (Brachylagus idahoensis) as Threatened or Endangered, 73 Red. Reg. (Jan. 8, 2008)(A.R. 80, 2260).

BLM's Special Status Species Policy.

34. Pursuant to the policies and duties established in the Federal Lands Policy and Management Act, BLM has adopted a Special Status Species Policy and codified it as Section 6840 of the BLM Manual. A.R. 174, 5194. The purpose of the Policy is "to provide policy and guidance . . . for the conservation of special status species plants and animals, and the ecosystems on which they depend." *Id*. The Policy's objectives include: "To ensure that actions requiring authorization or approval by [BLM] are consistent with the conservation needs of special status species and do not contribute to the need to list any special status species . . . under the provisions of the ESA." *Id*.

35. The Policy applies to species listed under the Endangered Species Act, "candidate species" that warrant listing, and sensitive species designated by BLM. *Id.* at 5229.

36. The Policy provides, "Implementation-level planning should consider all site-specific methods and procedures which are needed to bring the species and their habitats to the condition under which the provisions of the ESA are not necessary, current listings under special status species categories are no longer necessary, and future listings under special status species categories would not be necessary." *Id.* at 5229-30.

37. On rangelands, BLM must work toward achieving compliance with the Fundamentals of Rangeland Health as set forth at 43 C.F.R. § 4180. Toward this end,

"The BLM should seek opportunities to conserve and improve special status species and habitats for native animals and wildlife in the development of land use plans, activity plans, and in other BLM-authorized, funded or approved activities." A.R. 174 at 5234.

The Bishop Field Office and Resource Management Plan.

38. For administrative purposes, the BLM has divided the 256 million acres of public land under its care into units it calls "Field Offices." 43 C.F.R. § 1601.0-5. The Bishop Field Office encompasses 750,000 acres of public land in Mono County and Inyo County, California, running south along the eastern Sierra from Topaz Lake to Owens Lake. Bishop Resource Management Plan Record of Decision 1-2 (April 1993)(A.R. 233, 8881)("Bishop RMP").

39. BLM has designated 58 grazing allotments in the Bishop Field Office, and it currently permits 25 permittees to graze their livestock on the allotments. Bodie EA at 1269. This case concerns four livestock grazing allotments located in the Bishop Field Office: the Bodie Mountain, Mono Sand Flat, Aurora Canyon and Potato Peak allotments (collectively, the "Bodie Hills allotments").

40. BLM's management of the Bishop Field Office is governed by the Bishop RMP, which was adopted in 1993, and amended by the BLM Director's approval of the Central California Standards for Rangeland Health and Guidelines for Livestock Grazing Management on June 13, 2000. Ans. ¶ 48. *See also* Bishop RMP; Record of Decision Central California Standards for Rangeland Health and Guidelines for Livestock Grazing Management (June 1999)(A.R. 193).

41. The Bishop RMP focused on resolving four issues, one of which was "where and what management prescriptions are needed to enhance or maintain important wildlife

habitats and populations." Bishop RMP at 8881. In adopting the Bishop RMP, BLM explained, "Because of overwhelming public desire, we placed an emphasis on environmental values in the final RMP decisions." *Id.* at 8884.

42. The Bishop RMP's "Standard Operating Procedures provide specific guidelines for managing the various resources and activities occurring throughout the resource area," including the directive that the Field Office must "[m]anage candidate species, sensitive species and other species of management concern in a manner to avoid the need for listing as state or federal endangered and threatened species." *Id.* at 8890, 8892.

43. The Bishop RMP then sets forth "area-wide decisions, which present management prescriptions valid throughout the entire Bishop Resource Area," including:

-"Yearlong protection of endangered, threatened, candidate, and sensitive plant and animal habitats;"

-"Yearlong Protection within 1/3 mile of sage grouse leks;" and

-"Seasonal Protection within 2 miles of active sage-grouse leks from 5/1 to 6/30." Bishop RMP at 16.

Id. at 8895, 8897.

The Bodie Hills allotments.

