

[Petitioners' Names and Contact Information
Listed under Signature Lines]

**STATE DIRECTOR
CALIFORNIA STATE OFFICE
BUREAU OF LAND MANAGEMENT**

**REQUEST FOR STATE DIRECTOR REVIEW AND REQUEST FOR STAY OF
DECISION RECORD, FINDING OF NO SIGNIFICANT IMPACT, ENVIRONMENTAL
ASSESSMENT (EA#: DOI-BLM-CA-Do50-2017-0037-EA), AND APPROVAL OF PLAN
OF OPERATIONS FOR EXPLORATORY DRILLING, PERDITO PROJECT**

Pursuant to 43 C.F.R. § 3809.805, Friends of the Inyo, California Wilderness Coalition, the Sierra Club, the California Native Plant Society, the Wilderness Society, and the Center for Biological Diversity (Petitioners) hereby request State Director Review and Stay of the Perdito Exploration Project, as described in the Perdito Exploration Project Environmental Assessment, DOI-BLM-CA-Do50-2017-0037-EA (EA), Finding of No Significant Impact (FONSI), and Decision Record. Carl B. Symons, Field Manager for the Ridgecrest Field Office of the Bureau of Land Management issued the Decision Record on May 16, 2018. Petitioners received notice of this final decision on May 16, 2018.

As discussed in detail below, the EA, FONSI, DR, and Approved Plan of Operations (PoO) fail to adhere to the substantive and procedural obligations of the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.* (FLPMA), and the National Environmental Policy Act, 16 U.S.C § 4321 *et seq.* (NEPA). Accordingly, the State Director should vacate and rescind the EA/FONSI/DR/PoO approval. In addition, due to the immediate and irreparable harm to public resources caused by the Perdito Exploration Project (Perdito Project), the Petitioners request that the State Director immediately stay implementation of the Project until a new decision is issued.

Petitioners also request an in-person meeting with the State Director pursuant to 43 C.F.R. § 3809.805(b). We are available at your earliest convenience, and we request a meeting no later than the week of June 25, 2018.

OVERVIEW OF PETITIONERS

Friends of the Inyo (FOI) is a grassroots nonprofit conservation organization based in Bishop, California, dedicated to protecting and caring for the Eastern Sierra's public lands and wildlife. Over its 30-year history, FOI has become an active partner with federal land management agencies, including the BLM. FOI has participated in BLM's

decision-making process on the Perdito Project, including filing comments in opposition to BLM's EA.

California Wilderness Coalition (CalWild) is a nonprofit public benefit corporation organized in 1976 under the laws of the State of California, composed of conservation organizations, businesses, and individual members. Through advocacy and public education, CalWild builds support for the protection of California's wildest remaining places, primarily those managed by the federal government. CalWild has participated in BLM's decision-making process on the Perdito Project, including filing comments in opposition to BLM's EA.

The Sierra Club was founded in 1892 and is the nation's oldest grass-roots environmental organization. It is a national nonprofit organization of over 795,000 members, with approximately 174,000 members in California and 5,700 members in Nevada. In Inyo and Mono Counties, CA, the Sierra Club Range of Light Group is a member of the Toiyabe Chapter of the Sierra Club that offers outings and advocates for public lands and environmental protection on a wide range of issues with 428 members across both Counties. Sierra Club's purpose is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and use all lawful means to carry out these objectives. The Sierra Club has participated in BLM's decision-making process on the Perdito Project, including filing comments in opposition to BLM's EA. Many of our members visit and enjoy Conglomerate Mesa for hiking, camping, photography, and other uses.

The Wilderness Society (TWS) is a national nonprofit organization with 700,000 members and supporters nationwide whose mission is to protect wilderness and inspire Americans to care for our wild places. Since its founding in 1935, TWS has worked to provide scientific, legal, and policy guidance to land managers, communities, local groups, state and federal decision-makers, and diverse interests who care about our American public lands. TWS has participated in BLM's decision-making process on the Perdito Project, including filing comments in opposition to BLM's EA.

The Center for Biological Diversity ("Center") is a nonprofit public interest organization with offices located across the country, including offices in Oakland and Los Angeles, representing more than 1.6 million members and online activists nationwide dedicated to the conservation and recovery of species at-risk of extinction and their habitats. The Center has a longstanding interest in protecting and preserving the California desert ecosystem and, specifically, the public lands and resources in and near Conglomerate Mesa that are directly impacted by this action. Center staff and members have visited the public lands in this area and intend to continue to do so in the future. To date, more than 5,200 Center supporters have submitted comments to the BLM opposing this mining exploration project. The Center has participated in BLM's decision-making process on the Perdito Project, including filing comments on BLM's EA.

The California Native Plant Society (CNPS) is an organization of nearly 10,000 scientists, professionals, and laypersons united by an interest in California plant species and communities. Established in 1965 as a California 501(c)(3) nonprofit public benefit corporation, CNPS's mission is to increase understanding and appreciation of California's native plants and to conserve them and their natural habitats through education, science, advocacy, horticulture, and land stewardship. CNPS works closely with decision-makers, scientists, and local planners to advocate for well-informed and environmentally friendly policies, regulations, and land management practices. Given the importance of rare desert plant species and Joshua tree woodlands to California, CNPS has participated in the development the DRECP to preserve the natural resources on and around Conglomerate Mesa in Inyo County, CA. CNPS has participated in BLM's decision-making process on the Perdito Project, including filing comments in opposition to BLM's EA.

FACTUAL AND PROCEDURAL BACKGROUND

Conglomerate Mesa, Inyo Mountains

In FLPMA, Congress designated 25 million acres of southern California as the California Desert Conservation Area ("CDCA"). 43 U.S.C. § 1781(c). Congress declared that the CDCA is a rich and unique environment teeming with "historical, scenic, archaeological, environmental, biological, cultural, scientific, educational, recreational, and economic resources." 43 U.S.C. § 1781(a)(2). Congress found that the California desert and its resources are "extremely fragile, easily scarred, and slowly healed." *Id.*

Conglomerate Mesa is located within the Basin and Range subarea of the CDCA on BLM-managed public lands in the southern portion of the Inyo Mountains near the western edge of the Great Basin and east of the Sierra Nevada. This subarea extends west from the Nevada state line to the Sierra Nevada Mountain Range, approximately 85 miles east to west at its widest, and 130 miles north to south. Elevations within the Basin and Range subarea range from 1,000 to 12,000 feet, with mountains rising abruptly from the desert floor, and elevations in Conglomerate Mesa range from 6,400 to 7,400 feet above sea level.

The south end of the subarea gradually transitions to Mojave Desert vegetation dominated by creosote bush and white bursage. Streams, springs, and riparian areas dot the subarea, and provide critical water sources across the harsh arid environment. In general, this area experiences hot summers, cold winters, and receives about 8-10 inches of precipitation annually. Conglomerate Mesa itself is arid and lacks surface water resources, and the Mesa relies upon seasonal rain and snow.

Vegetation communities vary greatly, due to the sharp relief within the subarea, and plant communities include sagebrush steppe, pinyon-juniper woodland, and cottonwood/willow riparian vegetation, as well as unique alpine vegetation, subalpine bristlecone, and limber pine woodlands. In addition, native grasses and wildflowers also proliferate across the mesa, and seven endemic, imperiled native plants have been located on the mesa, including the Inyo rock daisy, Shockley's rock cress, Shockley's

prickleaf, Mojave fishhook cactus, Hairy erioneuron, Crested onion, and Cespitose evening-primrose. Each of these native plants are currently listed as a California-state or BLM sensitive species due to extant and burgeoning threats to their populations and habitat.

In addition, Joshua tree woodlands are scattered throughout Conglomerate Mesa and the Basin and Range subarea, and the Joshua tree woodlands on the Mesa exhibit vigorous regeneration. In contrast, Joshua tree woodlands in lower elevations are currently contracting across its range, which has generated an urgency to research the genomic and demographic characteristics of this iconic desert species. Indeed, the U.S. Fish and Wildlife Service (the Service) received a petition to protect the Joshua tree as an endangered or threatened species under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (ESA). In response, the Service recently concluded that there was substantial scientific and commercial information indicating that listing the Joshua tree as a threatened or endangered species under the ESA may be warranted. 81 Fed. Reg. 63160 (Sept. 14, 2016).

The geology undergirding Conglomerate Mesa consists of a sequence of strata called the Conglomerate Mesa Formation and the Santa Rosa Flat. These beds represent a complete geologic record from the Permian to the early Triassic. These geologic beds have been invaluable to interpreting other similar, but incomplete, sequences of strata in three other locations throughout the west (west Texas, Nevada, and northern California) and that combined data was used to reconstruct the continental margin during the Permian Era. The Early Permian strata at Conglomerate Mesa are particularly important because they are completely unique, and fossil beds in this sequence that can be dated by the unique fossils within them: fusulinids (plankton with calcite shells), conodonts, and corals. Three new genera and 12 new species of the fusulinids are endemic to the Conglomerate Mesa area—found nowhere else. None of the fusulinids survived the Permian Extinction, so these are the only beds that contain them. Conglomerate Mesa contains the key geologic beds to unraveling the evolution of the ancient coastline of the southwestern U.S. from the Permian through the early Triassic (300 to 247 million years ago).

The public lands in and around Conglomerate Mesa have outstanding ecological, cultural, recreational and historic values. For example, the Malpais Wilderness rests about one-half mile south, and the Cerro Gordo Wilderness Study Area (WSA) is located about four miles to the north. Immediately to the east lies Death Valley National Park. The Cerro Gordo-Conglomerate Mesa Area of Critical Environmental Concern (ACEC) is located on the mesa, and it recognizes and protects the cultural, plant, and wildlife resources known to occur throughout the Conglomerate Mesa.

In addition, the public lands of Conglomerate Mesa are located within the California Desert Conservation Area (CDCA) Wilderness Inventory Unit (WIU) #124 (Conglomerate Mesa). A 1979 inventory of this area conducted by the BLM concluded that it had superlative wilderness character. A more recent 2015 wilderness inventory of this same area similarly concluded that this area met the wilderness criteria for natural condition, outstanding opportunities for solitude, outstanding opportunities for

primitive and unconfined recreation, and supplemental values including plant and animal species and cultural resources.

The public lands in and around Conglomerate Mesa host of number of endemic wildlife species, including the golden eagle, prairie falcon, loggerhead shrike, Townsend's big-eared bat, and a host of migratory birds, raptors, and bats.

As Congress recognized, these CDCA desert lands and resources are "extremely fragile, easily scarred, and slowly healed." 43 U.S.C. § 1781(a)(2). Unfortunately, past extractive and anthropogenic use in and around Conglomerate Mesa have left lasting scars on the landscape. Primitive jeep trails can still be seen traversing the mesa, and supposedly "reclaimed" roads from an earlier (circa 1997) mining exploration mar the natural the superlative wilderness characteristics within Conglomerate Mesa. These past impacts and others have caused baseline conditions on Conglomerate Mesa to exceed acceptable levels of ground disturbance under the applicable resource management plan, which further risks the health of the vegetation, soil, and other ecological resources.

Desert Renewable Energy Conservation Plan

In 2016, BLM approved the Desert Renewable Energy Conservation Plan Land Use Plan Amendment (DRECP LUPA), which amended the CDCA Plan and the Bishop and Bakersfield Resource Management Plans. *See* DRECP LUPA.¹ BLM and its partners—including the U.S. Fish and Wildlife Service, the California Energy Commission, and the California Department of Fish and Wildlife—developed the DRECP to provide long-term conservation and management of special status species and vegetation types, along with other physical, cultural, scenic and social resources across the southern California plan area. At the same time, the DRECP streamlined development of utility-scale renewable energy generation and transmission. The public lands subject to the DRECP total almost 23 million acres and include the National Conservation Lands located on Conglomerate Mesa.

