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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Plaintiffs,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT, et al.,

Defendants,

and

P4 PRODUCTION, L.L.C.,

Intervenor-Defendant.

Case No. 4:21-cv-182-BLW

PLAINTIFFS' COMBINED RESPONSE/REPLY ON CROSS MOTIONS FOR SUMMARY JUDGMENT

(ECF NOS. 58, 61, 64)

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INTRODUCTION

Bureau of Land Management (BLM) unlawfully approved P4 Production, LLC's (P4) Caldwell Canyon Mine. Relying on a cursory and contradictory National Environmental Protection Act (NEPA) analysis, BLM authorized 40 years of open pit phosphate mining with significant adverse consequences for air quality, radiation exposure risk, imperiled sage-grouse habitat, and water quality in the upper Blackfoot River watershed. This case is hardly about flyspecking a NEPA document. By authorizing Caldwell Canyon Mine, BLM not only violated NEPA, but also several substantive obligations under the Federal Land Policy and Management Act (FLPMA) and Clean Water Act (CWA) for protection of sage-grouse and water quality.

The Court should remedy these deficiencies by vacating BLM's Final Environmental Impact Statement (FEIS), Record of Decision (ROD), and subsequent authorizations for the Caldwell Canyon Mine.

ARGUMENT

I. PLAINTIFFS HAVE STANDING.

Neither BLM nor P4 challenge Plaintiffs' Article III standing. The Court should hold that Plaintiffs have standing.

II. BLM VIOLATED NEPA.

A. BLM's irreconcilable statements about the Soda Springs Processing Plant violate NEPA.

BLM does not dispute that ore processing at the Soda Springs Plant is a reasonably foreseeable result of this action, meaning that it must be considered in the EIS. ECF No. 61-1 at 8–9[1] (quoting ROD statement "[o]re processing . . . is an indirect effect of the Caldwell Canyon Mine."); 40 C.F.R. § 1508.8(b); *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of the*

[1] Pin citations to docket entries refer to the author's pagination rather than the ECF pagination.

Interior, 588 F.3d 718, 725 (9th Cir. 2009) (holding that environmental impacts of off-site ore processing are "prime examples of indirect effects [of mine project] that NEPA requires be considered."). Still, BLM argues that it was proper to assume that the Soda Springs Plant would continue the same level of operation (and pollutant output) whether or not BLM authorized the Caldwell Canyon Mine and its 40-year supply of usable ore. BLM's argument is directly contradicted by BLM's assertions crediting the Caldwell Canyon Mine for saving jobs at the processing plant. AR071382, -84 (FEIS, 140, 142); *see also* AR026331, AR068481, AR068804 (noting that without the Caldwell Canyon Mine, the plant will close). BLM makes no attempt to reconcile these irreconcilable positions, leaving no dispute that its analysis is arbitrary and capricious. *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1175, 1196–97 (D. Colo. 2014); *Motor Veh. Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also WildEarth Guardians v. Bernhardt*, CV 17-80-BLG-SPW, 2021 U.S. Dist. LEXIS 20792, *30 (D. Mont. Feb. 3, 2021) (holding "when an agency chooses to quantify the socioeconomic benefits of a proposed action, it would be arbitrary and capricious for the agency to undervalue the socioeconomic costs of that plan by failing to include a balanced quantification of those costs").

Furthermore, BLM's assertion that Caldwell Canyon Mine development will not impact the duration or extent of impacts from the processing plant is explicitly contradicted throughout the record by BLM and others. AR004019 (ROD, 22) ("If phosphate ore from other mines is not available or developed to replace ore production from the Blackfoot Bridge Mine, P4 Production's Soda Springs plant would have to curtail production or shut down."); AR026555 ("No one on behalf of the City of Soda Springs is aware of an alternative source of ore and the City does not believe that such an assumption is reasonable."); AR026441 (County comment that if "Caldwell

Canyon Mine is not allowed to be built, P4 will run out of phosphate ore in the next few years"); AR068306; AR068481 (industry association comment that, without Caldwell Canyon Mine, phosphate would most likely have to come from China).

BLM's only support for its assumption that P4's plant would continue to operate using a different source of ore if Caldwell Canyon were not developed is a chart of mining projects in the district, including those owned or leased by companies other than P4. ECF No. 61-1 at 9 (citing AR071286–87). BLM specifically points to "exploration drilling to gather information about phosphate reserves on Trail Creek" and "mining on Ballard Lease expected in 2019." *Id.*[2] However, nothing suggests that Trial Creek or Ballard Lease would provide anywhere near the same volume of ore as Caldwell Canyon, which would keep the Soda Springs Plant operating for 40 years. *See* AR035877 (P4 has been investigating Trail Creek for over 20 years without any concrete plans for development); AR071286–87 (Ballard Lease was already mined decades ago and 2019 mining activity would not increase surface disturbance at this Superfund site). P4's latest declaration confirms that it stopped pursuing Trial Creek in 2019 and that Ballard Lease is not a substitute for Caldwell Canyon. ECF No. 64-2, ¶¶ 21–25. *Ctr. for Biological Diversity v. Dept. of Interior*, 623 F.3d 633, 647, 650 (9th Cir. 2010) (holding that agency's assumption of an alternative mineral source was unreasonable where "[t]here is nothing in the record supporting [the agency's] assumption"); *WildEarth Guardians v. BLM*, 870 F.3d 1222, 1235 (10th Cir. 2017) (Where BLM's "perfect substitution assumption lacks support in the record . . . this assumption is arbitrary and capricious.").

[2] P4 adds redundant citations to these same materials. ECF No. 64-1 at 6 (citing AR71286–87, AR71721, and AR24341 (identical FEIS and Biological Assessment tables noting Trail Creek exploration and Ballard Lease); AR35867-36026 (2013 Caldwell Canyon and Trail Creek exploration EA); and AR74643-78 (2013 Caldwell Canyon and Trail Creek exploration plan)).

Moreover, even if alternative, comparable sources were available, authorizing Caldwell Canyon development would still prolong impacts from the Soda Springs Plant for 40 years compared to the No Action alternative. *S. Fork Band Council,* 588 F.3d at 725.[3] BLM violated NEPA by ignoring the environmental and human health impacts of prolonging P4's ore processing operations. *Id.* at 725–26; AR071706–07 (asserting ore processing impacts including radiation exposure risk are "outside the scope of the analysis," and "would continue regardless of the project"); AR071324 (FEIS discussion of air emissions from Soda Springs Plant limited to the statement that the plant has an emissions permit).

B. BLM failed to take a hard look at impacts to greater sage-grouse.

BLM further violated NEPA by failing to take a hard look at the Caldwell Canyon Mine's direct, indirect, and cumulative impacts on greater sage-grouse.

1. <u>BLM overlooked important effects of the mine on greater sage-grouse habitat and populations.</u>

BLM violated its hard look mandate by presenting a misleading and incomplete picture of the mine's effects on greater sage-grouse. First, BLM failed to meaningfully account for functional habitat loss. Defendants do not dispute that functional habitat loss is an important consideration, but argue the EIS discussed the topic "thoroughly." The record does not support that claim. Of the various record citations Defendants provide, just two contain anything approximating an analysis of behavioral avoidance or fragmentation impacts. The first is a statement that the mine will increase noise so substantially at the Dry Valley lek that it may dissuade use of the lek. AR071362, AR071329. However, noise impacts to other habitat areas were not evaluated. The second is a

[3] The reasoning in *South Fork Band Council of Western Shoshone of Nevada,* 588 F.3d at 725–26, is on all fours with this case. The Ninth Circuit's decision did not turn on or even mention the "start-and-stop life cycle of gold mining" in Nevada, so BLM's attempt to distinguish the case on that basis is meritless. *Compare id*. with ECF No. 61-1 at 11.

reference to a section dealing not with sage-grouse but rather "wildlife and birds" generically. AR071275. It merely explains that the project may cause wildlife and birds to engage in "dispersal movements away from mining activities." *Id.* These two stray references to habitat avoidance do not amount to a "hard look" at the extent of functional habitat loss. Missing is any discussion of how much intact habitat around the Caldwell Canyon Mine sage-grouse may avoid, or how the project may further fragment available habitat patches and disrupt seasonal use patterns. And importantly, when describing the acres of sage-grouse habitat "loss or modification," BLM accounted for the project footprint alone. *See* AR071362 ("The action alternatives would result in a loss or modification to 113 acres of GHMA."); AR071229 (same); AR071276 (same).

P4 is obviously wrong that this issue is moot because the Slug Creek powerline will not be built. As Plaintiffs' opening brief explained, ECF No. 58-1 at 18, the mine pits, haul and service roads, supporting structures, and project noise are all likely to create functional habitat loss through behavioral avoidance and habitat fragmentation—risks BLM failed to meaningfully analyze.

In discussing the topic of functional habitat loss, Defendants attempt to downplay the habitat value of the project area for sage-grouse. They do not mention the numerous sightings of greater sage-grouse and sage-grouse signs in the project area, AR008054, AR015939, AR074236, AR071487; the multiple leks in the vicinity of the project, AR016533; or that most of the project area is designated habitat, AR016527, AR016533. Rather, they cherry-pick a passage stating that the project "is not within the current [sage-grouse] distribution area" and that "[n]o seasonal habitats have been identified for the project area." ECF No. 61-1 at 13 (quoting AR071476). Defendants cut off the next sentence, which explains why seasonal habitats had not been identified: "attempts at seasonal habitat mapping in proximity of the Project Area hadn't occurred" yet. AR071476. When BLM's contractor performed that analysis, it found that "41% of third-order

area is available breeding habitat, 19% of the area is available summer habitat, 17% of the area is available winter habitat." AR016519. Defendants also omit the part about the decades-old "Current Distribution" map being wrong. AR071477 (although project not within WDFW's 2002 "Current Distribution" map, lek activity indicates that sage-grouse "have been and continue to be present in this analysis area"). Finally, the "marginal" rating BLM's contractor assigned this habitat does not suggest it has lower value for the East Idaho Uplands population, as *all habitat* for that population was assigned the same "marginal" rating. AR071472. Rather, it underscores the precarious state of this sage-grouse population and importance of carefully studying and preserving the habitat patches and connectivity that remain.