44. Together, the four Bodie Hills allotments comprise an area of 133,264 acres of federal public land ranging in elevation from 6,400 feet along the eastern boundary of Mono Lake Scenic Area to 10,236 feet at the summit of Potato Peak. Ans. ¶ 52. "Vegetation communities for these allotments are dominated by a mix of sagebrush/bitterbrush and mountain shrub communities interspersed with pinyon-juniper woodlands." Bodie EA at 3. The Bodie Hills allotments provide habitat for a rich

diversity of wildlife, including the greater sage-grouse and the pygmy rabbit. *Id.* at 1316-17.

45. The Bodie Mountain, Potato Peak, and Aurora Canyon allotments contain several leks and extensive nesting habitat. In summer, large numbers of sage-grouse migrate to habitat near springs, streams, and meadows in the Bodie Mountain, Potato Peak, and Aurora Canyon allotments. Sage-grouse also use the Mono Sand Flat allotment. Ans. ¶ 23; EA at 1324-25. The Bodie Mountain, Aurora Canyon, and Potato Peak allotments are located entirely within the Bodie Population Management Unit ("PMU") and the majority of the Mono Sand Flat allotment is also located within the Bodie PMU. Bodie EA at 1324.

46. Pygmy rabbits are known to live on the Bodie Mountain, Potato Peak, and Aurora Canyon allotments. Pygmy rabbit may also occur on the Mono Sand Flat allotment, which contains suitable pygmy rabbit habitat. EA at 88-89.

47. Between 2001 and 2003, BLM conducted rangeland health assessments for the four Bodie Hills allotments. Bodie EA at 1245. BLM found that the Bodie Hills, Aurora Canyon, and Potato Peak allotments were not meeting the rangeland health standard for riparian areas, but were making significant progress toward meeting this standard. Specifically, six streams on the Bodie Mountain allotment, two streams on the Aurora Canyon allotment, and one stream on the Potato Peak allotment were rated "functioning at risk." A.R. 150, 4629; A.R. 151, 4634; A.R. 147, 4614. Two streams on the Bodie Mountain allotment were rated non-functioning. No streams on the Mono Sand Flat allotment were evaluated. A.R. 156, 4825.

48. Overall, BLM found, "the applicable Standards for Rangeland Health are being met and livestock management practices conform to all applicable guidelines for livestock grazing management" on the four Bodie Hills allotments." A.R. 147, 4615; A.R. 150, 4630; A.R. 151, 4635; A.R. 156, 4615.

The Contested Grazing Decisions.

49. F.M. Fulstone, Inc. ("Fulstone") grazes livestock on the Aurora Canyon and Potato Peak allotments. From 2001 to 2008, BLM permitted Fulstone to graze 235 cows on the Potato Peak allotment from June 1 to October 31 and to consume 1,088 Animal Unit Months ("AUMs") of forage. BLM also permitted Fulstone to graze 526 cows on the Aurora Canyon allotment from June 15 to September 30 and to consume 1,737 AUMs. A.R. 115, 2864. "An AUM is the amount of forage needed to sustain one cow and her calf, one horse, or five sheep or goats for a month." Bodie EA at 1291.

50. The Hilton Family Trust dba the Flying M Ranch ("Flying M") grazes livestock on the Bodie Mountain and Mono Sand Flat allotments. A.R. 33, 781-807. From 2003 to 2008, BLM permitted Flying M to graze 1791 cows on the Bodie Mountain allotment from June 1 to October 15 and to consume 5,647 AUMs. BLM also permitted Flying M to graze 505 cows on the Mono Sand Flat allotment from December 1 to May 31 and to consume 2370 AUMs of forage. A.R. 109, 2847. Flying M did not graze the Mono Sand Flat allotment from 2002 to 2009. Bodie EA at 1270.

51. Fulstone and Flying M's term grazing permits for the Bodie Hills allotments expired in 2008. BLM issued interim grazing permits (A.R. 70, 1932; A.R. 73, 1943) pursuant to Section 325 of Public Law 108-108, reauthorizing grazing under the same terms as the prior permits. Ans. ¶ 60; A.R. 32, 753; A.R. 33, 781.