The DRECP adopted goals, objectives, and conservation management actions to guide all actions on covered lands. Conservation management actions (CMAs) are allowable uses of the public lands that are anticipated to achieve the goals and objectives of the DRECP, and CMAs may permit, restrict, or prohibit uses of covered public lands.

The DRECP adopted specific CMAs for special status plant species, which require BLM to properly monitor plant populations and habitat, eliminate impacts to plant populations, and avoid impacts to plant habitats. More specifically, the DRECP CMAs require BLM to:

1. Conduct properly timed surveys of all special status plant species, using scientifically-based survey protocols, CMA LUPA-BIO-PLANT 1;

¹ Located at https://www.drecp.org/finaldrecp/lupa/DRECP_BLM_LUPA.pdf (last visited June 13, 2018).

2. Implement a so-called “avoidance setback” of .25 miles around all special status species occurrences, barring activities that may undermine the ecological processes necessary to support the special status plant species, CMA LUPA-BIO-PLANT 2; and
3. Avoid impacts to suitable habitat for special status plant species, and implement a 1% disturbance cap on habitat, CMA LUPA-BIO-PLANT 3.

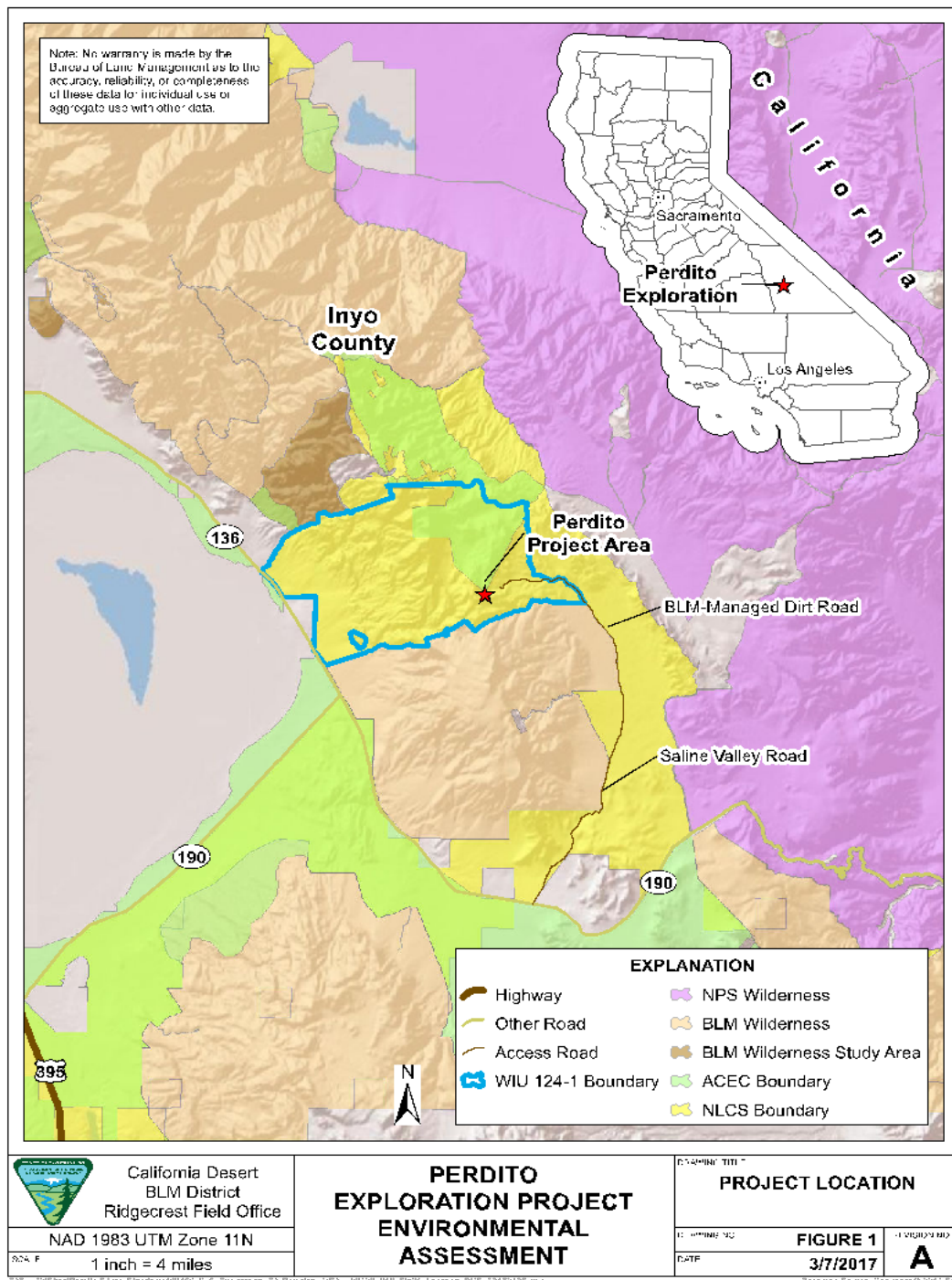
DRECP LUPA at 110. The DRECP also adopted a specific CMA designed to protect individual Joshua trees and Joshua tree woodlands. Like the CMAs for special status species, these CMAs follow the same “monitor, eliminate, and avoid” approach. For example, the DRECP CMAs require BLM to:

1. Monitor and prepare a habitat assessment and map detailing potential site and habitat assessments for Joshua tree woodlands, CMA-LUPA-BIO-1, CMA LUPA-BIO-SVF-1, *id.* at 93, 110; and
2. Avoid impacts to Joshua tree woodlands to the maximum extent practicable, except for minor incursions that do not undermine the protection of these woodlands, CMA LUPA-BIO-SVF-2, *id.* at 110.

The Perdito Exploration Project

On December 4, 2015, Silver Standard U.S. Holdings, Inc.— aka SSR Mining Inc. (Silver Standard)—submitted a plan of operations (PoO) for the Perdito Exploration Project. In its PoO, Silver Standard proposed to drill a total of seven diamond drill holes at seven locations on National Conservation Lands in the Conglomerate Mesa.

Silver Standard seeks to commence drilling at designated drill pads, located within the National Conservation Lands—including two holes within the Cerro-Conglomerate Mesa Area of Critical Environmental Concern. Silver Standard’s exploration plan calls for drilling around the clock—i.e., 24 hours a day for up to 7 months. *See* Figure 1 from the Perdito EA, below.



Silver Standard listed a series of industrial equipment its plan will require, including helicopter transportable drill rigs, a temporary water tank for storing the roughly 1,000 gallons of water needed per day, several 55-gallons drums of fuel to run a generator, a 10,000 watt gas generator to supply the drilling rig with electricity, light, and heat for the 24-hour a day drilling operation, hydraulic sump pumps, a diesel pump, and an excavator.

Pre-NEPA Consultation

On October 3, 2016, Silver Standard's environmental consultants—SRK Consulting (SRK)—prepared a memo to BLM discussing SRK's proposal for a visual resource assessment for the Perdito Project. *See* Memo from Carrie Shultz, SRK Consulting, to Randy Porter, BLM (dated October 3, 2016) (Attached hereto as Exh. 1) (SRK Memo). In the SRK Memo, SRK outlined its plan for a visual resources assessment, which included identifying and selecting 5 Key Observation Points (KOPs) to determine the breadth and scope of the impacts of the mining exploration on the visual resources in the area. According to SRK, Conglomerate Mesa and the public lands targeted for mine exploration are primarily used by hiking groups and others seeking solitary backcountry experiences, and hikers are known to use ridgelines and washes, with these routes converging in saddles and on peaks.

According to SRK, these five KOPs are necessary to evaluate and take account of recreational use patterns in and around Conglomerate Mesa, and these KOPs reflect the most critical viewpoints in the area. KOP 1 was located along a ridgeline; KOP 2 in a drainage bottom; KOP 3 was on a saddle through which ridgeline and drainage hikers would be funneled; KOP 4 was located on Conglomerate Mesa peak, above a designated hiking trails; and KOP 5 was located approximately 2.5 miles away in the Malpais Wilderness area, from a vantage point where two drill pads would be visible.

EA and Public Comments

In October 2017, BLM issued an Environmental Assessment ostensibly examining the ecological impacts of Silver Standard's proposed plan of operations on the surrounding public resources. The EA identified four alternatives in approving Silver Standard's PoO. With the exception of the no action alternative, under which BLM would deny any exploration activity, each alternative proposed the exact number of drill holes and drill pads ($n=7$), and each alternative proposed the same location for each of the seven exploratory wells. Each alternative also proposed drilling in the same manner, using the same equipment, to the same depth (1,000 feet). Under each alternative, all equipment (e.g., backhoe, bulldozer, drill rig), water, fuel, and provisions would be hauled more than 40 miles (80 miles round trip) up the Saline Valley Road, which is a high-use recreational dirt road and the primary means by which recreationists access the Inyo Mountains and the Santa Rosa Flat section of Death Valley National Park.

The only difference in the three action alternatives is the means and method of accessing the seven individual drill pads. The first alternative proposed to build or rebuild several miles of road between the drill pads. The second alternative proposed fewer miles of road, located these new roads on already disturbed areas, and permitted cross-county travel to ostensibly reduce further disturbance. The third alternative proposed only helicopter access to the well sites, and this alternative requires airlifting all equipment, water, fuel, and provisions from a final staging area (accessed via the Saline Valley Road) high in the Inyo backcountry to the seven well pads.

These alternatives mirrored the full complement of alternatives proposed by SRK—i.e., Silver Standard’s environmental consultants—in its October 3, 2016 memo (cited *supra*).

In the EA, BLM provides some baseline environmental conditions for some of the resources potentially impacted by Silver Standard’s mining exploration, together with a short narrative of potential impacts from the mine exploration. For example, BLM noted that seven special status plant species—including the Inyo rock daisy—were found within and around the proposed mine exploration site. According to BLM, because individual Inyo rock daisy plants are located within the .25 mile avoidance buffer mandated by the DRECP, *see supra*, this imperiled endemic flower is likely to be adversely impacted by the proposed mine exploration.

In addition, prior biological surveys found Joshua trees and Joshua tree woodlands—defined in the DRECP as areas evenly distributed with Joshua Trees at $\geq 1\%$, and single-leaf pinyon pine and California juniper $< 1\%$ absolute cover in the tree canopy—across the project site and the larger Conglomerate Mesa. The EA does not detail, however, the local vegetation communities subject to modification and removal to construct the seven new drill pads.

The EA also noted that BLM had recently completed a visual resource inventory of the area, and the project area received a scenic quality rating of “A,” and a sensitivity rating of “high” due to the setting and panoramic views. Overall, the scenic quality of the project area received a Visual Resource Inventory Class II, which is the highest rating outside of Wilderness or other specially-designated areas.