The second key problem with the FEIS's discussion of sage-grouse impacts is that BLM failed to examine how the Caldwell Canyon project would impact the viability of the East Idaho Uplands population, a population already at "high risk." AR065171–72.[4] Defendants do not dispute that this was an important consideration. Instead, they attempt to piece together such an analysis themselves from assorted references, then claim that a greater risk of extirpation to the East Idaho Uplands population was implicitly considered because it is "correlated" to habitat loss. But none of this is spelled out in the FEIS, and BLM did not meaningfully analyze habitat loss either, for the reasons explained above. Neither do the record citations from P4 contain this analysis. Although the FEIS and Greater Sage-Grouse Habitat Assessment Technical Report describe the *current status* of the East Idaho Uplands population, missing is any analysis of how the mine will *impact* the viability of that population.

[4] The "East Idaho Uplands" population, as it is called in the FEIS, AR071353, appears to be synonymous with the "East Central Idaho" population described elsewhere. AR071455–73.

The final problem with the FEIS's discussion of sage-grouse impacts is BLM's failure to consider how the mine will impair connectivity between the East Idaho Uplands population and other adjacent populations. AR016531, AR065125 (illustrative maps of populations). The record citations from BLM and P4 do not show otherwise. The first set (AR071474, -82-83) pertains to the related but distinct concept of habitat connectivity—that is, the connectivity between habitat patches and seasonal use areas used by the same population. *See W. Watersheds Project v. Bernhardt*, 519 F. Supp. 3d 763, 797–800 (D. Idaho 2021); *Oregon Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 572–74 (9th Cir. 2016) (both noting important differences between "genetic" or "inter-population connectivity" and "habitat" or "intra-population connectivity"). The second citation (AR071353) merely explains that eastern Idaho sage-grouse populations are *already* relatively isolated—but does not analyze whether the mine will further impair inter-population connectivity. Likewise, the various citations from P4, to the extent they are relevant, again just discuss existing conditions or the distinct concept of habitat connectivity. *See* ECF No. 64-1 at 18. Defendants then pivot to the argument that a discussion of genetic connectivity was not necessary for various reasons, but the record confirms this issue is "critical" to species viability, and thus some discussion was warranted. AR036914 (noting that population connectivity is critical); AR062255 ("Pathways for movement within and between populations are critical for maintaining population viability"). Finally, counsel speculates that the distance (18 to 31 miles) separating the East Idaho Uplands population from adjacent populations already prohibits genetic interchange, but the record confirms sage-grouse cover far greater distances. *See* AR062178 (seasonal migrations of up to 100 miles have been recorded).

2. BLM failed to take a hard look at cumulative impacts to sage-grouse.

BLM also failed to meaningfully consider the cumulative impacts to greater sage-grouse. Defendants claim BLM took an aggregate approach to the cumulative effects analysis, but BLM did not provide the requisite "quantified or detailed information" even at an aggregate level. *See Bark v. U.S. Forest Serv.*, 958 F.3d 865, 872 (9th Cir. 2020). The most obvious omission was a cumulative analysis of sage-grouse habitat loss from other past, present, and future projects when added to this mine. Although the Greater Sage-Grouse Habitat Assessment Technical Report provides an estimate of *past* anthropogenic disturbances, AR071475, habitat losses from *future* projects are not similarly quantified. BLM notes that the cumulative effects sections for "wildlife" and "vegetation" both estimate of future surface disturbance, AR071341–42, AR071364, but neither section explains how much of this disturbance will occur in suitable sage-grouse habitat. Those FEIS sections also cover a different geographic area than the Greater Sage-Grouse Habitat Assessment Technical Report, prohibiting meaningful comparison to the existing habitat and anthropogenic disturbance figures reported in the Habitat Assessment. *Compare* AR071483 (analysis area of ~100,000 acres), *with* AR071289; AR071341 (analysis area of 452,000 acres). Even if it were possible to piece together a cumulative surface disturbance figure for sage-grouse habitat from the record, there is also no evidence BLM performed this analysis itself. This violated NEPA. *See, e.g.*, *Bark*, 958 F.3d at 872 (finding EA insufficient where it failed to "quantify cumulative [habitat] loss" for the spotted owl); *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 997, 994 n.1 (9th Cir. 2004) (finding EAs insufficient on same ground and noting this is among the impacts that are "susceptible to easy measurement").

BLM also failed to consider the *actual effect* of this scale of cumulative habitat loss to greater sage-grouse in this region. *See Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d 989 at 994–95, 997 (cumulative effects analysis insufficient where EAs did not discuss "the effect of this

[cumulative habitat] loss on the spotted owl throughout the watershed"). This omission is significant given that "cumulative effects . . . [can] greatly influence regional extirpation of sage-grouse." AR036909; AR062265 ("Sage-grouse eventually avoid areas with a high density of anthropogenic features even if site-scale conditions are suitable . . . there is mounting evidence that sage-grouse are sensitive to human disturbances and will avoid areas they once used if those areas have been altered by anthropogenic features that exceed some threshold."). Although the short cumulative effects section for wildlife lists several types of impacts wildlife commonly face (e.g., mortality and habitat loss), *see* AR003672, it is silent as to the degree to which *any* species will face these harms. Such "general statements about possible effects" are insufficient to satisfy NEPA. *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 995; *Bark*, 958 F.3d at 872.

The cumulative effects discussion also overlooks how projects overlapping in time or space might interact synergistically to affect the species in ways not reflected by a simple tabulation of their size. *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 995 ("sometimes the total impact from a set of actions may be greater than the sum of the parts"). One example is the Dairy Syncline Mine—a project located just 2 miles to the south of Caldwell Canyon, AR071465, that was approved around the same time. *See* AR071287 (simply listing Dairy Syncline without even disclosing its close proximity or sage-grouse impacts in isolation). Given their proximity, the Caldwell Canyon and Dairy Syncline mines have the obvious potential to harm the same sage-grouse habitat and birds, including through the accumulation of noise, traffic, and fragmentation. "Preventing or adequately mitigating [such impacts] is the fundamental purpose of NEPA's requirement that agencies analyze cumulative impacts, and [there is] no basis in the record to assess whether [BLM] has taken the necessary steps to consider this possibility." *Bark*, 958 F.3d at 872–73.

In sum, BLM failed to provide "quantified or detailed information" about the cumulative impacts to sage-grouse from all past, present, and future projects, as NEPA requires. *Bark*, 958 F.3d at 872; *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 993.

C. BLM failed to take a hard look at impacts to water resources.

1. BLM failed to take a hard look at effects of selenium-contaminated dust.

BLM failed to adequately disclose how it analyzed selenium contaminated fugitive dust, or how those emissions will impact the Blackfoot River or its tributaries. BLM concluded that "[d]esignated uses in the Blackfoot River . . . would not be affected because selenium, other COPCs, and sediment would not be added," AR071312 (FEIS, 70), which BLM now concedes is an "inaccuracy," ECF No. 61-1 at 38 n. 18. Based on undisclosed modeling calculations, BLM also concluded that "it is very unlikely that the dust would increase the selenium concentration in the river water to the acute or chronic aquatic life standards (0.02 and 0.005 mg/L, respectively)." AR071312. However, the Blackfoot River is impaired pursuant to CWA section 303(d), 33 U.S.C. § 1313(d), which means that selenium concentrations in the river already exceed state standards. AR071300 (FEIS, 58). Thus, the FEIS's discussion and conclusions about surface water quality impacts mischaracterize both the baseline water quality and the project's additive impact.

BLM's David Alderman put it this way:

> I am a little nervous about disclosing any selenium deposition into the Blackfoot River as the Blackfoot is listed for selenium . . . Comparing this concentration [from the project] to the state and federal criteria is problematic as it does not take into account the existing selenium concentrations.

AR026258. Rather than resolving this "problematic" issue by disclosing the project's contribution to an already impaired river, BLM's analysis of surface water impacts continued to rely on a model that ignored the existing contamination in the river and exaggerated the river flow volume to understate the impacts. AR071312, AR020542. BLM then concluded, contrary even to its own

modeling, that "selenium . . . and sediment would not be added" and "concentrations and sediment loads would not increase." AR071312. This fails NEPA's hard look requirement, which "'should involve a discussion of adverse impacts that does not improperly minimize negative side effects.'" *League of Wilderness Defs./Blue Mts. Biodiversity Projecty v. U.S. Forest Serv*., 689 F.3d 1060, 1075 (9th Cir. 2012) (citation omitted).

BLM's newly disclosed documents underscore Plaintiffs' and EPA's concerns that selenium dust impacts could be significant and were understated by BLM's black box calculations. AR027242–43; AR004057 (ROD, A-2) (EPA repeatedly questioned the conclusion that impacts were unlikely, use of undisclosed model, and lack of appreciation for seasonal impacts on dust and stream flows). Like EPA, Idaho Department of Environmental Quality (IDEQ) seriously questioned BLM's opaque calculations and its failure to account for seasonal fluctuations in selenium-laden dust, stating:

> How is [the annual mass of selenium dust] applied as a function of time? It doesn't seem appropriate to spread the mass applied as a constant rate over a year as it seems most loading would occur as short term events where impacts could be significant, but dissipate quickly. It's unclear how this example calculation was completed or the assumptions involved.

AR077314. In response, BLM calculated selenium concentrations under the hypothetical scenario that all dust emissions occurred over nine days, *id.*, but it continued to use admittedly inflated stream flow data and ignore that the critical fact that Blackfoot River already exceeds selenium water quality standards, AR020542. This in turn caused BLM's calculations—whether spread over nine days or 365[5]—to understate resulting selenium concentrations by orders of magnitude, in

[5] BLM does not contend that either period is a reasonable approximation for this project and did not calculate impacts for any other time period. Without any reasonable estimate of the duration or resulting concentration of selenium, the public is left in the dark about dust impacts.

violation of NEPA. *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964–65 (9th Cir. 2005) (holding that EIS violated NEPA where inaccurate averaging skewed the data); *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2004) (citing 40 C.F.R. §1500.1(b)) (requiring "high quality information and accurate scientific analysis").