52. On December 17, 2007, BLM sent interested individuals a Notice of Proposed Action, announcing the Bishop Field Office's intent to "reissue 8 ten-year grazing permits to livestock operators to authorize continued livestock grazing on existing public land allotments," including the four Bodie Hills allotments at issue in this litigation. BLM also stated, "During 2008, the Bishop Field Office will prepare 5 environmental assessments (EAs) to analyze the impacts of reauthorizing the 8 ten-year grazing permits on 19 existing public lands allotments." Notice of Proposed Action (December 2007)(A.R. 87, 2290).

53. In July 2008, BLM issued a draft EA, whose stated purpose was "to consider whether to authorize grazing for 10-years on the Bodie Mountain, Mono Sand Flat, Potato Peak, and Aurora Canyon allotments." Draft Environmental Assessment Livestock Grazing Authority, EA Number CA 170-08-18 (July 2008)(A.R. 56, 1396).

54. The Draft EA analyzed three alternatives. Alternative 1-Proposed Action was "to authorize grazing for 10-years on the Bodie Mountain, Mono Sand Flat, Potato Peak, and Aurora Canyon allotments with applicable terms and conditions and other provisions as described in this section." *Id*. at 1405. Alternative 2- Current Management (No Action) "involve[d] issuing new 10-year permits with the same terms and conditions as under the existing authorizations." *Id.* at 1410-11. Alternative 3-No Grazing "would cancel the permit for the Bodie Mountain and Mono Sand Flat allotments, and the permit for the Potato Peak and Aurora Canyon allotments. As a result, grazing would not be authorized on these allotments." *Id.* at 1412.

55. Western Watersheds Project ("WWP") submitted comments to BLM about the Draft EA on July 28, 2008. *See* Letter from Michael J. Connor, California Director,

Western Watersheds Project, to Bill Dunkelberger, Field Manager, Bishop Field Office (July 28, 2008)(A.R. 53). WWP's comments stated,

> Because the proposed action and current management are so similar, in essence the EA has considered only two alternatives: the proposed grazing action and no grazing. However, "no grazing" will not fulfill the purpose of the action outlined on page 2. Thus, either the BLM failed to take a really hard look at the alternatives or the BLM has not provided a really broad range of alternatives. . . We suggest that the BLM add and analyze an alternative based on reducing stocking rates, and fencing off all riparian zones and wetland areas and aspen groves.

Id. at 1376.

56. WWP's comments also cited BLM's Special Status Species Policy and urged BLM to revisit the EA to fully review and analyze the individual and cumulative impacts of the EA's alternatives on the Bi-State population of sage-grouse, the pygmy rabbit, and wetland/riparian zones. *Id.* at 1376, 1378-80, 1387.

57. On September 30, 2008, BLM issued a final EA for the renewal of the Fulstone and Flying M permits. Environmental Assessment Livestock Grazing Authorization, EA Number CA 170-08-18 (September 2008)(A.R. 49)(the "Bodie EA"). Like the Draft EA, the final Bodie EA contained three alternatives.

58. Alternative 1-Proposed Action was "to authorize grazing for 10-years on the Bodie Mountain, Mono Sand Flat, Potato Peak, and Aurora Canyon allotments with applicable terms and conditions and other provisions as described in this section." *Id*. at 1257-62. Alternative 2- Current Management (No Action) "involve[d] issuing new 10-year permits with the same terms and conditions as under the existing authorizations." *Id*. at 1262-1264. Alternative 3-No Grazing "would cancel the permit for the Bodie Mountain and Mono Sand Flat allotments, and the permit for the Potato Peak and Aurora

Canyon allotments. As a result, grazing would not be authorized on these allotments." *Id.* at 1264.