In the EA, BLM identified only three Key Observation Points (KOPs) for a visual resource analysis, though these three KOPs are subset of the five KOPs proposed in the earlier memo prepared by Silver Standard’s consultants. *See discussion, supra*. BLM removed KOP 4, which was located on a Conglomerate Mesa peak and is located above a designated hiking trail. According to SRK, “KOP 4 was chosen to represent what hikers on this trail, making it the top of the mesa, may see of the alternatives.” SRK Memo at 3. BLM also eliminated KOP 5, which is located on a topographic high point within the Malpais Wilderness area, about 2.5 miles south of the Project. SRK chose this site “to represent hikers within the Malpais Wilderness who may hike to the topographic high points for views from which the Perdito Project may be visible.” *Id.* BLM never explains why it abandoned the two additional KOPs proposed by SRK.

The EA never discussed or examined the potential impacts of the mining exploration—in which Silver Standard proposed to punch seven drill holes up to 1,000 feet below grade—on groundwater resources and basins. The EA never even discussed whether or not a groundwater basin, perched aquifer, or any other subsurface water system sits below the Inyo Mountains, and BLM also never discussed or examined any recharge areas, groundwater trends, or groundwater storage capacity. BLM similarly presented no baseline studies or independent analysis of the groundwater hydrology in the Inyo Mountains, and the EA provides no information or analysis whatsoever. Indeed, the EA never even mentions the word “groundwater.”

FONSI and Decision Record

On May 16, 2018, BLM issued a Decision Record approving Silver Standard's Plan of Operations for its Perdito Project, and specifically approved the helicopter alternative. In its approval, BLM identified a series of so-called Best Management Practices and Applicant Committed Measures, but none of these measures addressed the management obligations and restrictions in the governing land use plan—i.e., CDCA Plan as amended by the Desert Renewable Energy Conservation Plan—for imperiled native plants, Joshua tree woodlands, and other critical resources.

On this same day, BLM issued a Finding of No Significant Impact, in which BLM determined to forego preparing a detailed environmental impact statement. Like BLM's Decision Record, the FONSI overlooks or ignores key issues, including the possibility that Silver Standard's mine exploration may contaminate groundwater; adversely impacts native plant communities and Joshua tree woodlands; and harms the world-class visual and night sky resources in Death Valley National Park and surrounding National Conservation Lands.

ARGUMENT

I. BLM's Approval of the Perdito Project Violated FLPMA.

BLM violated FLPMA by approving the Silver Standard's plan of operations permitting mine exploration without adhering to the mandatory Conservation Management Actions in the CDCA Plan as amended by the Desert Renewable Energy Conservation Plan.

A. FLPMA's Consistency Requirement.

FLPMA is the basic “organic act” for management of the BLM public lands. Under FLPMA, BLM must develop land use plans for the public lands under its control, 43 U.S.C. § 1712, and all resource management decisions must be in accordance with those plans. *Id.* § 1732(a), 43 C.F.R. § 1610.5-3(a). *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 69 (2004) (this requirement “prevent[s] BLM from taking actions inconsistent with the provisions of a land use plan”); *Ore. Natural Res. Council v. Brong*, 492 F.3d 1120, 1128 (9th Cir. 2007) (holding BLM decision is “inconsistent with the [Land Use] Plan and, consequently, violate FLPMA”); *W. Watersheds Project v. Salazar*, 843 F.Supp.2d 1105, 1114 (D. Id. 2012) (reversing BLM decisions as inconsistent with land use plans); *W. Watersheds Project v. Bennett*, 392 F.Supp.2d 1217, 1227 (D. Id. 2005) (same).

If a proposed action is not clearly consistent with the land use plan, BLM must either rescind the proposed action or amend the plan, complying with NEPA and allowing for public participation. *See* 43 C.F.R. §§ 1610.5-3, 1610.5-5. *See also National Parks and Conservation Ass'n v. FAA*, 998 F.2d 1523, 1526 (10th Cir. 1993) (nonconforming land use required RMP amendment). The Interior Board of Land Appeals recognizes that this “consistency” requirement reflects the mandatory duty to fully and strictly comply with

the governing land management plans. *See, e.g. Jenott Mining Corp.*, 134 IBLA 191, 194 (1995); *Uintah Mountain Club*, 112 IBLA 287, 291 (1990); *Marvin Hutchings v. BLM*, 116 IBLA 55, 62 (1990); *Southern Utah Wilderness Alliance*, 111 IBLA 207, 210-211 (1989).

Courts have applied this “consistency” requirement to mining plans of operations and required that plans of operations adhere to the mandatory requirements of governing land use plans. *Mineral Policy Center v. Norton*, 292 F.Supp.2d 30, 49 (D.D.C. 2003).

B. BLM Violated FLPMA By Failing to Adhere to the CMAs for Sensitive Plant Species.

The Desert Renewable Energy Conservation Plan set goals and objectives for the management of sensitive plant species occurrences and habitat, as well as adopted specific measures to avoid and minimize adverse impacts to these imperiled resources. As noted above, the Conservation Management Actions (CMAs) for sensitive species require BLM to monitor populations, eliminate impacts to plant occurrences, and avoid impacts to suitable habitat. BLM’s approval of Silver Standard’s plan of operations violates each of these CMAs.

i. BLM Failed to Conduct Mandatory Monitoring for Sensitive Species.

The DRECP requires that BLM conduct properly timed surveys of all special status plant species, using scientifically based survey protocols, prior to approval of an action. CMA LUPA-BIO-PLANT 1. California BLM has separately identified survey protocols for sensitive plant species. *See* Survey Protocols Required from NEPA/ESA Compliance for BLM Special Status Plant Species.² BLM’s survey protocols include detailed methodology, training, collection, documentation, and data submission requirements for sensitive species surveys. Among these requirements, BLM requires a “100 percent visual examination of the project area” using transects, or an intuitively controlled survey, which similarly requires detailed transects in the highest potential habitat. *Id.* at 2-3. Neither of these protocols permits an undifferentiated walk through portion of a project area.

BLM has failed to adhere to these requirements, and it appears that it permitted Silver Standard’s contractors to perform a more ad-hoc approach to sensitive species monitoring. For example, the EA does not disclose the existence of any sensitive species transects, and the Biological Evaluation for Sensitive Flora and Fauna reveals no transects or other scientifically-based survey protocols. Instead, it appears the contractor walked through portions of the exploration area and failed to undertake any systematic survey of the seven drilling sites. *See* Silver Standard’s Biological Evaluation for Sensitive Flora and Fauna, November 2016, at pp. 3-5. California BLM cannot apply different protocols for sensitive species surveys depending on whether BLM, a

² Located at <https://www.blm.gov/ca/dir/pdfs/2009/im/CAIM2009-026ATT1.pdf> (last visited June 14, 2018) (California BLM Survey Protocol).

proponent, or a proponent's contractor undertakes these surveys. Indeed, California BLM's own protocol—cited *supra*—specifically notes that while “[m]ost special status plant inventories of public lands conducted to assess the impacts of a project are performed by consultants hired by project proponents[,]” “[t]hese inventories must meet or exceed the intensity level required for the project by BLM.” California BLM Survey Protocol at 5.

Silver Standard's monitoring similarly fails to adhere to other BLM science-based standards for measuring and monitoring sensitive species plant populations. *See* BLM Tech. Ref. 1730-1, Measuring and Monitoring Plant Populations.³ According to BLM's own Technical Reference, which BLM “originally developed for monitoring special status plants,” *id.* at iii, the design of special status plan monitoring efforts is critical to its success, and the consequences of poor monitoring include unnecessary resource deterioration, inaccurate monitoring information, and wasted time and resources. *Id.* at 97. Instead of a meandering walk through occupied and unoccupied habitats to assess habitat and populations conditions, BLM recommends its monitoring staff adopt a comprehensive approach to sensitive species monitoring—one that elevates process and repeatability in an effort to obtain quality monitoring information. *Id.* at Ch. 7.

Silver Standard's ad hoc approach also runs afoul of the science-based population monitoring requirements adopted by the California Department of Fish and Wildlife (California DFW). *See* Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Sensitive Natural Communities.⁴ According to the California DFW,

The conservation of special status native plants and their habitats, as well as sensitive natural communities, is integral to maintaining biological diversity. The purpose of these protocols is to facilitate a consistent and systematic approach to botanical field surveys and assessments of special status plants and sensitive natural communities so that reliable information is produced and the potential for locating special status plants and sensitive natural communities is maximized.

Id. at 1 (unpaginated). Like BLM's monitoring protocols, California DFW requires systematic and repeatable botanical field surveys of the entire project area—recommending parallel survey transects to ensure thorough coverage. *Id.* at 5-6.

California DFW—like BLM—also recommends field botanical surveys occur at the time of the year when plants will be both “evident and identifiable,” usually during flowering or fruiting. *Id.* In fact, California DFW recommends “[s]pac[ing] botanical field survey visits throughout the growing season to accurately determine what plants exist in the

³ Located at <https://www.blm.gov/nstc/library/pdf/MeasAndMon.pdf> (last visited June 514, 2018).

⁴ Located at <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=18959> (last visited June 14, 2018).

project area. This usually involves multiple visits to the project area (e.g. in early, mid, and late-season) to capture the floristic diversity at a level necessary to determine if special status plants are present.” *Id.* at 6.

Contrary to these protocols, Silver Standard’s contractor undertook its 2016 survey in early May, before the primary growth season for imperiled plant species, and far too early for plant flowering and fruiting—especially at this elevation. Biological Evaluation for Sensitive Flora and Fauna, 2016 at 3. Indeed, the consultant even acknowledged that the “timing of [its] surveys in 2016 was not ideal for the detection of all these floral taxa [- i.e., the seven sensitive species plants located in the exploration area].” *Id.* at 6. The 2017 evaluation occurred a bit later—in early June—but there is no information on the climatic conditions in the area, whether these native sensitive species were, in fact, flowering or fruiting, or any other information that would assist in determining the appropriateness of these monitoring efforts.

ii. BLM Failed to Adhere to the Required Setback Requirements for Sensitive Plant Species.

BLM’s final approval of Silver Standard’s PoO also failed to adhere to the DRECP’s setback requirement for special status plant species. *See* CMA LUPA-BIO-PLANT 2 (implementing an “avoidance setback” of .25 miles around all special status species occurrences). The DRECP defines a “setback” as follows:

A defined distance, usually expressed in feet or miles, from a resource feature (such as the edge of a vegetation type or an occupied nest) within which an activity would not occur; otherwise often referred to as a buffer. *The purpose of the setback is to maintain the function and value of the resource features.*

DRECP at xxii (emphasis added). BLM’s own data and information established that it failed to adhere to this protective measure in approving the PoO. For example, in the 2016 Biological Evaluation for Sensitive Flora and Fauna, Silver Standard’s own contractor identified scores of occurrences of sensitive plant species—including each of the seven species identified *supra*—immediately within and around the approved exploration sites. *See, e.g.,* 2016 Biological Evaluation for Sensitive Flora and Fauna, Maps 2. A very basic examination of the legend, which identifies a linear area out to .3 miles, shows that many of these occurrences are found within the .25 acre buffer area.

Silver Standard’s 2017 biological evaluation reached the same conclusion, again finding occurrences of Inyo rock daisy and other sensitive species plants within the .25 buffer around the project area. *See* 2017 Biological Evaluation for Sensitive Flora and Fauna, Maps 1 & 2.

Indeed, BLM’s EA even acknowledged that some sensitive plant species are located within the setback area. *See* EA at 64 (“Some individual Inyo rock daisy plants are located within the 0.25-mile setback area of all alternatives as shown on Figure 6.”).