None of this is intelligible from the FEIS, however, because the model, calculations, and erroneous assumptions were not disclosed or described. *See* AR071311–12 (FEIS, 69-70); *see also* AR020534–50 (fugitive dust technical evaluation does not include any nine-day calculations). BLM argues that it did disclose details of water quality modeling, but the bulk of its citations are to groundwater quality studies and models, not the impacts of dust on surface water that is at issue here. *See* ECF No. 61-1 at 19–20. The discussion of the latter is at pages 69 and 70 of the FEIS, which does not contain any information about modeling methods, except to disclose the river volume input without also disclosing that it is an exaggerated value which biases the results downward, making the selenium concentration appear lower. AR071312. NEPA, in contrast, "requires up-front disclosures of relevant shortcomings in the data or models." *Lands Council v. Powell*, 395 F.3d at 1032.[6] Here, BLM did not make its full calculations available to the public

[6] *See also Blue Mtns Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (agency's "defense of its position must be found" in the NEPA document itself, not just somewhere in the voluminous record); *Save the Yaak Committee v. Block*, 840 F.2d 714, 718–19 (9th Cir. 1988) (biological assessment was not functional equivalent of NEPA analysis and also came too late); *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1287 (1st Cir. 1996) (existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot "bring into compliance with NEPA an EIS that by itself is inadequate." (citations omitted)), *cert. denied sub nom., Loon Mountain Recreation Corp. v. Dubois*, 117 S. Ct. 2510 (1997); *Massachusetts v. Watt*, 716 F.2d 946, 951 (1st Cir. 1983) ("[U]nless a document has been publicly circulated and available for public comment, it does not satisfy NEPA's EIS requirements.") As this authority demonstrates, the paperwork reduction regulation, 40 C.F.R.§ 1502.21, does not excuse BLM's failure to disclose any information about its calculations in the FEIS itself. *See also* 40 C.F.R. § 1502.24 (EIS shall identify any methodologies used).

until two days after it filed its brief in this case, when it filed its fourth administrative record supplement. ECF No. 63. This violates NEPA. *Lands Council v. Vaught*, 198 F.Supp.2d 1211, 1238 (E.D. Wash. 2002); *see also City of Sausalito v. O'Neill*, 386 F.3d 1186, 1214 (9th Cir. 2004) (Material may not be incorporated by reference when it is not reasonably available for inspection by potentially interested persons).

There is also no support in BLM's model or anywhere else in the record for BLM's assumption that only a small (unspecified) portion of the selenium dust will enter surface waters. Indeed, most potent sources of selenium dust will be stationed at the ore stockpile/processing/tipple area on the bank of Dry Valley Creek for the 40-year duration of the mine. AR071424, AR020536–37. Dry Valley Creek is a tributary to the Blackfoot River that already exceeds selenium standards and is a major source of selenium in this reach of the river. AR020544, AR053882–83. BLM suggests that the requirement for a dust control plan to be prepared at some point in the future supports its conclusion that only a small portion of fugitive dust will reach surface waters. That argument is specious because BLM's dust emission calculations assume that each source will abide by best management practices in a dust control plan. AR020536, AR071684.[7] In other words, the project will emit 5.5 kg of selenium dust each year even assuming all best management practices are perfectly implemented. AR020536, AR020544.

[7] BLM's claim that dust modeling accounted for only some relevant best management practices, like water spray and surfactants, but not vegetative covers, is not supported by the record. *See* AR020536 ("The inventory performed by Air Sciences accounts for dust controls *such as* application of water and chemical suppressants." (Emphasis added.)). P4's mining and reclamation plan does not list vegetative cover among the best management practices it intends to use for dust control for any source. AR009826–29. Vegetative covering is only conceivably applicable to two of the seventeen sources of fugitive dust, waste rock and ore stockpiles; the other fifteen sources are equipment, activities, or roads which cannot support vegetation. AR020536–37. Presumably the ore stockpiles will be continually worked and cannot support vegetation either.

Nowhere does the FEIS or the modeling disclose what the impacts of selenium dust on already impaired waters are expected to be. *See generally* AR071311–12, AR020543–45. They merely suggest that the project's contribution will either be nothing at all or small relative to the existing excessive load of pollution. This improperly minimizes and obfuscates a high priority environmental impact. *350 Mont. v. Haaland*, 29 F.4th 1158, 1170–71 (9th Cir. 2022) (holding that agency's analysis violated NEPA where "[t]he reader is left to guess how or why the GHG emissions from the Mine Expansion represent an insignificant contribution to the environmental consequences identified in the EA.") P4's briefing compounds this problem by misstating the two figures BLM did disclose. Specifically, P4 incorrectly claims that if annual dust emissions were deposited over nine days, it would only increase the concentration in the river by a small fraction of the water quality criterion. ECF No. 64-1 at 18. In truth, BLM concluded that if annual dust emissions were deposited over nine days, it would increase the concentration in the river by 100% of the water quality criterion. AR071312. Since the Blackfoot River already exceeds the water quality criterion, this means the project would approximately double the concentration of selenium in the Blackfoot River. That the project proponent could misunderstand or mischaracterize the data so dramatically underscores that the FEIS's cryptic discussion is inadequate.

BLM's failure to account for already elevated selenium levels in the receiving waters, and disclose its surface water quality calculations render its analysis of selenium contaminated fugitive dust arbitrary and capricious, and not in accordance with NEPA, in violation of the APA. 5 U.S.C. § 706(2)(A).

2. <u>BLM failed to take a hard look at cumulative effects to water resources.</u>

BLM failed to provide "quantified or detailed information" about cumulative impacts to water resources, as NEPA requires. *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d

1372, 1379–80 (9th Cir. 1998). While BLM listed other phosphate mines in the area and referenced one background water quality study, AR071321,[8] the agency must go beyond merely cataloguing projects and must include a "useful analysis" of the cumulative impacts of past, present, and future projects. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 809–10 (9th Cir. 1999).

A meaningful cumulative effects analysis is especially important here because past phosphate mines, including those authorized in the past decade and those with similar designs to Caldwell Canyon, have and will continue to impair the watershed with excessive selenium and other pollutants. Indeed, the purpose of examining cumulative effects is to "inform[] the analysis about alternatives presented for the current project," *Lands Council v. Powell*, 395 F.3d at 1027, and to understand whether the project's contribution to existing problems (here, selenium pollution) will bring the affected environment to a breaking point. *Klamath-Siskiyou*, 387 F.3d at 994; *Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1106 (9th Cir. 2016).

The FEIS contains no analysis, quantitative or otherwise, of the cumulative impact of critical factors such as (1) upward trending background selenium concentrations, (2) increasingly concentrated selenium discharges from P4's Blackfoot Bridge Mine, and (3) Caldwell Canyon's selenium dust, on surface water quality in the area. *See* AR071321–22. Several of these individual data points are scattered throughout the record, but the critical synthesis of the data is missing from the FEIS. *See* AR071321–22. Indeed, the FEIS does not even reference all the relevant information; such as, the Blackfoot Bridge Mine EIS, which anticipated that mine would result in discharges of groundwater containing selenium in excess of the water quality criterion to the Blackfoot River beginning in the early part of this decade and continuing for the next 350 years or

[8] The only other scientific study BLM cited in this section is a 1983 paper related to the direction of groundwater flow. *Id.*

more. AR002095. This contribution would be on top of the selenium sources catalogued by United State Geological Survey's 2015 report, which analyzed data spanning 2001 to 2012 and found selenium concentrations trending upward in the Blackfoot River and Dry Valley Creek. AR053882–83.

BLM likewise failed to explain the differences between past, present, and anticipated phosphate mines in the area, as is required. *Lands Council v. Powell*, 395 F.3d at 1028. BLM asserts that recent "analysis methods" affecting the design of phosphate mines shows that they will have "little potential for future impact" and its briefing suggests that open pits and overburden piles are the features of past mines that generated selenium pollution. ECF No. 61-1 at 24. But these vague assertions raise more questions than they answer given that P4's Blackfoot Bridge Mine and Caldwell Canyon are both open pit mines with overburden (waste rock) piles. AR002089, AR020536. What recent mines do not have these features and support BLM's claim that recent designs show "little potential for future impact"? The FEIS does not say.

In summary, the FEIS's cumulative effects section for water is limited to mere "general statements" that are insufficient under NEPA. *See Klamath-Siskiyou,* 387 F.3d at 993, 995; *Bark,* 958 F.3d at 872–73.

D. BLM violated NEPA by failing to consider the required range of alternatives.

BLM does not dispute that it only considered two action alternatives that were identical in all respects except for a slight difference in the cover system designed to reduce groundwater pollution after the ore is mined. For every resource but groundwater, the alternatives were indistinguishable and presented BLM no real choice. This violated NEPA. *See Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008) (range of alternatives must "allow for

a real, informed choice"); *Muckleshoot Indian Tribe*, 177 F.3d at 813 (considering the no action alternative along with "two virtually identical alternatives" is an inadequate range).

BLM had available at least two other reasonable alternatives, yet rejected them without any reasonable explanation. First was the fringe lease alternative. BLM did not give *any* reason for eliminating the fringe lease alternative, in violation of 40 C.F.R. § 1502.14(a). Defendants' brief nonetheless claims this alternative was properly rejected because: (1) it was inconsistent with BLM's purpose and need statement; (2) lease modification was the more "appropriate" vehicle; and (3) the environmental impacts are the same for a lease modification and a fringe lease. But none of these are explanations BLM itself provided in undertaking this action, and "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *See State Farm*, 463 U.S. at 50; *High Country Conservation Advocates v. U.S. Forest Serv.*, 951 F.3d 1217, 1223 (10th Cir. 2020) (declining to consider agency's *post hoc* rationale for eliminating alternative).

The explanations are also incorrect. First, the fringe lease alternative is not inconsistent with BLM's purpose and need. Defendants seize on the word "modify" in the purpose and need statement to suggest that BLM's purpose was to modify the lease. Rather, it was to "evaluate and respond to" a Mine and Reclamation Plan that contained a request "to modify" P4's leases. *See* AR003544; AR016135 (MRP) ("P4 is seeking a lease modification"). It would not be inconsistent with this purpose for BLM to reject the lease modification altogether or offer a fringe lease instead. If BLM's purpose was truly "to modify leases" as BLM suggests, that would render the EIS unlawful for a different reason—it would impermissibly define the purpose and need "in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action." *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1070 (9th Cir. 2010) (citation omitted).