59. The Bodie EA stated, "The Western Watersheds Project (WWP) comment letter on EA CA-170-08-18 proposed four additional alternatives for consideration in the analysis. These alternatives were considered but eliminated from detailed analysis after initial review." *Id.*

60. BLM rejected WWP's proposal to reduce the stocking rate, stating,

> All of these allotments were found to meet the Secretary of the Interior Approved Rangeland Health Standards and therefore did not warrant such an alternative. Furthermore, the proposed alternative would not be in conformance with the Bishop Resource Management Plan (1993) as amended by the Record of Decision, Central California Standards for Rangeland Health and Guidelines for Livestock Grazing (BLM 2000). Lastly, the proposed alternative did not justify the need for and/or include supporting data or information to warrant such an alternative.

Id. at 1264-65.

61. Based on the Final EA, BLM issued a Finding of No Significant Impact ("FONSI"), which stated, "an environmental impacts statement is not needed" because "none of the effects identified [in the EA] including direct, indirect, and cumulative effects are considered significant based on seasonal use of the allotments and minimal impacts to the native vegetative community." A.R. 48, 1232.

62. Also on September 30, 2008, BLM issued two proposed grazing decisions for the Bodie Hills allotments— one proposing renewal of Fulstone's permit to graze the Potato Peak and Aurora Canyon allotments (A.R. 46) and the other proposing to renew Flying M's permit to graze the Bodie Mountain and Mono Sand Flat allotments (A.R. 47). Ans. ¶ 66.

63. WWP timely protested the proposed decisions to the Field Manager of the Bishop Field Office (A.R. 42; A.R. 43). Ans. ¶ 68. The protests stated, "We protest the failure of the BLM to review and analyze an adequate range of alternatives . . . The defect in the range of alternatives in the DEA has not been remedied in the revised EA." (A.R. 42, 1178-79; A.R. 43, 1190-91). *See also* 43 C.F. R. § 4160 (describing the process BLM uses to finalize grazing decisions).

64. In addition, WWP stated:

> We protest the failure to consider the impact of continued use of livestock developments on the health of the sage-grouse population in making this decision. As the BLM is aware, in 2004 at least one transmitted sage-grouse from the Bodie Hills area was confirmed as having succumbed to West Nile virus. The EA should analyze the role of the allotments' range improvements, especially stagnant livestock waters, make in providing mosquito habitat within this important sage-grouse area. The EA and decision should be revised to incorporate appropriate vector control mitigations.

Id. at 1182 (underlining in original).

65. On July 27, 2009 BLM issued a final grazing decision to Fulstone, authorizing it to graze 235 cows on the Potato Peak allotment from June 1 to October 31 and to consume 1,088 AUMs of forage. The decision also permits Fulstone to graze 526 cows on the Aurora Canyon allotment from June 15 to September 30 and to consume 1,737 AUMs. A.R. 32, 769.

66. Also on July 27, 2009 BLM issued a final grazing decision to Flying M authorizing it to graze 505 cows on the Mono Sand Flat allotment from December 1 to May 31 and to consume 2,370 Animal Unit Months ("AUMs") of forage. The decision also permits Flying M to graze 1791 cows on the Bodie Mountain allotment from June 1 to October 15 and to consume 5,647 AUMs. A.R. 33, 796. Flying M's permit was later

corrected to reflect that it may only consume 5647 AUMs of forage on the Bodie Mountain allotment. A.R. 1, 1.

67. The Fulstone and Flying M decisions contain the following terms and conditions:

-"[F]orage utilization on key perennial species does not exceed 40 percent on the average";

-If "utilization guidelines on the average of the upland key areas across the allotment are exceeded for 2 consecutive years or in any 2 years out of 5 years, BLM will consult with the permittee to address the situation;"

-"[W]hen grazing utilization exceeds 70% in any upland key area for more than 2 consecutive years, immediate management action will be taken to remedy the problem in the area of the allotment that key area represents;" and

-Grazing practices should maintain a minimum herbage stubble height of 4-6 inches on the average on all stream-side riparian and wetland areas at the end of the growing season.

A.R. 32, 770; A.R. 33, 797.

68. In order to comply with these terms and conditions, the Bodie EA explained, the permittees would have to manage their livestock for more even distribution across the allotment, particularly the uplands, through herding, salt placement, and the use of water developments. "For example, strategic management of livestock by active herding to distribute use of forage across the allotment will indirectly improve forage resources." Bodie EA at 1243. BLM predicted, "the lower level of utilization prescribed for key upland forage species would result in overall lower use levels on the allotments and result

in better livestock distribution, so that cattle are less likely to concentrate use at any spring or stream for a long period of time." Bodie EA at 1306.