While BLM does not deny that its approval of Silver Standard's PoO violates this DRECP requirement, BLM seeks to excuse its non-compliance by grafting standards from other legal mandates into BLM's FLPMA "consistency" obligations. *See, e.g.*, EA at 63 (noting that while sensitive species are within the 0.25-mile setback area, "none of the alternatives moves the species towards the need for ESA protection, and none of the alternatives isolates the population. Therefore, in consideration of the access entitlement provided by the mining laws, the action is consistent with the BLM 6840 manual."). *See also id.* at 64 (excusing non-compliance with FLPMA's consistency mandate by noting that BLM's approval is consistent with BLM's sensitive species policy and mining law regulations).

BLM cannot, however, excuse non-compliance with FLPMA's consistency requirement by citing to other legal standards and obligations. Indeed, the IBLA has interpreted FLPMA's "consistency" requirement as a mandatory duty to fully and strictly comply with land use plan, and BLM cites to no authority upholding decisions at odds with the governing land use plan. *See, e.g. Jenott Mining Corp.*, 134 IBLA 191, 194 (1995); *Uintah Mountain Club*, 112 IBLA 287, 291 (1990); *Marvin Hutchings v. BLM*, 116 IBLA 55, 62 (1990); *Southern Utah Wilderness Alliance*, 111 IBLA 207, 210-211 (1989).

Indeed, BLM not only violated the letter of the DRECP, but failed to address the underlying reasons for these protections. The Decision Record and other documents do not discuss the purpose of the setback as stated in the DRECP— "to maintain the function and value of the resource features"—or make any attempt to explain how the function and value of these special status plants in this habitat can be preserved without adherence to the setbacks.

iii. BLM Failed to Adhere to Additional Protections for Sensitive Species in the DRECP.

In its Perdito EA, BLM acknowledges that the Perdito Project—including the helicopter alternative—will impact occurrences of the imperiled Inyo rock daisy. EA at 64 (noting that occurrences of Inyo rock daisy are located within the .25 mile required under the DRECP). BLM does not claim that these adverse impacts cannot be avoided, though BLM asserts that the scope of the impacts represents a small fraction of suitable habitat for the Inyo rock daisy (n=0.2 acres). DR, Appx. B at 3 ("Based on the currently available model, there exists approximately 55,846 acres of modeled suitable habitat on BLM lands for Inyo rock daisy. The alternatives were anticipated to impact between .2 and 7.75 Acres of BLM lands."). In failing to avoid all impacts to Inyo rock daisy occurrences, and then relying on an arbitrary calculation of baseline suitable habitat, BLM has violated the conservation management actions in the DRECP.

More specifically, the DRECP adopted a conservation measure designed to protect sensitive plant species (i.e., CMA LUPA-BIO-PLANT-3), which requires that "[i]mpacts to suitable habitat for Focus and BLM Special Status plant species should be avoided to the extent feasible, and are limited [capped] to a maximum of 1% of their suitable habitat throughout the entire LUPA Decision Area." DRECP at 110. According to this CMA, "[t]he baseline condition for measuring suitable habitat is the DRECP modeled

suitable habitat for these species utilized in the EIS analysis (2014 and 2015), or the most recent suitable habitat modeling.” *Id.*

BLM failed to follow these mandatory conservation measures in the DRECP. First, there is no suggestion anywhere in the EA, Decision Record, or otherwise that it was infeasible to rework the proposed drill sites to “avoid” sensitive species occurrences. Indeed, BLM never even proposed alternative drill sites, although there may be plenty of areas within Conglomerate Mesa that have few to no occurrences of Inyo rock daisy⁵.

Second, BLM’s claim that the Perdito Project falls far below the maximum threshold for adverse impacts to suitable habitat (i.e., 1% of suitable habitat) is equally faulty because BLM failed to establish an adequate baseline, as demanded by the DRECP. As noted above, the DRECP requires BLM to establish a baseline based on either: (1) a DRECP modeled suitable habitat for the species utilized in the EIS analysis (2014 and 2015), if available, or (2) the most recent suitable habitat modeling. *Id.*

In the case of Inyo rock daisy, BLM did not prepare a habitat suitability model during the DRECP EIS analysis. BLM similarly failed to prepare a habitat model as part of the Perdito EA, and there is currently no publicly available habitat model for Inyo rock daisy. Indeed, Petitioners—including the California Native Plant Society, which is an organization of nearly 10,000 scientists, professionals, and laypersons united by an interest in California plant species and communities – have never seen, reviewed or even been made aware of BLM’s so-called “currently available model” it relied upon in making its estimate of compliance with the DRECP caps. *See* DR, Appx. B at 3 (BLM claiming that “[b]ased on the **currently available model**, there exists approximately 55,846 acres of modeled suitable habitat on BLM lands for Inyo rock daisy”) (emphasis added).

BLM cannot rely on a secret habitat suitability analysis to meet its obligations under FLPMA and the DRECP to avoid and mitigate its impacts on sensitive plant species.⁶

⁵ Because BLM failed to comply with the sensitive species monitoring requirements of the DRECP, *see* Argument I.B.i, *supra*, it is not possible to fully evaluate the Perdito Project area for presence or absence of Inyo rock daisy occurrences.

⁶ Courts have also not hesitated to hold unlawful an agency’s NEPA analysis when the agency fails to provide the data and models informing the agency’s analysis. *See, e.g., Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998) (“allowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff’s ability to challenge an agency action or results in the courts second guessing an agency’s scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion.”); *Seattle Audubon Society v. Moseley*, 798 F. Supp. 1473, 1479 (W.D. Wash. 1992), *aff’d* 998 F.2d (9th Cir. 1993) (“A[n agency’s] conclusory statement unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind not only fails to crystalize the issues, but affords no

This is especially true here, where the plight of the sensitive Inyo rock daisy may hang in the balance. As noted, Inyo rock daisy is a rare plant, and there remain only eight documented occurrences of it in the world. For species distribution modeling, one must have a minimum number of distinct occurrence points upon which to base the model. *See, generally*, Declaration of Gregory Suba (filed herewith) (“Suba Decl.”). The more occurrence points, the greater the statistical power of the model outputs.

Because rare plants by definition have fewer occurrence points available, a minimum number of occurrence points associated with robust rare plant models tend to range from 20-80 occurrences, depending upon distance between points and variation between the climate variables. *Id.* Models based on too few points generate results that will not have enough statistical power to predict the distribution of the species. *Id.* Any such analyses would result in a map where the degree of uncertainty unreasonably outweighs any benefit of predictability of the results. *Id.*

Furthermore, if the model has not been checked via fieldwork to ground truth the outputs, it further diminishes the power of the results. A habitat suitability model based on a maximum of eight points for Inyo rock daisy [*P. inyoensis*] raises many serious questions about the validity of the model results, yet there is no way for the public to verify answers since neither the model nor its underlying methods are publicly available. *Id.*

For these reasons, BLM’s reliance on a secret habitat suitability model does not comply with the requirements of the DRECP, and, thus, BLM’s EA, FONSI, Decision Record, and approval of Silver Standard’s PoO should be reversed.

C. BLM’s Violated the CMAs Designed to Protect Joshua Tree Woodlands.

BLM also violated the DRECP requirements to “monitor, eliminate, and avoid” impacts to Joshua tree woodlands. As noted above, the DRECP CMAs require BLM to monitor and prepare a habitat assessment and map detailing potential site and habitat assessments for Joshua tree woodlands, and avoid impacts to Joshua tree woodlands to the maximum extent practicable, except for minor incursions that do not undermine the protection of these woodlands. DRECP LUPA 93 (CMA-LUPA-BIO-1), 110 (CMA LUPA-BIO-SVF-1), and 111 (CMA LUPA-BIO-SVF-5). “Joshua Tree woodlands” are defined in the DRECP as an area “[e]venly distributed with Joshua trees at $\geq 1\%$ and *Juniperus* and/or *Pinus* spp. $< 1\%$ absolute cover in the tree canopy.” *Id.* at xvii. BLM’s approval of Silver Standard’s plan of operations violates each of these CMAs.

First, BLM failed to prepare a habitat assessment and map for Joshua tree woodlands prior to approving the Perdito Project. BLM seeks to excuse its failure to prepare this analysis by claiming, “[t]he project area does not include any Joshua tree woodlands, as they are defined by the glossary in the DRECP LUPA.” DR, Appx. B at 3. BLM provided

basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives.”).

no further explanation or analysis supporting its conclusion that the Perdito Project area lacks Joshua tree woodlands, and BLM failed to cite to any report, study or scientific assessment of the Joshua tree woodlands in the area. And, BLM is not permitted to rely on naked conclusions to support its position. *Native Ecosystems v. U.S. Forest Service*, 418 F.3d 953 (9th Cir. 2005) (rejecting NEPA analysis based on conclusions with no analysis because court was “unable to determine from the record that the agency is complying” with the law).

Moreover, recent analysis and examination by Petitioner California Native Plant Society calls into question the accuracy of BLM’s determination. *See, generally*, Suba Decl. Suba, who is trained as a conservation biologist with over 20 years experience, recently conducted a Joshua tree habitat evaluation—like the one BLM should have prepared—to determine if Joshua tree woodlands exist in and around the Perdito Project area. *Id.* at ¶¶ 12-28. In preparing this analysis, Suba relied on existing BLM databases and maps prepared during the DRECP decision-making process and additional aerial imagery, together with standard photo-interpretation skills. *Id.* The steps Suba completed in preparing his habitat evaluation to identify and estimate aerial extent of Joshua tree woodlands around the proposed Perdito exploratory project “follow standard operating procedures used by vegetation ecologists employing ‘heads-up digitizing’ to delineate and map vegetation Alliances (e.g., *Yucca brevifolia* Alliance, aka JTW) using the National Vegetation Classification System.” *Id.* at ¶ 22.

After reviewing the available BLM maps, data and aerial images, Suba concludes, “Considering the percent cover of Joshua trees detectable in aerial imagery of the project drill hole, pump, and tank locations, as well as the presence of younger, undetectable Joshua tree signatures, I conclude to a reasonable degree of scientific certainty that JTW [i.e., Joshua tree woodlands] are present at the Perdito project area as defined by the DRECP LUPA.” *Id.* at ¶ 27.

Because BLM concluded—without discussion, analysis, or documentation—that the Perdito Project contained no Joshua tree woodlands, BLM did not seek to avoid impacts to the maximum extent practicable, and there is nothing in the record to support BLM’s position here.

In fact, Suba’s maps, pictures and analysis shows that Joshua tree woodlands occur across the Perdito Project area. *See* Suba Decl., Images 1-7. BLM has made no effort to avoid impacts to Joshua tree woodlands in these areas, again running afoul of the DRECP and FLPMA’s “consistency” requirement.

D. BLM Violated Other Substantive FLPMA Standards.

BLM’s Decision Record approving Silver Standard’s PoO also violated FLPMA by failing to prevent unnecessary or undue degradation, causing undue impairment of scenic, scientific and environmental values of the California Desert Conservation Area, and failing to “assure against pollution of streams and waters within the CDCA.”

i. BLM Failed to Prevent Unnecessary or Undue Degradation.

FLPMA requires that the BLM “take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b). This duty is “the heart of FLPMA [that] amends and supersedes the Mining Law.” *Mineral Policy Center*, 292 F.Supp.2d at 42. “FLPMA, by its plain terms, vests the Secretary of the Interior [and the BLM] with the authority—indeed the obligation—to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land.” *Id.* BLM cannot approve a mining project that would cause UUD. 43 C.F.R. § 3809.411(d)(3) (iii).