Second, BLM's regulations do not preclude issuing a fringe lease under these circumstances, as Defendants appear to concede. That BLM's customary practice would be to issue a lease modification under these circumstances does not make the fringe lease option unreasonable either.

Third, the two alternatives are materially different, in that a fringe lease would allow BLM to attach more protective stipulations to the lease. This would allow the inclusion of stipulations that might exceed BLM's discretion at the MRP stage (e.g., making the right to develop contingent on surveys confirming absence of sage-grouse), avoid unnecessary leaseholder objections that such measures exceed the scope of BLM's retained rights under the lease, and allow BLM to guarantee that future officials will not authorize development to proceed on less stringent terms. 43 C.F.R. § 3510.21; *see also* AR074723 (listing two examples of such special stipulations already attached to P4's leases); *Cominco American Inc.*, 26 IBLA 329, 331–32 (1976) (listing other examples of special stipulations attached to phosphate lease).

BLM also unreasonably rejected the alternative of keeping the existing lease boundaries, which would better preserve surface resources such as greater sage-grouse. Defendants do not offer anything to refute the problems Plaintiffs' opening brief identified with BLM's rejection of this alternative, aside from suggesting that it was inconsistent with BLM policy objectives. To the contrary, the *modification* is inconsistent with BLM policy where it would undermine sage-grouse conservation policies and violate the RMP by allowing mine pit expansion within the lek buffer for the Dry Valley lek. *Compare* AR016526 (map of proposed lease modification) *with* ECF No. 56 (showing lek buffer).

III. BLM VIOLATED FLPMA BY DISREGARDING GREATER SAGE-GROUSE PROTECTIONS.

The Caldwell Canyon authorizations also violate RMP requirements for the protection of greater sage-grouse. Although not previously disclosed or reflected in the administrative record provided to Plaintiffs, P4's briefing indicates that it modified the Caldwell Canyon Mine and Reclamation Plan (MRP) sometime in 2020 to: (1) replace the Slug Creek powerline with a utility corridor along the East Caldwell Haul Road; (2) relocate the office and shop complex, laydown yard, waste water treatment and disposal area, septic and lagoon system, and growth media stockpile from Dry Valley to a location along the East Caldwell haul road; (3) resize and relocate sediment control ponds; (4) construct a new access road segment paralleling the Dry Valley Haul Road then extending north from the Dry Valley tipple area to the junction with Dry Valley Road. *See* 2d. Gibson Decl., Ex. A at 7–8, 11–14 (ECF No. 64-2); *compare* AR016147 *and* ECF No. 56 (maps of 2017 MRP facility layout) *with* 2d. Gibson Decl., Ex. A at 8, 12, 19 (maps of 2020 MRP facility layout). Plaintiffs are investigating this 2020 MRP modification and have concerns that it was undertaken without the requisite authorization or NEPA review by BLM and that it entails new surface disturbance within the Dry Valley lek buffer. *See* 43 C.F.R. § 3592.1(a), (c) ("No operations shall be conducted except as provided in an approved plan" which must cover "the proposed roads [and] the size and location of structures and facilities to be built"); *id.* § 3592.1(d) ("mining plan modification(s) shall not be implemented unless previously approved").

Plaintiffs reserve the right to present new argument as to this MRP modification consistent with Defendants' responses to their outstanding questions about this matter. However, for purposes of this brief and based on the representation that P4 will no longer be constructing the Slug Creek powerline, ECF No. 64-2 (2d. Gibson Decl.) ¶¶ 6–7, Plaintiffs focus on the RMP violations pertaining to the East Caldwell haul road and adjacent utility corridor.

A. BLM unlawfully approved the East Caldwell haul road and utility corridor within the Dry Valley lek buffer.

BLM's approvals for the East Caldwell haul road and utility corridor violated the sage-grouse lek buffers, as depicted in Plaintiffs' map (ECF No. 56). Specifically, the 2019 Caldwell Canyon ROD approved an MRP that included construction of the East Caldwell haul road for truck transport of material from the mine pits to the ore stockpile and tipple. *See* AR016128, -47, -56 (MRP). This violated the prohibition on surface disturbance within 2 miles of a lek, under the 2019 ARMPA that had not yet been enjoined. *See* AR036616 (lek buffer requirement). BLM subsequently issued ROWs for the haul road (AR077118–28, AR077107–17) and an adjacent water pipeline (AR077129–39), fiber optic line (AR077140–50), and powerline (AR077151–61), in violation of the 2015 ARMPA prohibition on "linear features" and "surface disturbance" within 3.1 miles of leks. *See* AR036260 (lek buffer requirement). Plaintiffs' map shows the overlap of these features with BLM-administered split estate, GHMA, and the 2.0 and 3.1-mile buffers. *See* ECF No. 56. BLM's sole defense to this argument is that the lek buffers were not applicable because the Dry Valley lek was not "occupied" or "active" and is located on private land. Neither argument has merit, for the reasons described below.[9]

1. The Dry Valley lek is "occupied."

Defendants wrongly suggest that the Dry Valley lek is not actually a "lek" and is neither "active" nor "occupied." However, three consecutive years of spring breeding activity place the Dry Valley lek squarely within the "lek" and "occupied" definitions of the ARMPA—as BLM

[9] P4's additional complaints merit only a brief response. First, Plaintiffs do not "challenge outdated right-of-way approvals." Their opening brief at pages 4-5 accurately describes the East Caldwell ROW authorizations and amendments, then collectively references them again by shorthand at page 36. Second, BLM has subsurface mineral rights over the entire road segment in GHMA, thus triggering all ARMPA requirements. *See* AR036165 (ARMPA applies to all "BLM-administered lands, including split-estate lands"); AR016526; ECF No. 56 (maps showing BLM split estate).

itself concluded. AR036225 (definitions); AR071774, AR074604, AR074219 (all concluding the lek is occupied). Four males attended the Dry Valley lek during the 2016 and 2017 breeding seasons, and one male attended in 2018. AR074236. The Dry Valley lek meets BLM's definition of a "lek" because "two or more" males have engaged in spring courtship displays there. *See* AR036225. It was "active" in 2016 because it was "attended by more than one male [sage-grouse] during the breeding season." *Id.* It remained "active" and became "occupied" as of 2017 after multiple displaying males were observed there in a second breeding season. *Id.* Although only one male was observed in 2018, the Dry Valley lek retained its "occupied" status because it was "active" in at least one of the five prior breeding seasons. *Id.*

Defendants claim this misrepresents the record because those lek observations occurred at three slightly different locations, but BLM itself ultimately determined that these sightings constituted a single lek. *See* AR071694 ("Pending lek 3C089 is considered to be the same birds that displayed at pending lek 3C040 and has therefore been combined with 3C040"); AR074236 (BLM wildlife biologist, in consultation with the IDFG, determined that "this is all the same lek, just shifted slightly due to limited grouse attendance and variability from year to year."); AR074184 ("this is all the same lek, just shifted slightly"); AR071362 (FEIS) ("It is expected that the three display locations constitute one set of birds."); *see also* AR036571 (noting that a lek may "move[]" from year-to-year).

Defendants next claim the Dry Valley lek was not active or occupied because the Idaho Department of Fish and Game (IDFG) assigned it a status of "pending." However, relying on that "pending" designation to avoid recognizing the Dry Valley lek as active or occupied was improper for at least three independent reasons.

First, the federal ARMPA contains only four possible lek status designations—active, inactive, occupied, and unoccupied—and "pending" is not one of them. AR036225. IDFG was "unwilling to make" a determination as to whether the Dry Valley lek met the active or occupied criteria, AR074237, so there was no relevant IDFG determination on which BLM could possibly rely. *See also* AR074185 (noting IDFG's "indecision"); AR003562 ("Pending leks . . . do not have a status determination from the [IDFG]"); AR074248 (relaying message that 3C040 "will be listed as 'pending' as [IDFG] does not have enough info at this time" to make a status determination); *but see* AR074228 (email from BLM contractor and biologist noting that the "survey data" and "clear definitions for lek status in the ARMPA" provided the "information required to make a call on the management status").[10]

Second, IDFG's "pending" designation itself appears to be improper under state guidelines. The extra-record document proffered by P4 reveals that IDFG uses the "pending" label for "[a] newly discovered lek," but that if "displaying males are observed at a pending lek in any of the subsequent four years," the pending status "converts to 'occupied.'" *See* Ann Moser, IDFG, 2021 Sage-grouse Population Triggers Analysis, at 14 (Aug. 12, 2021). Thus, the "pending" Dry Valley lek should have automatically converted to "occupied" status when males displayed there again in 2017 and 2018.

[10] Although IDFG made no status determination for 3C040, it designated 3C089 as "inactive/not a lek" in 2018. AR074248. Because displaying males were observed at 3C089 in both 2016 and 2018, and because the "inactive" designation requires data showing there "was no strutting activity throughout a breeding season," AR036225, the only reasonable explanation is that IDFG, like BLM, decided these were a single lek and merged those observations into 3C040. *See* AR071694 ("Pending lek 3C089 is considered to be the same birds that displayed at pending lek 3C040 and has therefore been combined with 3C040"); AR074236 (noting BLM biologist consulted with IDFG in determining that "this is all the same lek").

Third, had IDFG actually determined that the Dry Valley lek was not active or occupied (which it did not), it would have been unreasonable for BLM to rubber stamp that decision. To be sure, the ARMPA requires BLM to "use the most recent active or occupied lek data available from the state wildlife agency," AR036260, but it places the authority to "determin[e] lek locations" with BLM. *Id.* This language does not delegate to the state final authority to determine a lek's federal management status, as Defendants suggest.[11] Even if it did, BLM cannot lawfully subdelegate authority to an outside party without reserving some oversight role. *See U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565–67 (D.C. Cir. 2004) ("[A] federal agency may turn to an outside entity for advice and policy recommendations, provided the agency makes the final decisions itself."); *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation of State of Mont.*, 792 F.2d 782, 795 (9th Cir. 1986) (collecting cases for the proposition that agencies may rely on outside entities for advice so long as they do not merely "rubber stamp" outside decisions).