The Monograph and FWS's "Warranted But Precluded" Findings.

69. On November 4, 2009, the U.S. Geological Survey announced the early release of a comprehensive monograph prepared by the nation's leading sage-grouse experts entitled, "Ecology and Conservation of Greater Sage-Grouse: A Landscape Species and Its Habitats" (the "Monograph"). Ans. ¶ 70; Letter from M. Connor, California Director, Western Watersheds Project, to Bernadetta Lovato, Bishop Field Office Manager, Bureau of Land Management (May 14, 2010)(A.R. 7, 59).

70. The Monograph revealed that the Bi-State Population faces a high risk of extinction. Garton et al determined that the population of sage-grouse north of Mono Lake decreased by thirty-five percent between 1965 and 2007, and long term persistence is unlikely. *See* Reply in Supp. Mot. to Complete Administrative Record, Att. E (Docket No. 73-5)(Nov. 23, 2011) p. 324-325. The population south of Mono Lake declined by forty-nine percent between 1985 and 2007 and "the probability of long term persistence is low." *Id.* p. 235.

71. The Monograph also explained that the Bi-State Population is at high risk to WNv because the population is "small, isolated, [] genetically depauperate . . . [and] on the fringe of the species range." *See* Reply in Supp. Mot. to Complete Administrative Record, Att. C (Docket No. 73-3)(Nov. 23, 2011) p. 140. Stock tanks, ponds, and water-filled hoof prints provide breeding habitat for mosquitoes, which are the primary vector for the transmission of WNv. Walker and Naugle recommended, "Eliminating mosquito

breeding habitat from anthropogenic water sources is crucial for reducing impacts." *Id.* at 127.

72. On March 3, 2010, the U.S. Fish and Wildlife Service ("FWS") published its 12-Month Findings for Petitions to List the Greater Sage- Grouse (Centrocercus urophasianus) as Threatened or Endangered in the Federal Register. 75 Fed. Reg. 13910 (March 3, 2010)(A.R. 8)("Warranted But Precluded Finding"). FWS found, "listing the greater sage-grouse (rangewide) is warranted but precluded by higher priority listing actions." *Id.* at 61.

73. When FWS finds that a species warrants listing under the ESA, it assigns the species a Listing Priority Number between 1 and 12. A species' listing priority number is determined by "the magnitude of threats (high vs. moderate to low), immediacy of threats (imminent or nonimminent), and taxonomic status of the species (in order of priority: monotypic genus (a species that is the sole member of a genus); species; or part of a species (subspecies, DPS, or significant portion of the range)). The lower the listing priority number, the higher the listing priority." *Id.* at 159. FWS assigned the greater sage-grouse a Listing Priority Number of 8. *Id.* at 159.

74. In addition to listing an entire species, FWS also has the authority to list a Distinct Population Segment ("DPS") of a species under the Endangered Species Act. *Id.* at 139-140. FWS's "warranted but precluded" findings of March 2010 determined that the Bi-State population is a DPS of the greater sage-grouse because, "the Bi-State greater sage-grouse population is discrete and significant to the overall species." The Bi-State Population is discrete because it "is markedly separate from other populations of the greater sage-grouse based on genetic data from mitochondrial DNA sequencing and from

nuclear microsatellites." The Bi-State population is significant to the greater sage-grouse species because, "the preservation of genetic diversity represented by [its] unique allelic composition is of particular importance for conservation." *Id.* at 140-141.

75. FWS found, "listing the Bi-State population (previously referred to as the Mono Basin area population), which meets our criteria as a distinct population segment (DPS) of the greater sage-grouse, is warranted but precluded by higher priority listing actions." *Id.* at 140-141.

76. FWS "assigned the Bi-State DPS of the greater sage-grouse an LPN of 3 based on our determination that the DPS faces threats that are overall of high magnitude and are imminent (i.e. ongoing)." *Id.* at 160.