“FLPMA’s requirement that the Secretary prevent UUD supplements requirements imposed by other federal laws and by state law.” *Center for Biological Diversity v. Dept. of Interior*, 623 F.3d 633, 644 (9th Cir. 2010). BLM complies with this mandate by exercising case-by-case discretion to protect the environment, including by approving or rejecting individual mining plans of operation.” *Id.* at 645, *quoting Mineral Policy Center*, 292 F.Supp.2d at 44. *See also Kendall’s Concerned Area Residents*, 129 IBLA 130, 138 (1994) (“If unnecessary or undue degradation cannot be prevented by mitigation measures, BLM is required to deny approval of the plan.”). To meet this duty, all operations “must take mitigation measures specified by BLM to protect public lands.” 43 CFR § 3809.420(a)(4).

Failure to require mitigation to reduce adverse impacts constitutes UUD. “Mitigation measures fall squarely within the actions the Secretary can direct to prevent unnecessary or undue degradation of the public lands. **An impact that can be mitigated, but is not, is clearly unnecessary.**” 65 Fed. Reg. 69998, 70052 (Nov. 21, 2000) (preamble to BLM’s 43 C.F.R. Part 3809 mining regulations) (emphasis added).

Here, the EA does not address, examine, or impose mitigation measures to eliminate or substantially reduce all of the potential impacts from the Perdito Project. For example, BLM fails to require that the sumps associated with each drill site be eliminated in favor of removable tanks (to avoid impacts to surface lands and associated resources and groundwater).

BLM’s failure to consider these options is particularly surprising here because BLM and federal courts have accepted the propriety of “closed loop” systems (which include removable water and waste tanks) to handle the disposal of drilling mud and waste in certain circumstances. The propriety of a “closed-loop” system has been recognized by the federal courts:

[T]he government and Lexam note that the Final EA recognizes that hazardous wastes will be a factor in the project, primarily from drill mud but also from drilling fluids and construction materials. The Final EA provides that Lexam must use a closed loop drilling system, placing all fluid and drill cuttings in tanks to be then transported and disposed off-site. Lexam expects to use water-based drilling fluids unless unforeseen conditions are present. In addition, Lexam is

required to keep all chemicals in a central site, to maintain a data file of all materials to be used, to use catch pans and liner systems, to follow all federal and state regulations regarding transportation and storage of hazardous materials, and will be required to create a spill prevention control and countermeasure plan as well as a stormwater management plan.

San Luis Valley Ecosystem Council v. United States Fish & Wildlife Serv., 657 F. Supp. 2d 1233, 1245 (D. Colo. 2009). BLM itself has acknowledged that a “closed-loop” system is ecologically preferable to one that employs a sump, including in the mining context. *See, e.g.*, BLM Environmental Assessment, DOI-BLM-CO-300-2012-012-EA, DAHC San Francisco #1 Well, January 2014, at 20, 47, 96 (discussing BLM mitigation measure requiring on-site portable storage tanks for drilling mud/waste/water) (excerpts attached hereto as Exh. 2).⁷

Here, BLM failed to consider the closed loop tank system or even requiring lining each sump, which would also reduce resource damage. Both of these are reasonable alternatives under NEPA that should have been fully analyzed, and mitigation measures that should have been required under FLPMA (particularly the closed-loop drilling systems noted above). In violation of FLPMA and NEPA, BLM failed to provide any explanation why the accepted closed-loop system was not analyzed or required.

In addition, BLM’s failure to conduct a proper NEPA analysis, as discussed in detail *supra*, violates not only NEPA, but also FLPMA’s substantive UUD standard:

Like NEPA, the [UUD] definition requires BLM to consider the nature and extent of surface disturbances resulting from a proposed operation and environmental impacts on resources and lands outside the area of operations. *Kendall's Concerned Area Residents*, 129 IBLA 130, 140-41 (1994); *Nez Perce Tribal Executive Committee*, 120 IBLA 34, 36 (1991); *see Sierra Club v. Hodel*, 848 F.2d 1068, 1078 (10th Cir. 1988) (nondegradation duty is mandatory). . . . To the extent BLM failed to meet its obligations under NEPA, it also failed to protect public lands from unnecessary or undue degradation.

Island Mountain Protectors, 144 IBLA 168, 202, 1998 WL 344223, *28 (internal citations omitted). For the reasons discussed in detail *infra*, BLM’s repeated violations of NEPA also constitute violations of FLPMA’s UUD standard.

⁷ Although these two examples are from oil and gas drilling, and not hardrock mining exploration, the feasibility and environmental protection aspects of on-site closed loop drilling systems are the same. *See, e.g., Gifford Pinchot Task Force v. Perez*, 2014 WL3019165, *18 (D. Or. 2014) (noting that BLM’s EA for a hardrock mineral exploration project required “[a]ppropriately sized sumps lined with impermeable liner and/or tanks would be used to contain recyclable drilling fluids. Sumps and/or tanks would be required to be placed within currently defined drill pads.”). This court further noted that BLM’s EA regarding the additional mitigation measure that all “solid materials such as cuttings would be appropriately disposed of off-site.” *Id.*

Finally, BLM's failure to adhere to the conservation management actions required in the DRECP also violates FLPMA's UUD requirement as well. For example, one of the "performance standards" that must be met in order to comply with the UUD standard is that all mining plans comply with the applicable RMP (such as the DRECP amendment to the CDCA RMP). *See* CFR 3809.420(a)(3).

ii. BLM Caused Undue Impairment of the Scenic and Environmental Values of the CDCA.

BLM also failed to meet the specific FLPMA requirements to "to protect the scenic, scientific, and environmental values of the public lands of the California Desert Conservation Area against undue impairment, and to assure against pollution of the streams and waters within the California Desert Conservation Area." 43 U.S.C. § 1781. BLM does not dispute and, indeed, confirms that all areas subject to the mining exploration are protected as California Desert National Conservation Lands under the DRECP. EA at 19, 22.

BLM's surface mining regulations, 43 C.F.R. § 3809 *et seq.*, specifically define UUD as occurring when operations "[f]ail to attain a stated level of protection or reclamation required by specific laws in areas such as the California Desert Conservation Area." 43 C.F.R. § 3809.5. This standard is a more environmentally protective standard than the UUD standard, which applies on all BLM lands:

Under FLPMA section 601(f), BLM can prevent activities that cause undue impairment to the scenic, scientific, and environmental values or cause pollution of streams and waters of the CDCA, separate and apart from BLM's authority to prevent unnecessary or undue degradation. The IBLA has agreed that BLM's obligation to protect the three enumerated CDCA values from "undue impairment" supplements the unnecessary or undue degradation standard for CDCA lands. *See Eric L. Price, James C. Thomas*, 116 IBLA 210, 218–219 (1990). Thus, BLM decisions with respect to development proposals in the CDCA are governed by both the "undue impairment" standard of subsection 601(f) and the "unnecessary or undue degradation" standard of section 302(b), as implemented by the subpart 3809 regulations.

66 Fed. Reg. 69998, 70018 (Nov. 21, 2000)(emphasis added).

Here, the EA, FONSI, and DR fail to even mention FLPMA's "undue impairment" standard for the CDCA, let alone require measures to "to protect the scenic, scientific, and environmental values of the public lands of the California Desert Conservation Area against undue impairment, and to assure against pollution of the streams and waters within the California Desert Conservation Area." FLPMA Section 601(f), 43 U.S.C. § 1781(f). As noted herein, the unmitigated adverse impacts to sensitive and protected plant species and trees, wildlife, water resources, scenic, and other environment values violate FLPMA and the 3809 regulations.

II. BLM Violated NEPA.

A. NEPA Requirements.

NEPA is our basic national charter for protection of the environment, and it has twin aims: to obligate federal agencies to consider every significant aspect of the environmental impact of a proposed action before proceeding with the proposed action, and to ensure the agency will inform the public that it has considered environmental concerns in its decision-making process. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983). NEPA requires federal agencies to “take seriously the potential environmental consequences of a proposed action” by taking a “hard look” at the direct, indirect and cumulative impacts of their proposed actions. *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 864 (9th Cir. 2005). *See also* 40 C.F.R. §§ 1500.1(a), 1508.7, 1508.8.

Under NEPA, an agency is required to prepare an environmental impact statement (EIS) for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). “As a preliminary step, an agency may prepare an [environmental assessment] to decide whether the environmental impacts of a proposed action is significant enough to warrant preparation of an EIS.” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

NEPA requires that the agency provide the data on which it bases its environmental analysis. *See Lands Council v. McNair*, 537 F.3d 981, 994 (9th Cir. 2008) (en banc) (holding that an agency must support its conclusions with studies that the agency deems reliable). This baseline analyses must occur before the proposed action is approved, not afterward. *See LaFlamme v. FERC*, 852 F.2d 389, 400 (9th Cir. 1988) (“[T]he very purpose of NEPA's requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need for speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action.”)

The establishment of a “baseline is not an independent legal requirement, but rather, a practical requirement in environmental analysis often employed to identify the environmental consequences of a proposed agency action.” *Am. Rivers v. FERC*, 201 F.3d 1186, 1195 n. 15 (9th Cir. 1999) (*American Rivers*).

B. BLM Unlawfully Ignored Visual Impacts of Mine Exploration on the Dark Sky Resource.

BLM erred in failing to examine the potential impacts of SSR’s mining exploration on the dark sky resources in and around the project area, including on the surrounding Wilderness Areas, Wilderness Study Areas, and Death Valley National Park. The nighttime environment is important as a natural and cultural resource, and naturally dark skies have inherent value that may have a profound effect on the quality of the many other natural and ecological resources, including wildlife, wilderness, recreation, astronomy, cultural and historic resources, and overall ecosystem function.

Accordingly, BLM must examine the impacts of SSR's proposed mining exploration on the areas dark sky resources either independently or as a required element of its environmental impact review on other natural resources.

This is especially true based on the exceptional landscape in and around the project area. As noted, Wilderness and Wilderness Study Areas hug the northern and southern boundaries of the project area, and these areas are rated as a Visual Resource Management (VRM) Class I, which means the objective for management of these areas is to preserve the existing visual resources and manage for natural ecological conditions. EA at 19, 22, 27-30. *See also* EA, Appx., Figures 1, 5, 7, 9. Night sky quality is an important wilderness value, contributing to the experience of solitude in a landscape free from signs of human occupation and technology.

In addition, Death Valley National Park is located about two miles to the east of the mine exploration area, and Death Valley NP harbors some of the darkest night skies in the United States. That dark sky resource is key to its certification as the third International Dark Sky Park in the U.S. National Park System. Death Valley National Park's night sky is near pristine and, in many places, offers views close to what could be seen before the rise of civilization. While Death Valley is comprised of rugged wilderness areas and is famous for its extreme climate, the night skies above the park are as fragile as the land below. The Park is largely free of its own sources of light pollution, but lights from surrounding areas—including distant Las Vegas and other cities—have an impact on the park's skies and desert nightlife.

Death Valley National Park skies are affected by only the smallest amounts of light pollution classifying it as a "Gold Tier" designation by the International Dark Sky Association. This "Gold Tier" status corresponds to an area containing only natural, non-polluted nighttime sky. Indeed, astronomical objects seen in Death Valley are available only to some of the darkest locations across the planet.

Death Valley National Park has made a priority of preserving its natural lightscapes, which the park believes will keep the nocturnal photopic environment within the range of natural variability. According to the park, a natural starry sky absent of anthropogenic light is one of Death Valley National Park's key scenic resources, and the recreational value of dark night skies is important to campers and backpackers.