In exercising that requisite oversight, it would have been unreasonable for BLM to blindly accept an IDFG finding that the Dry Valley lek was not "active" or "occupied" where BLM and its own wildlife experts decided to the contrary:

- "BLM would have called the [Dry Valley] lek active and occupied based on observed activity." AR071774 (minutes from February 14, 2019 meeting).

[11] Although the 2019 ARMPA contains this same phrase, *see* AR036616, BLM stated that "[n]owhere in the plan is there a decision that could be construed as delegating or otherwise ceding federal decision-making authority to the State of Idaho." *See* BLM, Protest Resolution Report for Idaho Greater Sage-Grouse Proposed RMP Amendment, at 3, 6 (Mar. 2019), *available at* https://www.blm.gov/sites/blm.gov/files/Idaho%20GRSG%20Protest%20Report%20%28March%2015%2C%202019%29.pdf. P4 also agreed that the authority to determine whether a lek meets the ARMPA definitions of active or occupied rested with BLM. AR000360 ("BLM must determine that the Subject Lek is active or occupied as those terms are defined in the ARMPA Glossary and using the Idaho Department of Fish and Game's most recent lek data.").

- "[BLM wildlife biologist] indicated that the last three years observing males at the site puts the [Dry Valley] lek squarely in the active and occupied category." AR074604.

- "[T]hose assembled sage-grouse . . . meet criteria for an active . . . and therefore occupied lek . . . [so] there should be some healthy discussion about how/why certain lek and breeding habitat related RDF's [sic], buffers, and mitigation is/isn't applicable." AR074219.

- "P4/Bauer[sic]/Monsanto is unwilling to direct their [NEPA] contractor(s) to describe the leks as active/occupied." AR074184 (insinuating that 2016–2018 lek counts satisfy those definitions).

In sum, considering the available survey data, clear definitions for lek status in the ARMPA, and BLM's own conclusion that the Dry Valley lek was active or occupied, it was unreasonable for BLM not to apply the lek buffers simply because the IDFG determination as to the same was still pending.

2. It is irrelevant that the Dry Valley lek is itself on private land.

Equally unavailing is the argument that the lek buffers did not apply because the Dry Valley lek is located on private land. The plain text forecloses this argument. The 2015 ARMPA prohibits BLM from approving certain habitat-disrupting activities in GHMA and PHMA within specified distances of leks. *See* AR036261 (BLM may not "approve actions in [PHMA, GHMA, and IHMA] that are within the applicable lek buffer distance identified" unless a specified exemption applies); *see also* AR036192 ("In undertaking BLM management actions. . . BLM will apply the lek buffer-distances"). Defendants stress that the ARMPA only applies to BLM-administered lands in federal habitat management areas, but they do not dispute that the offending portions of the East Caldwell haul road and utility corridor occur: (a) on BLM-administered surface or split estate and (b) in GHMA. There is no textual basis for exempting the lek buffers simply because the federally-managed habitat surrounds a lek on private lands.

Defendants ask the Court to disregard the plain text because applying the lek buffers here would supposedly exceed their intended purpose of "protect[ing] sage-grouse habitat on federal lands." ECF No. 61-1 at 31.[12] But again, applying the lek buffers to the Caldwell Canyon project would protect designated GHMA habitat on federal lands—areas that may provide nesting and other seasonal habitat for birds using the Dry Valley lek. *See* ECF No. 56 (map); AR016528 (map); AR008054, AR015939 (both confirming greater sage-grouse sightings in the project area); AR036346 ("IDFG data show that over 90% of nesting occurs within 10 km of the lek"); *see also* AR036342 (nesting habitat is among the "most limited and seasonal habitats in Idaho"). As noted in the USGS report from which they were derived, lek buffers serve sage-grouse in two distinct ways: by protecting nesting and brood-rearing habitat that often surrounds a lek and by avoiding interference with the breeding site itself. *See* Exhibit A (USGS, *Conservation Buffer Distance Estimates for Greater Sage-Grouse—A Review* (2014)) (lek sites themselves are "breeding habitats, but their locations are focal points within populations, and as such, protective buffers around lek sites can offer a useful solution for identifying and conserving seasonal habitats required by sage-grouse throughout their life cycle."); *see also* AR036260 (citing USGS report). Thus, BLM's interpretation is inconsistent with both the plain text and purpose of the lek buffer requirement.

Finally, P4's reference to BLM authority over private land is a red herring. Application of the lek buffers here (and in every instance required by the ARMPAs) would restrict activities on *BLM-administered lands* and protect habitat *on BLM-administered lands*. FLPMA provides BLM

[12] The record also makes clear that the ARMPA has a more lofty goal of "conserve[ing], enhance[ing], and restor[ing] GRSG habitat across the species' remaining range . . . so that [the greater sage-grouse] is no longer in danger of extinction." AR036055. It is consistent with that purpose to ensure that BLM-authorized activities do not harm leks on private lands.

with clear authority to condition its land use authorizations in this fashion. *See* 43 U.S.C. § 1732(a), (b) ("the Secretary shall . . . regulate . . . the use, occupancy, and development of the public lands" and "shall manage the public lands under principles of multiple use and sustained yield"); *id.* § 1702(c) (defining "multiple use" as management that accounts for "wildlife"); *id.* § 1701 (declaring a Congressional policy that "public lands be managed in a manner that will protect the quality of . . . . environmental . . . values" and that will provide "habitat for . . . wildlife"); *see also* 43 C.F.R. § 3591.1 (requiring mineral leaseholders to "take such action as may be needed to avoid, minimize or repair . . . . [i]njury to or destruction of fish or wildlife and their habitat").

Although the buffers here would also protect habitat on federal land, BLM regulations and IBLA precedent confirm the common-sense principle that BLM may condition its land-use authorizations simply to avoid harm to nonfederal lands. *See, e.g.*, 43 C.F.R. § 3590.0-5(g) (reclamation must include measures to "prevent or control on-site or offsite damage to the environment"); *Cominco American Inc.*, 26 IBLA 329, 335, 339 (1976) (confirming BLM's authority to condition the extraction of federal phosphate deposits on "environmental stipulations which apply to lands which do not belong to the Federal Government"). *Cominco* is on all fours—and did not deal only with split estate, as P4 misrepresents. *Id.* at 330 (noting that certain sections were "privately owned, both surface and subsurface."); *id.* at 334 (noting that the developer objected to environmental restrictions as "to the mine yard and hauling road operations which take place on lands where both the surface and subsurface estates are not in federal ownership").

For all these reasons, neither the location of the Dry Valley lek on private land, nor the state's "pending" designation for that lek, justified BLM's decision to approve the East Caldwell road and utility corridor to be constructed within the 2.0- and 3.1-mile lek buffers. These authorizations were arbitrary, capricious, and contrary to the ARMPAs, and therefore FLPMA.

B. BLM failed to ensure compensatory mitigation sufficient to offset the habitat impacts of the East Caldwell haul road and utility corridor.

BLM also violated the compensatory mitigation requirement of the 2015 ARMPA by failing to require compensatory mitigation for the East Caldwell haul road and utility corridor sufficient to ensure a "net conservation gain" to greater sage-grouse. Defendants offer nothing of substance to dispute this violation, ECF No. 61-1 at 39, n.14, and the responses from P4 are either irrelevant or wrong. First, regulatory uncertainty is no excuse for BLM's noncompliance with the compensatory mitigation requirement because the East Caldwell haul road and utility corridor were approved while the 2015 ARMPA was clearly back in effect. Second, the fact that P4 modified the project to avoid certain impacts to sage-grouse does not somehow relieve P4 of the obligation to offset the residual impacts it did *not* avoid. AR036376 ("If impacts . . . . remain after applying avoidance and minimization measures . . . then compensatory mitigation projects will be used to provide a net conservation gain to the species."). Third, P4's sage-grouse mitigation plan does not satisfy the ARMPA requirements, as explained in detail below.

There were three components to P4's sage-grouse mitigation plan: (1) reclamation of the mine pits; (2) a research project on Bayer's private Fox Hills Ranch; and (3) an "in-lieu fee" contribution of $62,273.[13] AR003403–20. Plaintiffs explained in their opening brief why

[13] Paragraph 5 of the 2nd Gibson declaration regarding the Leadore project and related references in P4's brief should be stricken. The Court cannot consider extra-record and post-decisional evidence of how the in-lieu mitigation funds were supposedly spent, as judicial review under the APA "is to be based on the full administrative record that was before the [agency] at the time [it] made [its] decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). The declaration also lacks sufficient evidence to find that Gibson has personal knowledge that 800 acres were actually "reclaimed," *see* Fed. R. Evid. 602, or to qualify Gibson on an expert on the subject of sage-grouse habitat restoration, *see* Fed. R. Evid. 701, 702, 703. This testimony is also not predicated upon any concrete facts, such as what reclamation work was performed, whether the project would not have occurred but for this funding, the habitat quality before and after the work was performed, and actual conservation outcomes.

components (1) and (2) cannot be considered toward the "net conservation gain" standard because they do not meet the additionality, timeliness, or durability criteria for compensatory mitigation. P4 does not contest this fact and concedes that these measures do not constitute compensatory mitigation.

Nonetheless, P4 claims, without authority, that the Fox Hills research and pit reclamation should still be credited toward the "net conservation gain" standard. But these neither "avoid" nor "minimize" adverse impacts of the East Caldwell haul road and utility corridor, so to be considered as a "conservation gain" attributable to those authorizations, they *must* be offered as compensatory mitigation. *See* AR036380 (defining three types of mitigation: "avoidance," "minimization," and "compensatory"). The pit reclamation and research cannot be considered for a second reason: BLM declined to do so, and "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50. BLM found it inappropriate to consider pit reclamation as a *gain* for sage-grouse where it did not also acknowledge the *loss* of that very same habitat. AR004248 (listing only in-lieu fee payment and Fox Hills project in RMP conformance determination); AR004254 ("I am not sure how a reclaimed mine could be considered applicable to a net gain calculation for wildlife habitat?"); *id.* ([S]ince the mine lease area is excluded from GHMA, it seems inappropriate to include reclamation of the mine lease area as part of the net conservation gain requirement discussion."). BLM also clarified in response to comments from Western Watersheds Project that it was "not interpreting the proposed research as mitigation." AR003500.