77. FWS found that the Bi-State DPS is threatened by loss of habitat, disease, the inadequacy of existing regulatory mechanisms, and certain recreational activities. *See id.* at 145-157. "The major threat is current and future destruction, modification, or curtailment of habitats" due to a variety of human activities, including livestock grazing. *Id.* at 157. These threats "are exacerbated by the small population sizes, isolated nature, and limited availability of important seasonal habitats for many Bi-State area populations."

78. FWS also found that WNv poses a high risk to the Bi-State DPS. Outbreaks of West Nile virus are likely to recur in the future and populations like those in the Bi-State DPS that are small, isolated and "genetically limited" are particularly vulnerable because "an infection may reduce population size below a threshold where recovery is no longer possible." The loss of these individual populations threatens the persistence of the Bi-State DPS. *Id.* at 153.

79. Citing the Monograph, FWS concluded, "Substantial new information on WNv and impacts on the greater sage-grouse has emerged since we completed our finding in 2005 . . . The continued development of anthropogenic sources of warm standing water throughout the range of the species will likely increase the prevalence of the virus in sage-grouse . . ." *Id.* at 121.

80. FWS also made specific findings regarding the Bodie Hills area. FWS found that the Bodie PMU contains the largest stronghold of leks in the California and Nevada Bi-State area, accounting for 29 out of 89 total leks. *Id.* at 142-143. However, "In several locations in the northern Bi-State area (Bodie Hills, Desert Creek, Fales), adult survival is below what some researchers consider to be sustainable." *Id.* at 154 (internal citations omitted).

81. FWS found that sage-grouse habitat in the Bodie PMU "is affected by grazing management practices and has a negative effect on sage-grouse in those areas" and "loss or degradation of habitat due to grazing contributes to the risk of extirpation of some local populations, which in turn contributes to increased risk to the persistence of the Bi-State DPS." *Id.* at 149.

82. On May 14, 2010, WWP's California Director wrote to the Bishop Field Office. Citing FWS's 12-Month Findings and the Monograph, WWP stated,

> [T]he Bi-State sage-grouse population is now officially recognized as a DPS; the Service has found that the Bi-State DPS is at much higher risk of extirpation than is the greater sage-grouse as a whole; and, new information available in the Studies in Avian Biology monograph lends further support to points we raised in our protests and comments regarding the effects of grazing on sage-grouse. In view of these findings, the BLM needs to conduct supplemental NEPA analysis for the Bodie Mountain, Mono Sand Flat, Potato Peak, and Aurora Canyon Allotments grazing authorizations.

A.R. 7, 59.

83. With regard to the Monograph, WWP stated, "This monograph contains many articles relevant to the grazing decisions for the four Bodie Hills allotments. For example, Dr. Walker and Dr. Naugle's article 'West Nile Virus ecology in sagebrush habitats and impacts on Greater Sage-Grouse populations' includes conservation recommendations to reduce West Nile Virus risks." *Id.*

84. On June 30, 2010, BLM responded to WWP's May 14 letter, stating, "While I fully understand and acknowledge the importance of the Service's recent findings, the findings did not present any new information specific to sage-grouse habitats or populations on these allotments that would warrant the requested supplemental analysis." A.R. 4, 52.

Dated: December 7, 2011.

Respectfully submitted,

/s/ Natalie J. Havlina
Natalie J. Havlina
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2011, I caused the foregoing Plaintiffs' Separate Statement of Undisputed Facts to be electronically filed with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the counsel of record listed below:

J. Earlene Gordon
earlene.gordon@usdoj.gov

William E. Peterson
wep@morrislawgroup.com

Suellen Fulstone
sf@morrislawgroup.com

Brandon L. Jensen
brandon@buddfalen.com

Karen Budd Falen
Karen@buddfalen.com

Deborah A. Sivas
dsivas@standford.edu

Leah Russin
leah.russin@law.stanford.edu

Alicia Thesing
athesing@law.stanford.edu

/s/ Natalie J. Havlina