Yet, despite this world-class natural resource in and around the proposed mine exploration area, BLM failed to conduct even the most rudimentary analysis on the impacts of Silver Standard's mine exploration on the night sky resource. Indeed, the EA only notes, "[n]ighttime lighting would be short-term and limited to only necessary use areas. Project activities would be confined to the designated routes and drill pads." EA at 4. This level of analysis is wholly inadequate to examine the impacts of the proposed mine exploration on the nighttime sky resource, especially when the proposed actions may impact the world-class night sky resource of Death Valley National Park and the surrounding Wilderness Areas.

BLM's refusal to undertake this analysis here is particularly surprising because BLM had previously agreed to conduct a dark sky analysis at the project implementation level.

More specifically, in 2015, BLM was in the midst of preparing the Desert Renewable Energy Conservation Plan (DRECP), which revised and amended the governing land use plans for the entire Mojave desert region. During this process, the National Park Service commented on the draft Environmental Impact Statement for the DRECP, and specifically requested BLM prepare an analysis of potential impacts of BLM's land use plan and subsequent implementation decisions on the surrounding dark sky resource. *See* Comments from National Park Service to BLM (Febr. 23, 2015) (Excerpts attached hereto as Exh. 3).⁸ The Park Service noted:

While there are several scattered mention of night lighting throughout the [DRECP DEIS], it is currently difficult for the NPS to determine what lighting measures will be specifically required and what the impacts will be from anticipated night lighting. Bringing night lightning into a single topic area will help decision-makers, reviewers, and project proponents understand and implement consistently minimal night lightning. Facility and construction lighting should be described, in addition to avian obstruction lighting. Among the topics to specifically address are the various types of light pollution (glare, sky glow), and the ways they affect the environment (scotopic vision, wildlife behavior, view of night sky, scientific discovery).

Id. at Comment Matrix, p. 47, 48. BLM rejected the Park Service's request for further night sky analysis at the RMP-planning level, noting:

The type of detailed analysis of night sky impacts that you request is more appropriate at the site-specific scale at the time a project is proposed. We believe the existing level of analysis for that resource in the DRECP is appropriate for this large-scale programmatic analysis. The BLM is happy to partner with the NPS when a project is proposed to model and analyze night sky impacts.

DRECP Proposed LUP and Final EIS, Response to Comments, p. A4-108 (Attached hereto as Exh. 4).⁹ BLM has now identified, examined, and approved a site-specific mine exploration project that may have impacts on the night sky resources—including by using unspecified industrial lighting to illuminate seven well pads—and, yet, BLM has failed to conduct any promised night sky analysis.

In fact, during the decision-making process for this site-specific project, the Park Service again weighed in and warned that BLM's proposed "[c]onstruction lighting and night-time operations could result in light pollution into the Death Valley Wilderness [in Death Valley National Park]." *See* Letter from Mike Reynolds Carl Symons (dated Nov. 28, 2017) (Attached hereto as Exh. 5). BLM dismissed the National Park Service's

⁸ Located at https://www.drecp.org/draftdrecp/comments/National_Park_Service_comments.pdf (last visited March 13, 2018).

⁹ Located at <https://www.drecp.org/documents/> (last visited June 13, 2018).

concerns, however, claiming that any impacts from construction and drilling equipment on night sky resources did not even rise to be an “issue” worthy of examination under NEPA; instead, according to BLM, any impacts of lighting on the world class night sky resource would be “extraneous background data.” DR, Appx. B at 25. BLM provided no explanation or assessment in support of its position, no scientific protocol supporting its assertion that night sky resources will not be affected, and BLM even failed to include any discussion of the expected amount and use of construction lighting and associated light pollution.

Under NEPA, BLM cannot simply ignore its obligations to take a “hard look” at the impacts of its decisions. *See S. Utah Wilderness Alliance v. BLM*, 2107 WL 6909036, Case No. 13-01060 (D. Utah. Feb. 5, 2016) (*SUWA*). In *SUWA*, conservationists challenged a BLM decision approving a proposal to drill 16 wells, arguing that BLM violated NEPA by failing to examine the potential impacts of noise on boaters and other recreationalists using the Green River, which was located between one-half to one mile from the project site. In response, BLM sought to excuse its failure to examine the impacts of noise by claiming that it determined that noise was not an issue warranting detailed analysis. *Id.* at *7. The district court disagreed, and held BLM’s NEPA analysis was arbitrary and capricious, stating:

The BLM must take a hard look at the potential environmental consequences of the proposed action. The “documents prepared as part of NEPA’s ‘hard look’ requirement must not only reflect the agency’s thoughtful and probing reflection of the possible impacts associated with the proposed project, but also provide a reviewing court with the necessary factual specificity to conduct its review.” *Id.* The repeated notation that the Interdisciplinary Team did not find the Sixteen–Well Project would affect recreation does not provide the Court with the necessary factual specificity to conduct its review. . . . Therefore, the Court holds the BLM acted arbitrarily in concluding without apparent basis that the project would have no significant sound impacts on recreation.

Id. *SUWA* directly undermines BLM’s position here. Like in *SUWA*, BLM here has failed to provide any explanation or assessment in support of its position that the lights emanating from Silver Standard’s mine exploration site—which will be powered by a generator delivered via helicopter—will have no effect (i.e., are not an “issue” in BLM’s parlance) on the dark sky resource. In both cases, the agency relies on nothing more than conclusory statements to support its position.

Moreover, like in *SUWA*, BLM also fails to provide any scientific protocol supporting its claim that dark sky resources won’t be affected by the mining exploration. And, in response to the Park Service’s concerns over the potential impacts of mine exploration on the dark sky resource, BLM offers no explanation or discussion of expected construction lighting and associated light pollution.

Like in *SUWA*, here BLM provided no explanation or assessment in support of its position, no scientific protocol supporting its assertion that night sky resources will not

be affected, and BLM failed to include any discussion of expected construction lighting, associated light pollution or any other factual basis upon which to determine the veracity of its conclusions. Accordingly, the State Director should find that the decision failed to comply with NEPA and reverse it.

C. BLM Failed to Collect, Analyze, and Disclose Baseline Conditions of Groundwater Resources As Required for the NEPA Analysis.

BLM violated NEPA by failing to provide any baseline information on conditions and presence of groundwater potentially affected by Silver Standard's exploratory drilling. As noted above, the establishment of the baseline conditions of the affected environment is a fundamental requirement of the NEPA process, because an inadequate environmental baseline precludes an accurate assessment of project impacts. *Oregon Nat. Desert Ass'n v. Jewell* 823 F.3d 1258 (9th Cir. 2016) (without accurate baseline information the agency cannot accurately assess project impacts); *N. Plains Resource Council v. Surface Transp. Board*, 668 F.3d 1067 (9th Cir. 2011) (reversing decision because inadequate baseline information); *American Rivers*, 201 F.3d at 1195 n. 15 (same).

Courts have held this baseline requirement applies equally to groundwater resources. In *Idaho Conservation League v. U.S. Forest Service*, 2012 WL 3758161 (D. Idaho 2012), conservation groups challenged the Forest Service's approval of a hardrock mining exploration project, arguing the Forest Service's environmental review failed to provide any baseline information on groundwater. In response, the Forest Service argued detailed information on groundwater resources was unnecessary because, in its judgment, the mine exploration would have "no impact" on groundwater resources. The district court disagreed, and held that NEPA requires more than "conclusory assertions that an activity will have only an insignificant impact on the environment." *Id.* at *14 (quoting *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005)). Instead, the Court required detailed baseline data, including "a baseline hydrogeologic study to examine the existing density and extent of bedrock fractures, the hydraulic conductivity of the local geologic formations, and [measures of] the local groundwater levels to estimate groundwater flow directions." *Id.* at *16. See also *Shoshone-Bannock Tribes of Fort Hall Reservation v. U.S. Dept. of Interior*, 2011 WL 1743656, at *10 (D. Idaho 2011) (rejecting agency analysis of impacts of mine on groundwater).

BLM's groundwater analysis here similarly fails to comply with NEPA. Like in *Idaho Conservation League*, BLM here failed to conduct, collect, or examine any baseline studies on groundwater, and the EA contains no analysis of the potential impacts of Silver Standard's mining exploration on groundwater resources. Indeed, the full extent of BLM's groundwater analysis totals a few sentences in the Appendices to the EA, in which BLM states,

Drilling proposed under the project is not anticipated to encounter groundwater. Water used for drilling will be obtained off-site and transported to the location. Drill hole plugging procedures described as

applicant committed environmental protection measures are deemed sufficient to prevent unnecessary or undue degradation of water resources. If water is encountered, drill hole plugging will be carried out in accordance with state and federal requirements. Potential impacts to groundwater are not anticipated to be to a degree necessitating detailed analysis.

Appendices, Interdisciplinary Team Analysis Record Checklist, p. 4.

BLM cannot meet its NEPA obligations by foregoing collection of baseline data, and, instead, “anticipat[ing]” that the impacts of a proposed decision will be insignificant. *Half Moon Bay Fishermans’ Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988). *See also Gifford Pinchot Task Force v. Perez*, 2014 WL 3019165, *28 (D. Or. 2014) (USFS/BLM EA for mineral exploration project failed to obtain and analyze baseline water quality data in violation of NEPA) (“Ninth Circuit cases acknowledge the importance of obtaining baseline condition information before assessing the environmental impacts of a proposed project.”) Indeed, in *Half Moon Bay*, the Ninth Circuit noted that the starting point of any NEPA analysis is the collection and description of baseline data, because, “without establishing ... baseline conditions ... there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA.” 857 F.2d at 510. *See also Ctr. for Biological Diversity v. BLM*, 422 F. Supp. 2d 1115, 1163 (N.D. Cal. 2006) (baseline is the “heart of the EIS” and must “be accurate and complete”). BLM’s current position turns *Half Moon Bay* and NEPA on its head, and the agency provides no support for this novel reading of NEPA.

BLM’s failure to collect any baseline data is particularly troubling here because much of the project area sits above the so-called Conglomerate Mesa Formation, which is a conglomerate sandstone and minor sandstone formation. According to the Declaration of Dr. Tom Myers (filed herewith), if fractured, this formation can transmit water and associated drilling solvents, lubricants, and compounds to discharge points. *See Declaration of Tom Myers, Ph.D.*, at ¶¶ 10-11.

According to Dr. Myers, who has over 25 years experience in hydrology in and around the Great Basin, “[t]he BLM has presented no evidence supporting its statement that the drilling is not anticipated to intersect groundwater. Drilling will go as deep as 1,000 feet, and the BLM presents no evidence that there is not groundwater to 1,000 feet below ground surface.” *Id.* at ¶ 14. In fact, the presence of two springs in the Inyo Mountains northwest of the project area suggests the existence of “shallow groundwater in the elevation range of the Perdito Project,” according to Dr. Myers. *Id.* at ¶ 13.

The combination of these three factors—i.e., a sandstone subsurface formation, lack of any evidence on existing groundwater resources, and shallow groundwater resources at a similar elevation of the Perdito Project—cause Dr. Myers to recommend that BLM prepare, at a minimum, a “baseline hydrogeologic study that would develop a conceptual flow and transport model to assess whether contaminants could affect important groundwater resources.” *Id.* at ¶ 15.

In the absence of this type of information, it is impossible for BLM to make an informed assessment of the impacts of the Perdito Project on groundwater. And, thus, there is no way for BLM to comply with NEPA. *Jewell*, 823 F.3d at 1266-67.