This leaves only the in-lieu fee contribution of $62,273, an amount reflecting the estimated cost of reclaiming 32.1 acres of sage-grouse habitat. AR019478. BLM's decision to accept this amount to satisfy the "net conservation gain" standard was arbitrary and capricious because the

record shows this is insufficient to offset the conservation losses from even the East Caldwell disturbances. First, although the direct footprint of the segment in GHMA is likely less than 32.1 acres,[14] the "net conservation gain" calculation must consider other harms this road and utility corridor will entail, such as functional habitat loss from sage-grouse avoidance of intact habitat near the road. *See* AR062183 (noting sage-grouse "behavioral avoidance of road areas because of noise, visual disturbance, pollutants, and predators moving along a road"). Estimates suggest the area of influence of roads extends roughly 0.6 mile "beyond the actual line feature," AR039231, which would lead to functional habitat loss roughly 70 times as great as the direct footprint of the haul road. Second, BLM failed to offset the adverse impacts from traffic noise emanating from the road. As its name suggests, the haul road will be used regularly by dump trucks hauling ore and overburden, which BLM predicted would increase ambient noise levels substantially in the surrounding areas, including at the Dry Valley lek itself. AR003156 (projecting up to a 10dbA increase at the Dry Valley lek, the maximum increase allowed under the ARMPA). Anthropogenic noise contributes to habitat abandonment, increases bird stress levels, and can interfere with bird vocalizations and mating rituals, AR027571, AR027584, AR027595, AR027626–27, AR027631, and traffic noise "has a much more detrimental impact on sage-grouse" because its intermittent nature prevents habituation, AR027624. Third, BLM failed to consider or offset the impacts this haul road may pose as a barrier to seasonal migration from the Dry Valley lek to habitat south of the road. *See* PRIV000184 (map); AR062182 (roads may "create barriers to migration corridors or seasonal habitats"); AR003013 (fragmentation is "a primary cause of the decline of sage-grouse

[14] The record does not contain this figure in isolation, but the haul road itself will result in roughly 18 acres of surface disturbance, a significant portion of this in GHMA. *See* AR016156 (noting haul road has an approximate running length of 2 miles and width of 75 feet).

because the species requires large expanses of contiguous sagebrush"). Fourth, BLM failed to account for direct mortality impacts from bird-vehicle collisions and facilitation of predator movements. AR062182. Fifth, BLM failed to account for the road's contribution to the spread of invasive weeds that contribute to habitat loss. AR062182. For all these reasons, the in-lieu fee contribution fails to ensure that the East Caldwell haul road and utility corridor will provide a "net conservation gain" to sage-grouse.

In sum, BLM failed to apply RMP-mandated lek buffers and compensatory mitigation to the East Caldwell haul road and utility corridor, rendering these authorizations arbitrary, capricious, and unlawful under FLPMA.

IV. BLM VIOLATED FLPMA AND THE CLEAN WATER ACT BY AUTHORIZING POLLUTION IN VIOLATION OF STATE STANDARDS.

Under FLPMA's regulations and the CWA, "federal agencies managing federal lands generally must comply with the water pollution laws and regulations of the relevant State, including the State's laws concerning discharges from nonpoint sources." *Cent. Sierra Env't Res. Ctr. v. Stanislaus Nat'l Forest*, 30 F.4th 929, 932 (9th Cir. 2022); 43 C.F.R. § 2920.7(b)(3); 33 U.S.C. § 1323(a). BLM raises several jurisdiction defenses to Plaintiffs' CWA section 313 claim, none of which have merit.[15] The Court should reach the merits of Plaintiffs' CWA and FLPMA claims and find that BLM illegally authorized pollution in violation of Idaho water quality standards.

[15] BLM does not dispute the Court's jurisdiction over Plaintiffs FLPMA claim. BLM's FLPMA regulation, 43 C.F.R. § 2920.7(b)(3), requires "that BLM draft land use authorizations, including leases, such that they '[r]equire compliance with air and water quality standards established pursuant to applicable Federal or State law.'" *WildEarth Guardians v. BLM*, 8 F. Supp. 3d 17, 38 (D.D.C. 2014).

A. The Court has jurisdiction over Plaintiffs' CWA claim.

1. BLM's authorizations are subject to 33 U.S.C. § 1323.

Section 313 of the CWA applies to "any property or facility" over which BLM has jurisdiction. 33 U.S.C. § 1323. Without any authority, BLM argues that federal mineral estates are not "the type of 'property' that Congress had in mind." ECF No. 61-1 at 41. This argument is foreclosed by the plain language of the statute, which broadly applies to "any property," 33 U.S.C. § 1323(a), as well as *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1146, 1149 (9th Cir. 2010), which applied section 313 to the Forest Service's authorization of mining federal phosphate leases. Furthermore, the federal mineral interests involved here are, by definition, federal public lands. 43 U.S.C. § 1702(e).

Equally unavailing is BLM's argument that a federal mineral lease falls outside the scope of section 313 because it does not have the potential to pollute. ECF No. 61-1 at 33. Of course it does. *See Greater Yellowstone Coal.*, 628 F.3d at 1149 (applying section 313 to a federal mineral lease and noting that phosphate mines in the area are major contributors to existing selenium contamination). Relatedly, BLM suggests that the federal government must be operating the mine and related equipment itself to be liable. ECF No. 61-1 at 34. But section 313 governs federal entities "(1) having jurisdiction over any property or facility; **or** (2) engaged in any activity resulting, or which may result in the discharge or runoff of pollutants." 33 U.S.C. § 1323(a) (emphasis added). By listing these triggers disjunctively, Congress rejected BLM's argument that the federal government must itself be engaged in the mining activity to be liable. Federal "jurisdiction over any property" alone is sufficient, just as the statute says. *Id.*; *see also Audubon Soc'y of Portland v. Zinke,* No. 1:17-cv-00069-CL, 2019 U.S. Dist. LEXIS 230161, at *63 (D. Or. Nov. 18, 2019) ("Put simply, [section 313 of] the CWA requires the [Fish and Wildlife] Service

to comply with the State of California's water pollution laws with respect to runoff from agriculture on the leased farmlands."); *Cent. Sierra Envtl. Res. Ctr. v. Stanislaus Nat'l Forest*, 304 F. Supp. 3d 916, 937 (E.D. Cal. 2018) (holding that even under section 313's second prong "[t]here is no requirement that the government itself be the discharger").

Requiring BLM's mineral estate leasing actions to abide by Idaho water quality standards is entirely consistent with section 313's directive that federal agencies "shall be subject to" "all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity." 33 U.S.C. § 1323(a). Courts have repeatedly subjected private and public landowners to CWA liability merely because they own the property, including where the CWA violations stemmed from their leased properties and actions carried out solely by the lessees. *See Sierra Club v. El Paso Gold Mines*, 421 F.3d 1133, 1144–46 (10th Cir. 2005) (landowner that had never conducted mining activities on the property may be held liable for CWA violations stemming from abandoned mine shaft); *Puget Soundkeeper All. v. APM Terminals Tacoma, LLC*, No. C17-5016 BHS, 2018 U.S. Dist. LEXIS 93567, *10 (W.D. Wash. June 4, 2018) (port could be liable for violations caused by tenant's operations); *Cal. Sportfishing Prot. Alliance v. Shiloh Grp.*, LLC, 268 F. Supp. 3d 1029, 1044–46, 1050 (N.D. Cal. July 24, 2017) (industrial park landlord could be liable for its tenants' violations, holding that "[o]wners and/or operators who have sufficient control over a facility can be held liable under the CWA even if they do not themselves perform the industrial activities that create the pollutants in the storm water discharge"); *Puget Soundkeeper Alliance v. Cruise Terminals of America, LLC*, 216 F. Supp. 3d 1198, 1213 (W.D. Wash. 2015) (landlord "may also be liable if it had sufficient

control over the cruise terminal and knowledge of the alleged unpermitted discharges, even if it did not create the discharges itself").

2. Plaintiffs' CWA claim does not require a 60-day notice letter.

Plaintiffs' CWA claim alleges that Caldwell Canyon will violate state water quality standards via pollution from both point and non-point sources. BLM recognizes that Plaintiffs' non-point source allegations do not fall within the CWA's citizen suit provision, 33 U.S.C. § 1365, and therefore do not require a 60-day pre-suit notice letter. *See* ECF 61-1 at 35 (notice argument limited to point sources); *Or. Nat. Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 848–49, 851–52 (9th Cir. 1987). However, BLM erroneously argues that Plaintiffs' point source allegations do fall within 33 U.S.C. § 1365 and require a notice letter. Citizen suits under 33 U.S.C. § 1365(a)(1) are limited to alleged violations of an "effluent standard or limitation." Here, Plaintiffs seek to enforce state water quality standards, which do not fall within the definition of an "effluent standard or limitation." 33 U.S.C. § 1365(f); *see also Or. Nat. Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 848–49, 851–52. As a general matter it is true that state water quality standards can be translated into permit limits for a specific point source discharge, and violations of those permit limits (not the water quality standards themselves) are properly subject to a citizen suit under 33 U.S.C. § 1365. *Id.* at 850. But here Plaintiffs allege violations of water quality standards themselves, ECF No. 46-1, ¶ 135, which are not actionable under 33 U.S.C. § 1365. *Or. Nat. Res. Council*, 834 F.2d at 850 (holding "it is not the water quality standards themselves that are enforceable" under 33 U.S.C. § 1365).[16] Thus, none of Plaintiffs' CWA allegations, whether

[16] *See also McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 707 F. Supp. 1182, 1199 (E.D. Cal. 1988) (holding "the only state law requirements that constitute enforceable effluent standards or limitations under section 505 [33 U.S.C. § 1365] are those that have been established administratively through the issuance of NPDES permits.")

related to point sources or non-point sources, trigger the 60-day notice letter requirement. *See id.* at 848–49, 851–52.