D. BLM Failed to Adequately Assess Impacts to Surface Waters.

BLM also failed to take a “hard look” at the impacts of Silver Standard’s mining exploration of surface waters, particularly because BLM failed to disclose the source of the water used in its exploration (up to 1,000 gallons/day); failed to disclose the solvents, lubricants, and other industrial compounds used in its mine exploration; never discussed and analyzed the full scope of Silver Standard’s fluid recirculation and disposal efforts; failed to examine the impacts of using only unlined sumps to filter and handle the industrial chemicals used in the mining; and failed to examine the potential impacts on wildlife of introducing 1,000 gallons of water per day in any otherwise arid environment.

BLM erred first in failing to disclose the source of the water to be used in Silver Standard’s exploration work, and BLM only claims that “[w]ater would be obtained from an existing and permitted source by Silver Standard.” EA at 11. *See also id.* at 17 (“Water would be sourced from a permitted/authorized source.”). While the source of the water raises a host of obvious environmental considerations—including loss of water resources for other purposes, introduction of pollutants into the Conglomerate Mesa environment from the source waters¹⁰ —BLM never examined or discussed from where Silver Standard was scheduled to obtain its water. The complete absence of any analysis of surface water issues dooms BLM’s EA, FONSI, and Decision Record.

General statements about the source of the 1,000 gallons/day of water needed for the Perdito Project are inadequate to provide the data and analysis needed for NEPA review. The source of the water is an important environmental concern and can have significant impacts on the environment. The project could have very different impacts depending on the source of water—for example, water that comes from already depleted groundwater basins or from wells that impact streamflow, or water that is contaminated. Because the source of water and the impacts of obtaining water for drilling were not disclosed or analyzed, the impacts of using water with potential contamination on these public lands were also not analyzed.

BLM also failed to adequately respond to Petitioners’ respective comments made in response to the EA. In its Decision Record, BLM claims that “Appendix A of the EA

¹⁰ A search of available public records shows that water quality at some wells in the nearby Keeler Community Services District, which is a small district supplying water to 58 retail customers, are out of compliance for several elements repeatedly, including arsenic and manganese, and coliform bacteria. *See* <http://inyoplanning.org/lafco/documents/KeelerCommunityServicesDistrict.pdf>; https://sdwis.waterboards.ca.gov/PDWW/JSP/Violations.jsp?tinwsys_is_number=10382&tinwsys_st_code=CA.

discloses that water resources are/were considered present in the area, but not affected to a degree that detailed analysis is required.” DR, Appx. B at 14. However, Appendix A of the EA is an Interdisciplinary Checklist that does not address the water source at all. See EA, Appx. A at 5 (addressing groundwater and surface on the site, waters of the U.S., etc.). The lack of meaningful response to comments is also a violation of NEPA.

Another central issue in understanding the potential ecological impacts of Silver Standard’s mining exploration—particularly under the PoO at issue here—is the presence and use of solvents, lubricants, and other industrial compounds used in the mine exploration. Yet, here again, BLM has refused to identify or discuss any potentially harmful material, chemical, or extremely hazardous substance Silver Standard intends to use on the exploration drilling. This information is critical not just to the potential for these chemicals to leach into the groundwater resources through the drilling process, but also to better understand the adequacy of Silver Standard’s sump and recirculation system.

BLM fails to provide even the most rudimentary information on this sump and recirculation system. BLM’s Decision Record allows the “[c]onstruction of seven drill pads with drilling fluid containment sumps, as needed, on top of previously disturbed and reclaimed drill pad sites. The containment sumps would measure less than five feet by five feet, by four feet deep.” EA at 10. After drilling is complete, “the sumps will be allowed to dry and then be backfilled,” and Silver Standard will drain onto the land surface any remaining water untreated from the tanks or trucks. DR at 3; EA at 17. See also DR at 6 (same). The EA contains no discussion of the time it will take to dry these sumps or how the wildlife will be protected from accessing these toxic waters while they are drying. The EA also fails to discuss and analyze the impact of leaving dried, backfilled, unlined sumps on these public lands containing toxic elements from drilling fluids and other machinery that could be mobilized in the environment after rain and snow events.

The EA acknowledges that the introduction of water into the arid Conglomerate Mesa can attract wildlife, but BLM never addresses the impact on wildlife of use and disposal of this water. Indeed, BLM completely misapprehends the problems, focusing its remedial efforts on eliminating the use of open water stock tanks on the Perdito Project. Compare EA at 17 (noting that a “300- to 500-gallon stock tank” would be located at each drill site. . . . [and] [t]he stock tank would be fit[ed] with a wildlife egress route”); with DR at 6 (noting that all water would be enclosed in tanks). While open, standing water on the Conglomerate Mesa does present an attractant to wildlife—as BLM acknowledged—BLM completely ignores the equally problematic impacts to wildlife that may be attracted to the drill sites by water used for the drilling. In this very arid region, even a small amount of water is attractive to wildlife and *may attract them into harm’s way*.

Petitioners raised these issues in their respective comments, and BLM again failed to even address the use and disposal issue. See DR, Appx. B at 5 (stating only “[t]here will be no open water sources”). See also *id.* at 6 (“Water will be enclosed in tanks . . .”). Because BLM’s environmental review failed to address the important question of how

water is used at the site, including how draining excess water from trucks and tanks onto the land surface will affect wildlife and other resources, the environmental review is inadequate.

In addition, BLM never examined viable alternatives to addressing the sump and water use and disposal issue during drilling, including measures that would require the applicant to protect wildlife from accessing the sumps when filled with wastewater. In addition, BLM should have considered additional protection and reclamation measures, such as requiring liners in the sumps, closed-loop tanks (as discussed above), and/or removing the dried drilling waste for proper disposal off of these fragile public lands.

In short, BLM cannot meet its obligations by simply ignoring impacts to surface waters from Silver Standard's approved PoO.

E. BLM's Analysis on Impacts to Natural Scenic Values is Unlawful.

1. Visual Resources Management Analysis.

BLM is required to manage public lands to protect scenic vistas and natural scenic values. 43 U.S.C. §1708(a)(8) (FLPMA) (noting that it is the policy of the United States that the public lands be managed in a manner that will protect the quality of the "scenic" values); 43 U.S.C. § 1702(c) (identifying "natural scenic" values as one of the resources for which public land should be managed); 43 U.S.C. § 4331(b)(2) (NEPA) (requiring protection of "esthetically pleasing surroundings"). *See also* BLM Handbook, H-8400-1(.02), (.06)(A) (identifying BLM's "stewardship responsibility" to "protect visual values on public lands . . . in a manner which will protect the quality of the scenic (visual) values.")¹¹. BLM undertakes this stewardship responsibility by preparing a so-called Visual Resources Management (VRM) analysis prior to approving any action that may impact scenic vistas or natural scenic values on BLM-administered public lands. *See* BLM Manual 8431, Visual Resources Contrast Rating.¹²

BLM's VRM analysis is a stepped process, in which BLM sequentially: (1) obtains the project description; (2) identifies VRM objectives; (3) selects Key Observation Points (KOPs); (4) prepares visual simulations; and (5) completes a visual contrast rating. *Id.* at 2-3 (unpaginated).

The heart of the VRM analysis is the selection of Key Observation Points (KOPs), which are viewpoints selected in areas where people are present and/or have public sensitivity, from which to evaluate the visual contrast that would be created if the proposed project were built. According to BLM, "[f]actors that should be considered in selecting KOP's

¹¹ Located at https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_H-8410.pdf (last visited June 14, 2018).

¹² Located at <https://www.blm.gov/download/file/fid/20550> (last visited June 14, 2018).

are; angle of observation, number of viewers, length of time the project is in view, relative project size, season of use, and light conditions.” *Id.* at 2 (unpaginated).

After selecting appropriate KOPs, the next step is determining visual impact is completing a visual contrast rating. The visual contrast evaluation is designed to see any visual contrast at KOPs between the project and its location, and the visual contrast rating—or contrast rating—compares the features of the proposed project to the features of the existing landscape, focusing on form, line, color, and texture. *Id.* See also *id.* at 5 (unpaginated). The degrees of contrast are rated as none, weak, moderate, or strong, and the factors to be considered when choosing a rating are distance, angle of observation, length of time the project is in view, relative size or scale, seasons of use, light conditions, recovery time, spatial relationships, atmospheric conditions, and motion. *Id.* at 4 (unpaginated).

Once BLM selects appropriate KOPs and completes a visual contrast rating, BLM then determines whether the observed contrast between the natural scenic values and the impacts of the proposed actions is consistent with the areas VRM objectives. *Id.* at 5 (unpaginated). If BLM identifies any adverse visual contrasts, it must prepare mitigation measures designed to reduce the contrasts. *Id.*

2. BLM Arbitrarily Eliminated Two Key Observation Points from Its VRM Review.

BLM violated NEPA’s “hard look” requirement when it eliminated from its VRM assessment two Key Observation Points recommended by Silver Standard’s own consultant without any analysis or discussion. According to BLM Manual 8431, which describes in detail the requirements for a visual contrast rating under BLM’s VRM analysis, selecting appropriate Key Observation Points (KOPs) is key to understanding the visual impacts of an agency decision. See Manual 8431 at p. 2 (unpaginated)¹³. Indeed, these KOPs are the “most critical viewpoints” to determining the visual impacts, and should be located along commonly travelled routes or other likely observation points. *Id.* In the absence of appropriate KOPs, there is no way for BLM to complete an adequate VRM analysis.

Silver Standard’s VRM consultant (i.e., SRK Consulting) proposed that BLM review the visual impacts of its exploration proposal from 5 KOPs, which, according to SRK Consulting, would allow SRK Consulting to complete a VRM analysis from the most critical viewpoints in and around the exploration area. See Exh. 1 (SRK Memo). As noted above, these proposed key points included KOP 4, which was located on Conglomerate Mesa peak above a designated hiking trail, and KOP 5, which was located approximately 2.5 miles away in the Malpais Wilderness area, from a vantage point where two drill pads would be visible. *Id.* According to SRK Consulting, these KOPs were designed to capture the intermediate and long-distance visual impacts of the Perdito Project. *Id.*

¹³ Located at <https://www.blm.gov/download/file/fid/20550> (last visited June 11, 2018).

In its final Environmental Assessment, however, BLM eliminated both KOP 4 and KOP 5, and BLM focused its VRM analysis only on KOPs 1-3. EA at 70-72. Importantly, BLM never discussed or examined why it chose to ignore and reject SRK Consulting's proposed KOPs. *Id.* Indeed, BLM never even mentions these additional KOPs, or whether the existing VRM analysis from the three KOPs adequately captures the VRM impacts at KOPs 4-5, including the intermediate and long-distance visual impacts of the Perdito Project.

BLM cannot meet its NEPA obligations by arbitrarily limiting its consideration of the ecological impacts of its decision, and ignoring SRK's viewpoint and conclusions that five KOPs were needed to adequately establish the visual impacts of the Perdito Project. Under NEPA, agencies must ensure the professional integrity of their environmental analyses, which requires an agency to respond to conflicting or responsible opposing viewpoints. *Earth Island Institute v. U.S. Forest Service*, 442 F.3d 1147 (9th Cir. 2006). Here, BLM never even responds to SRK's position that a full and proper VRM review examining visual conflicts from five KOPs.

BLM State Director cannot defer to the Ridgecrest Field Office on the selection of appropriate KOPs, and a court will not defer, because while deference may be appropriate in some circumstances, deference is only appropriate to the extent that the agency utilizes, rather than ignores, the analysis of its experts." *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 685 (D. D.C. 1997) (citing *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 483 (W.D. Wash. 1988)). Here, SRK Consulting recommended a VRM assessment from five different vantage points (or KOPs), and BLM ultimately ignored this approach. Accordingly, deference is inappropriate.

PETITION FOR STAY

Pursuant to 43 C.F.R. § 4.21, Petitioners respectfully request that the State Director grant their petition for a stay of the challenged DR, EA, FONSI, and any agency actions in reliance on the unlawful NEPA analysis. Petitioners are likely to succeed on the merits of their claims that BLM violated NEPA, FLPMA, and the APA in approving the Perdito Project EA, Decision Notice, FONSI, and PoO. Moreover, a stay of BLM's decisions and the mine exploration are necessary to prevent irreparable harm to the environment and Petitioners. In contrast, a brief stay while the State Director deliberates will not harm BLM or any other party. Finally, the public interest favors environmental protection and legal compliance in this case. Petitioners therefore meet all the requirements for a stay.

I. LEGAL STANDARD FOR A STAY

To prevail on a petition for stay, the appellant must demonstrate that: (1) the balance of harms weighs in favor of granting a stay; (2) the appellant is likely to succeed on the merits of the appeal; (3) irreparable harm to the appellant and resources is likely if a stay is not granted; and (4) the public interest favors granting a stay. 43 C.F.R. § 4.21(b)(1).

In balancing the likelihood of movant's success against the potential consequences of a stay on the other parties, it has been held that it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and, thus, more deliberative investigation. *Wyo. Outdoor Council Inc.*, 153 IBLA 379, 388 (2000) (internal quotes omitted).

II. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS.

In requesting a stay, an appellant need only raise "serious questions" going to the merits. *Wyoming Outdoor Council*, 153 IBLA 379, 388 (2000); *Sierra Club*, 108 IBLA 381, 384–85 (1989). An appellant's likelihood of success need not be "free from doubt." *Jan Wroncy*, 124 IBLA 150, 152 (1992); *Island Mountain Protectors*, 144 IBLA 168 (1997).

Petitioners meet these standards. As explained above, BLM's EA, FONSI, DN, and BLM's approval of Silver Standard's PoO were based on inadequate environmental analysis in violation of NEPA, failed to comply with the applicable land use plan in violation of FLPMA, and are arbitrary, capricious, and an abuse of discretion in violation of the APA. Petitioners are thus likely to succeed on the merits of these claims.

III. PETITIONERS WILL SUFFER IRREPARABLE HARM IS A STAY IS NOT GRANTED.

If the Perdito Project is allowed to move forward, Petitioners will suffer irreparable harm to their respective interests in the affected wildlife and wildlands. Petitioners will also suffer irreparable harm from the BLM's bureaucratic commitment to permitting mine exploration on Conglomerate Mesa even if NEPA compliance is later demanded.

The Supreme Court has stated repeatedly that "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e. irreparable." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987). "If environmental harm is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Id.* Such development causes irreparable harm because "once the desert is disturbed, it can never be restored." *Save Our Sonoran v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005).

As detailed above, the Perdito Project threatens irreparable harm to public lands and resources of Conglomerate Mesa, including: introducing 1,000 gallons of water per day into an arid desert environment; permitting the use of undisclosed drilling solvents, lubricants, and industrial compounds over Conglomerate Mesa Formation, with undetermined and unexamined risks that any fractures resulting from the exploration process will transmit these solvents into the local groundwater; allowing industrial uses of occupied habitat for the Inyo rock daisy, which occur at only eight locations worldwide, and in direct contravention of the governing DRECP; altering the night sky

environment of Death Valley National Park; and adding further scars and altering and modifying the exceptional visual qualities of Conglomerate Mesa.

In addition, as described in the attached declarations of Thomas Budlong, Todd Vogel, Gregory Suba and John Louth, permitting the Perdito Project to begin mine exploration threatens irreparable harm to their respective recreational, educational, business, health, scientific, archaeological, and aesthetic interest in Conglomerate Mesa and its plants and wildlife. For example, Thomas Budlong has been recreating and conducting field investigations and research on Conglomerate Mesa— and publishing the results of his investigation – for almost a generation, and he has averred that the Perdito Project will inhibit his ability and willingness to recreate, research and do field work on Conglomerate Mesa. *See, generally*, Budlong Decl.

For his part, Todd Vogel has been leading youth on annual backpacking trips in the California Desert, including trips to Conglomerate Mesa, since 1988, as well as routinely recreating personally on the Mesa because its combination of wilderness-level solitude, expansive views, rich history and unique plant and animal life make it a special destination. Vogel Decl., ¶¶ 3-4, 9-10. Vogel has also stated that Perdito Project will destroy the peace and solitude Conglomerate Mesa provides, and it would further interfere with his recreational tourism business. *Id.* at ¶¶ 10-13. The Declarations of Greg Suba and John Louth further amplify many of these same harms likely to flow from the Perdito Project. *See, generally*, Suba and Louth Declarations.

Petitioners will also be irreparably harmed by BLM’s violations of NEPA, as discussed in detail above. *South Fork Band Council of Western Shoshone of Nevada v. U.S. Dep’t of Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (“likelihood of irreparable environmental injury without adequate study of the adverse effects and possible mitigation is high”). Permitting BLM to move forward without first preparing an adequate analysis of the ecological impacts of the Perdito Project will skew BLM’s decision-making toward its original decision to approve mining exploration. “Once large bureaucracies are committed to a course of action, it is difficult to change that course—even if new, or more thorough, NEPA statements are prepared and the agency is told to ‘redecide.’” *Com. of Mass. v. Watt*, 716 F.2d 946, 952–53 (1st Cir. 1983). Thus, if BLM is allowed to proceed before the environmental analysis is complete, there is a risk that the NEPA analysis will be skewed toward the agency’s original decision. *Id.*

Courts have routinely held that this phenomenon justifies a preliminary injunction in NEPA cases, even where no immediate environmental harm is likely. In *Davis v. Mineta*, 302 F.2d 1104 (10th Cir. 2002), for example, the Tenth Circuit concluded that plaintiffs would suffer irreparable injury if a highway project was allowed to proceed because “if any construction is permitted on the Project before the environmental analyses is complete, a serious risk arises that the analysis of alternatives required by NEPA will be skewed toward completion of the entire Project.” 302 F.3d at 1115.

Similarly, in *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989), the First Circuit found a likelihood of irreparable harm from delayed NEPA compliance, reasoning as follows:

A district court, when considering a request for a preliminary injunction, must realize the important fact of administrative life that we described in *Watt*: as time goes on, it will become ever more difficult to undo an improper decision (a decision that, in the presence of adequate environmental information, might have come out differently). The relevant agencies and the relevant interest groups (suppliers, workers, potential customers, local officials, neighborhoods) may become ever more committed to the action initially chosen. They may become ever more reluctant to spend the ever greater amounts of time, energy and money that would be needed to undo the earlier action and to embark upon a new and different course of action. And the court, under NEPA, normally can do no more than require the agency to produce and consider a proper EIS. It cannot force the agency to choose a new course of action. Given the realities, the farther along the initially chosen path the agency has trod, the more likely it becomes that any later effort to bring about a new choice, simply by asking the agency administrator to read some new document, will prove an exercise in futility.

Id.; see also *Com. of Mass. v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983) (finding a likelihood of irreparable harm from non-compliance with NEPA even though the challenged oil and gas lease sale did not entitle lease buyers to drill for oil immediately); *Colorado Wild v. United States Forest Serv.*, 523 F. Supp.2d 1213, 1220-21 (D. Colo. 2007) (finding irreparable harm in “difficulty of stopping ‘a bureaucratic steamroller’ once it is launched”).

Here, too, the more time and resources BLM and Silver Standard are allowed to invest in moving forward with hardrock mine exploration on Conglomerate Mesa, the greater the likelihood that future compliance with NEPA and FLPMA will prove to be a merely empty gesture. Therefore, despite the additional bureaucratic steps BLM would have to take before the further effects of wide scale mining and exploration are fully realized, the failure to follow NEPA creates a risk that real environmental harm will occur. Thus, a stay is necessary to ensure that Petitioners can obtain meaningful relief in this case.

IV. THE BALANCE OF HARM FAVORS PETITIONERS.

In contrast, there is little to no harm to BLM from a stay. BLM may claim that a stay would result in economic harm to Silver Standard, but this prong of the test is not concerned with harm to non-parties. This is also not a case where an injunction would halt ongoing economic activity; it would simply delay mine exploration until BLM fully adheres to its legal requirements under NEPA and FLPMA.

Further, economic harm to Silver Standard is not credible or irreparable, especially where any stay would be only temporary. See *S. Fork Band Council*, 588 F.3d at 728 (economic injuries to mining operations temporary); *S.E. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1101 (9th Cir. 2006) (“there is no reason to believe that the delay in construction activities caused by the court’s injunction will reduce significantly any future economic benefit that may result from the mine’s operation”); *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 738 (9th Cir.

2001) (“loss of anticipated revenues . . . does not outweigh the potential irreparable damage to the environment”).

Moreover, granting a stay actually furthers BLM’s interests, insofar as it will allow the agency to adequately study the potential impacts of mine exploration on sensitive plant species, wildlife, groundwater, surface water, and the dark sky resources in and around the Conglomerate Mesa area, as well as reduce the likelihood and need for these sensitive plant species to be listed under the ESA, and will therefore avoid constraining BLM’s flexibility in managing public lands across these species’ range.

V. THE PUBLIC INTEREST SUPPORTS A STAY.

Finally, the issuance of a stay would serve the public interest. Allowing mining exploration to proceed with National Conservation Lands would leave critical groundwater, sensitive species habitat and populations, and visual and dark sky resources vulnerable to permanent damage. Courts have “held time and again that the public interest in preserving nature and avoiding irreparable injury outweighs economic concerns” *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005).” Here, too, the risk to the environment is of greater public interest than moving forward with Silver Standard’s mining exploration. To allow Silver Standard to begin mining exploration before BLM has fully analyzed the project’s impacts, or ensured compliance with the applicable land use plan, would harm the public’s interest in reasoned government decision-making and lawful management of public lands. *See Sierra Forest Legacy*, 526 F.3d at 1234 (*citing Amoco*, 480 U.S. at 545) (noting the public’s inherent interest in enforcing environmental laws).

CONCLUSION

Petitioners request that the State Director fully consider this Petition and vacate the FONSI/DR, EA, and PoO approval and remand the matter to the Ridgecrest Field Office with instructions to comply with FLPMA and NEPA. In the meantime, Petitioners ask the State Director to stay the Project approval to preserve the status quo until Petitioners’ claims can be properly decided. If a stay is not issued, substantial and irreparable harm to Petitioners’ interests and the environment will occur.

For the reasons set forth above, the Petitioners are entitled to a stay of the decision at hand. The balance of harms tips decidedly in Petitioners’ favor. This Petition raises significant and credible questions concerning the legality of BLM’s decision, on which Petitioners are likely to succeed on the merits. The Petitioners and public resources will suffer irreparable harm if the Project is allowed to proceed absent a legally-sufficient NEPA review.

Thank you for your consideration of this Request for State Director Review. Petitioners also request an in-person meeting with the State Director pursuant to 43 C.F.R. § 3809.805(b). We are available at your earliest convenience, and we request a meeting no later than the week of June 25, 2018.

Respectfully submitted this 15th day of June, 2018.



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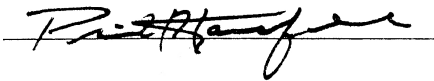
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