3. Plaintiffs have satisfied administrative exhaustion requirements.

BLM has not identified any administrative exhaustion requirements particular to Plaintiffs' CWA claim. *See generally* ECF No. 61-1 at 36; *see also Amer. Forest and Paper Ass'n v. U.S. EPA*, 137 F.3d 291, 295-96 (5th Cir. 1998) (noting the agency "failed to identify any provision in the CWA that suggests a party's failure to comment waives its right to seek judicial review" and holding that no such requirement exists in the CWA). BLM's exhaustion argument relies on *Bahr v. Regan*, 6 F.4th 1059, 1081 (9th Cir. 2021), but that case arose under a provision of the Clean Air Act with strict statutory exhaustion requirements that are not present here.

To the extent a generic exhaustion requirement applies, Plaintiffs' water quality concerns were sufficiently raised during BLM's administrative process. In early 2019, Plaintiffs commented that the draft EIS (DEIS) lacked sufficient information to determine if the project complied with the CWA. AR028511. EPA likewise commented on the DEIS's "lack of detail" on current conditions, water resources, and modeling, AR027236, noted that BLM's analysis gave conflicting information about whether the project would involve point source discharges, AR027240–41, and highlighted that there was no support or explanation in the DEIS for BLM's assertion that fugitive dust would not increase selenium in the Blackfoot River, AR027242–43. EPA also noted that the Blackfoot River is impaired by selenium pollution and requested that BLM analyze the project's impacts on surface water quality against new more stringent water quality standard for selenium. *Id.* As EPA noted in its comments on the FEIS, BLM failed to adequately respond to these comments and the FEIS fails to adequately analyze or disclose the dust impacts on water quality which are the core of Plaintiffs' CWA claim. AR028577. Where, as here, "Plaintiffs lacked the

information necessary to bring a more specific claim during the notice and comment period . . . Federal Defendants cannot now claim that Plaintiffs failed to raise their concerns with sufficient clarity to allow the [agency] to address those concerns during the administrative process. Plaintiffs' claim is administratively exhausted." *Native Ecosystems Council v. Marten*, No. CV 18-87-M-DLC, 2020 U.S. Dist. LEXIS 52990, at *30 (D. Mont. Mar. 26, 2020) (holding that general comment that the project did not conform to standards was adequate for claim that agency's conclusion relied on improper calculation method "[g]iven the lack of transparency surrounding the method of calculation provided in the [NEPA document]").

Furthermore, "[t]here is no need for a litigant to have personally raised the issue, so long as the issue was raised by another party and the agency had the opportunity to consider the objection." *Conservation Cong. v. United States Forest Serv.*, 555 F. Supp. 2d 1093, 1106 (E.D. Cal. 2008) (collecting cases).[17] Here, comments from EPA, IDEQ, and others provided BLM ample opportunity to consider the substance of Plaintiffs' CWA claims. EPA provided detailed recommendations for better analysis and repeatedly raised concerns over dust impacts, surface water quality, state water quality standards, and existing selenium impairment. AR027236–43; AR028577. IDEQ likewise recommended a different analysis of dust and water quality impacts to reflect rather than obscure seasonal variation. AR077314. Groups Yellowstone to Uintas and Kiesha's Preserve specifically questioned the efficacy of best management practices, and point sources like the tipple and crusher located on the bank of Dry Valley Creek and the attendant localized dust plumes. AR071683–84. BLM also had sufficient notice of concerns over adding selenium-laden dust to Blackfoot River tributaries that flow through the project area. BLM's David

[17] *See also BioDiversity Conservation Alliance v. BLM*, 608 F.3d 709, 714 (10th Cir. 2010); *Kern v. BLM*, 38 F. Supp. 2d 1174, 1180 (D. Or. 1999), rev'd on other grounds, 284 F.3d 1062 (9th Cir. 2002).

Alderman and IDEQ's Wayne Crowther both raised the need to analyze impacts to Dry Valley Creek and Slug Creek because they are already impaired by excess selenium and sediment. AR026257–58. In any event, EPA's comment raising concern over the project's potential to increase selenium levels in the Blackfoot River provided BLM an adequate opportunity to evaluate the tributaries that flow through the project area, as they are direct pathways for selenium from the project to reach the river.

B. BLM is in violation of the CWA and FLMPA.

As explained above, BLM's analysis of the project's impact on surface water quality was arbitrary and capricious, as are BLM's conclusions that the project will not violate water quality standards. The Court should therefore grant summary judgment on Plaintiffs' CWA and FLPMA claims.

BLM's and P4's defenses rely very heavily on IDEQ's letter stating that the project complies with state water quality standards, but this letter is unavailing for several reasons. First, to the minute extent that IDEQ's letter touches on surface water as opposed to groundwater, it expressly and exclusively relies on BLM's flawed FEIS analysis for its conclusion that the project will comply. AR077097–99 (IDEQ's determination of compliance is based upon the "water quality analysis generated to produce the FEIS" and otherwise focused on ground water). Indeed, all that IDEQ's letter says about surface water quality is "[m]odeling conducted in support of the FEIS has shown that the Caldwell Canyon Mine could impact surface and ground water quality by increased mobilization of naturally occurring contaminants (NOCs) such as selenium and other trace metals." AR077097. An arbitrary and capricious NEPA analysis of water quality impacts cannot demonstrate compliance with Idaho water quality standards. *Wilderness Socy & Prairie*

Falcon Audubon, Inc. v. U.S. Forest Serv., No. CV08-363-E-EJL, 2013 U.S. Dist. LEXIS 153036, at *9, *21 (D. Idaho Oct. 22, 2013).

Second, section 313 requires substantive compliance by stating that federal agencies "shall be subject to, and comply with" state laws "respecting the control and abatement of water pollution," which cannot be satisfied by a letter from a state agency alone. 33 U.S.C. § 1323(a). Where Congress intended a letter of compliance from the state to satisfy CWA requirements, it expressly stated that using markedly different language. *See* 33 U.S.C. § 1341(a) (applicants for federal permits must provide a "certificate from the State" stating that the "discharge will comply"). Where, as here, the CWA requires substantive compliance, the state's opinion about compliance is not determinative. *See Ass'n to Protect Hammersley v. Taylor Res*., 299 F.3d 1007, 1012 (9th Cir. 2002) ("Although the EPA or an authorized state agency may be charged with enforcement of the Clean Water Act, neither the text of the Act nor its legislative history expressly grants to the EPA or such a state agency the exclusive authority to decide whether the release of a substance into the waters of the United States violates the Clean Water Act."). Blindly deferring to IDEQ's cursory letter is especially inappropriate in this case because it relied on a flawed analysis which EPA repeatedly criticized.

Third, and most important, the record demonstrates pollution in violation of state water quality standards despite IDEQ's letter and despite the best management practices (BMPs) P4 intends to use. These violations are catalogued in Plaintiffs' opening brief at pages 40 to 43 and further discussed below.

1. Violation of Idaho Administrative Code r. 58.01.02.051 (anti-degradation).

BLM does not dispute that the Blackfoot River, Dry Valley Creek, and Slug Creek do not provide "the level of water quality necessary to protect the existing uses," such as fishing and

habitat, due to excessive sediment and selenium pollution. BLM also does not dispute that Caldwell Canyon Mine will add even more sediment and selenium to these waterways. This violates Idaho's anti-degradation regulation, which provides that "existing in stream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." Idaho Admin. Code r. 58.01.02.051. Plaintiffs do not argue that Idaho law is violated "whenever any amount of pollution would be added to a water," as BLM's straw man argument posits. Plaintiffs' point is that these three waterways already fail to protect existing uses, so there is no way that a project which adds more of the problem pollutants "maintains" or "protects" "the level of water quality necessary to protect the existing uses." Idaho Admin. Code r. 58.01.02.051. BLM goes on to discuss some "different provision of Idaho's rules" including an inapplicable regulation for "high-quality waters," ECF No. 61-1 at 39, but Plaintiffs are not attempting to enforce these regulations.[18] The record shows a violation of Idaho Administrative Code r. 58.01.02.051, which in turn violates section 313 of the CWA and BLM's FLPMA regulations. The Court should grant summary judgment on this violation.

2. Violation of Idaho Administrative Code r. 58.01.02.350 (BMPs for non-point source pollution).

BLM next argues that the Court should ignore the failure to require BMPs for nonpoint source pollution that "provide full protection or maintenance of beneficial uses" because Idaho regulations state that such BMPs "should" be implemented, rather than "shall" be implemented. BLM's argument improperly isolates the word "should." *King v. Burwell*, 576 U.S. 473, 497

[18] Plaintiffs recognize that several of IDEQ's water quality standards impose procedural requirements on IDEQ itself, as opposed to a polluter. However, each of the specific water quality regulations addressed in Plaintiffs' motion apply directly to polluting activities. BLM's reliance on *Central Sierra Environmental Resource Center*, 30 F.4th at 942, where plaintiffs sought to enforce a planning document intended to direct the agency's development of specific requirements, is therefore misplaced.

(2015) (holding that statutory phrases must be read in the context of the whole, not in isolation). Reading the entire regulation together, as one must, demonstrates that Idaho Administrative Code r. 58.01.02.350 requires BMPs "be designed, implemented and maintained to provide full protection or maintenance of beneficial uses." First, the regulation repeatedly states that BMPs, ("current best management practices," specified best management practices, or "a knowledgeable and reasonable effort to minimize resulting adverse water quality impacts") must be used for a nonpoint polluter to be insulated from enforcement.[19] Thus, BMPs are required. Second, the regulation provides for the state's "review *for compliance* project plans for proposed nonpoint source activities, *based on whether or not the proposed activity will fully maintain or protect beneficial uses*." Idaho Admin. Code r. 58.01.02.350.02(c) (emphases added). In other words, BMPs are only "compliant" with the regulation if they "fully maintain or protect beneficial uses." *Id.* Thus, while the regulation provides various opportunities for IDEQ to exercise its enforcement discretion, it also requires BMPs for nonpoint source pollution that protect and maintain beneficial uses. Caldwell Canyon violates this requirement because even with its minimal BMPs for fugitive dust, 5.53 kilograms of selenium will enter the selenium-impaired Blackfoot River watershed each year for 40 years. AR020544; AR071684.

3. Violation of Idaho Administrative Code r. 58.01.02.800 (materials storage).

BLM makes a similar illusory argument about Idaho's prohibition on storage and accumulation of hazardous and deleterious materials in the immediate vicinity of state waters. Idaho Admin. Code r. 58.01.02.800. This regulation expressly prohibits such storage without adequate measures "to insure that those materials will not enter state waters as a result of high

[19] The regulation also provides that "injunctive or other judicial relief may be initiated against the operator of a nonpoint source activity" if necessary, further demonstrating that the regulation provides judicially enforceable requirements. Idaho Admin. Code r. 58.01.02.350.

water, precipitation runoff, [or] wind." *Id.* ("materials must not be stored . . . unless"). The regulation goes on to list two criteria IDEQ will use to "judge" the measures and controls—the potential for the materials to enter the water and the potential injury to beneficial uses—but this does not undermine the plain language of the regulatory prohibition. *Id.* Caldwell Canyon violates the regulatory prohibition because it entails stockpiling of high-selenium content ore on the bank of selenium-impaired Dry Valley Creek, and despite minimal BMPs for these piles, wind erosion will cause them to emit about 21,682 kilograms of dust containing 466,163 milligrams of selenium, each year for 40 years. AR020536–37.

4. Violation of Idaho Administrative Code r. 58.01.02.055.05 (TMDL consistency).

Finally, BLM's generic, speculative defenses fail to rebut Plaintiffs' specific, factually supported claims over point source discharges. For example, Plaintiffs showed that the project involves three categories of point source discharges that will add sediment to waterbodies governed by a total maximum daily load (TMDL), AR071300, which precludes new point source discharges that add sediment. AR016351 (TMDL is already fully allocated to pre-existing sources of sediment); Idaho Admin. Code r. 58.01.02.055.05 ("discharges of causative pollutants shall be consistent with the allocations in the TMDL"). BLM's response that CWA permits are required to comply with water quality standards, such that permit compliance is "generally deemed" to comply with water quality standards, does not change the fact that Caldwell Canyon point sources cannot be permitted or otherwise allowed because the sediment TMDL prohibits them. Idaho Admin. Code r. 58.01.02.055.05. BLM itself acknowledges that the sediment TMDL "does not have an allocation for point sources." ECF No. 61-1 at 42. To the extent BLM suggests that a permit authorizing sediment discharges from Caldwell Canyon might somehow issue in the future, BLM is speculating and mischaracterizing the record. *Id.* (citing AR049801). The record clearly states

that "there are no wasteload allocations" for point sources in the sediment TMDL. AR049801.[20] In short, the Caldwell Canyon point source discharges that add sediment to waters subject to the sediment TMDL violate Idaho water quality standards, including Idaho Administrative Code r. 58.01.02.055.05.

Plaintiffs have demonstrated violations of Idaho water quality standards in violation of section 313 of the CWA, and BLM's FLPMA regulation, 43 C.F.R. § 2920.7(b)(3). BLM's authorizations are therefore contrary to law in violation of the APA, and summary judgment for Plaintiffs on their water quality claims is appropriate.

CONCLUSION AND REMEDIES

The presumptive and appropriate remedy here is to vacate BLM's Caldwell Canyon authorizations. The Court needs no further information to award that relief. *See* 5 U.S.C. § 706(2)(A) ("court shall . . . set aside" unlawful agency action); *Nat'l Family Farm Coal. v. U.S. EPA*, 960 F.3d 1120, 1145 (9th Cir. 2020).

BLM and P4 do not carry their burden to demonstrate compelling equities that "overcome the presumption of vacatur." *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1122 (9th Cir. 2018). With regard to the "seriousness" factor, BLM's violations of NEPA, FLPMA, and the CWA are serious and make it exceedingly unlikely that BLM could simply reaffirm these same authorizations without changes on remand. Disruptive consequences are not sufficient to overcome

[20] P4 incorrectly argues that point source discharges of stormwater are not subject to this limitation. *See* ECF No. 64-1 at 35. The relevant regulation, Idaho Administrative Code r. 58.01.02.055.05, makes no such distinction. Rather, it requires all "discharges of causative pollutants" to be "consistent with the allocations in the TMDL," *id.*, and the TMDL does not allocate any sediment loads to point sources, AR049801. P4's argument also ignores that the project's non-stormwater point sources, including those perched on the bank of Dry Valley Creek which will contribute 1.65 tons of dust (sediment) to waters subject to the TMDL each year. AR020536–37. While P4 claims this is "speculative," it comes directly from P4's consultant's technical memo. *Id.*

vacatur where it is "unlikely that the same [authorizations] would be adopted on remand." *Nat'l Family Farm Coal.*, 960 F.3d at 1145. The record also demonstrates that allowing the Caldwell Canyon Mine to proceed as currently authorized will have significant adverse consequences for sensitive resources. Namely, the project will disrupt highly imperiled sage-grouse breeding grounds and add toxic selenium pollution to a watershed already plagued by selenium to the point its fish are inedible. Where present, the risk of environmental harm weighs strongly in favor of vacatur. *See, e.g., Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 528 (9th Cir. 2015) (focusing on whether vacatur would avoid or risk "possible environmental harm").

The disruptive consequences do not overcome this result. Indeed, BLM has not made any showing of disruptive consequences and merely argues that the appropriate remedy depends on Plaintiffs' success on the merits. ECF No. 61-1 at 43–45. Fair enough, but BLM had all the information it needed to describe possible disruptive consequences of vacating the Caldwell Canyon authorizations and has not identified any.

P4's briefing and the second Gibson declaration do not satisfy BLM's heavy burden to "overcome the presumption of vacatur" either. *All. for the Wild Rockies*, 907 F.3d at 1122. P4's arguments improperly conflate vacatur with a permanent injunction against any future development of Caldwell Canyon Mine. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 158 (2010) (vacatur is a "less drastic remedy" than an injunction). P4 thus greatly exaggerates potential economic impacts. *Ctr. for Food Safety v. Vilsack*, 753 F. Supp. 2d 1051, 1059 (N.D. Cal. 2010) (finding intervenor's cost estimates "not to be credible" because they were based on a complete injunction and thus "greatly exaggerated" the extent of economic harm). For example, P4 points to the money it has spent on project authorizations and infrastructure to date, but there is no reason to think that vacatur will prevent P4 from recouping that investment once BLM

modifies its authorizations to address their flaws (for example, by adding protections for sage-grouse and water quality). P4's claim that vacatur will put hundreds of people out of work is inconsistent with BLM's argument that the Soda Springs plant will continue operations with or without the Caldwell Canyon Mine, so the Court should disregard any arguments about disruption of the local economy. ECF No. 61-1 at 8–10; ECF No. 61-2 at ¶ 11 ("P4 Production's Soda Springs plant would continue to operate albeit using a different ore source if Caldwell Canyon was not approved"). P4 also anticipates that it will be several more years before Caldwell Canyon supplies any ore to its Soda Springs plant, ECF 65-1 at ¶ 21, so it is unclear that vacatur will cause any significant changes in employment at the plant during the time it takes P4 to resolve the issues in this case. Moreover, devising and implementing modifications to the project design will further employ engineers, contractors, and construction workers. P4's arguments about increasing project costs also lack the context necessary for equitable consideration. There is no evidence in the record to support P4's cost increase estimates much less to compare them to P4's and Bayer's anticipated profits from turning Caldwell Canyon's 40-year supply of ore into Roundup pesticide products. *See California v. Bernhardt*, 472 F. Supp. 3d 573, 631 (N.D. Cal. 2020) (concluding vacatur is appropriate including because industry's costs "are but a small fraction of operator profits").

Moreover, giving strong weight to economic loss would provide perverse incentives for agencies and industry to invest heavily in potentially illegal projects up front. As Judge Boasberg of the D.C. District Court explained in rejecting claimed economic disruption of "hundreds of millions of dollars" allegedly lost from vacating an unlawful approval of a pipeline project:

> [D]enying vacatur on the basis of alleged economic harm risks creating undesirable incentives for future agency actions. If projections of financial distress are sufficient to prevent vacatur, the Court fears that agencies and third parties may choose to devote as many resources as early as possible to a challenged project –

> and then claim disruption in light of such investments. Such a strategy is contrary to the purpose of NEPA, which seeks to ensure that the government "looks before it leaps."

Standing Rock Sioux Tribe v. U.S. Army Corps of Engrs, 282 F. Supp. 3d 91, 106 (D.D.C. 2017); *see also W. Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042, 1088 (D. Idaho 2020) (noting same policy concern in rejecting requests to withhold vacatur).

P4's suggestion that vacating the project authorizations could cause more environmental harm than allowing the project to proceed is also disingenuous and nonsensical. P4's declarant admits that "much of the water management features are in place" already, and additional water management features would only be needed "with additional areas being opened up as part of the mine." ECF No. 65-1 ¶ 18. No "additional areas" will be "opened up" during the time the authorizations are vacated, so there is no need for additional water management features. Furthermore, state law obligates P4 to maintain existing compliance measures and protect groundwater regardless of the status of BLM's authorizations and regardless of P4's claims that vacatur would somehow make compliance "difficult." Idaho Admin. Code r. 58.01.02.080, -.350; *see also* AR050069; ECF No. 65-1 ¶ 18. Finally, vacatur would stop the illegal encroachment on sage-grouse habitat, which courts have held is sufficient grounds alone to vacate an agency action. *E.g., W. Watersheds Project v. Zinke*, 441 F. Supp. 3d at 1085; *see also Pollinator Stewardship Council*, 806 F.3d at 532 (vacating decision to protect imperiled species where leaving the decision in place "risks more potential environmental harm than vacating it").

At bottom, while the Court has equitable discretion to withhold the statutorily prescribed remedy of vacatur under "limited" circumstances, *Nat'l Family Farm Coal.*, 960 F.3d at 1145, this is not such a case. Vacatur here will avoid irreparable environmental harm and provide a clean slate on remand for BLM to ensure this project complies with federal law.

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Respectfully submitted.

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