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March 8, 2021

By Electronic Mail and Federal Express

U.S. Bureau of Land Management
White River Field Office
Attn: Kent Walter, Field Manager
220 East Market Street
Meeker, CO 81641
email: BLM_CO_White_River@blm.gov

Re: Protest of BLM's Decision to Proceed with the Buffalo Horn Land Exchange

Dear Mr. Walter:

Through undersigned counsel, Colorado Wild Public Lands Inc. ("COWPL") hereby protests the January 19, 2021 Notice of Decision of the U.S. Bureau of Land Management ("BLM") to approve the Buffalo Horn Land Exchange ("Land Exchange") (the "Decision"). The parties to the Land Exchange are BLM and Buffalo Horn Properties, LLC ("Proponent"). BLM's Decision approves an exchange of 2,652 acres of BLM land composed of 14 parcels (referred to as Parcels C-1, C-2, D-4, E-1, E-3, F-1, F-2, F-3, F-4, F-5, F-6, F-7, F-8, and G) for one 1,327.06-acre parcel owned by Proponent (referred to as Parcel B-1). Decision at 3–5. In addition, Proponent will donate four additional parcels (referred to as Parcels B-2, B-3, B-4, and B-5).[1]

[1] Notably, BLM's preferred alternative for the Land Exchange as laid out in the record documents is Alternative B, which involves a different 14-parcel configuration of lands owned by BLM totaling 2,815 acres (referred to as Parcels C-1, C-2, D-3, D-4, E-1, E-3, F-1, F-2, F-3, F-4, F-6, F-7, F-8, and G) and a single 1,835.26-acre parcel owned by Proponent (referred to as Parcel B). At some point after the Preliminary EA and Preliminary FONSI, BLM inexplicably swapped two parcels: Parcel F-5 is included in the Decision and the federal appraisals but not in Alternative B

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BLM's Decision is purportedly predicated on a May 7, 2018 preliminary environmental assessment ("Preliminary EA") and preliminary finding of no significant impact ("Preliminary FONSI"), and a January 19, 2021 final environmental assessment ("Final EA") and finding of no significant impact ("Final FONSI"), all undertaken pursuant to the National Environmental Policy Act ("NEPA").[2] In addition, BLM obtained appraisals of the market value of the federal and non-federal parcels.[3] COWPL submitted comments and associated exhibits on the Preliminary EA on June 6, 2018 and on the appraisals on May 19, 2020. We incorporate those comments and exhibits in this Protest by reference.

This Protest raises issues under the Federal Land Policy and Management Act ("FLPMA"), NEPA, and BLM's Land Exchange Handbook. Because the Land Exchange does not comply with these laws, BLM should rescind its approval of the Land Exchange and reverse the Decision.

COWPL lodges this Protest pursuant to, and under the authority of, 43 C.F.R. §§ 2201.7-1(b) and 2201.7-2, and the BLM's Land Exchange Handbook (H-2200-1), Chapter 9(F). In accordance with BLM regulation, 43 C.F.R. § 2201.7-2, and the agency's January 15, 2021 General Public Letter on the Land Exchange's webpage, the filing of this Protest by COWPL stays implementation of the Land Exchange. ***As a result, the exchange of the various parcels involved in BLM's decision cannot be completed until this Protest and, if filed, an administrative appeal to the Interior Board of Land Appeals ("IBLA") are resolved. COWPL files this Protest to ensure it exhausts any and all administrative remedies, to the extent exhaustion is required to challenge a BLM land exchange.***

INTERESTS OF THE PROTESTING PARTY

Colorado Wild Public Lands Inc. was formed in 2014 and is a 501(c)(3) nonprofit corporation. COWPL's business address is P.O. Box 1772, Basalt, Colorado 81621.

COWPL's mission is to protect the integrity, size, and quality of public lands in Colorado from diminution by private interests. COWPL's members are concerned citizens who

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and vice-versa: Parcel D-3 is included in Alternative B but omitted from the Decision and federal appraisals. BLM has not explained this bait and switch, but regardless of which configuration BLM intends to proceed with, its determination is unlawful. We have included references to both F-5 and D-3 in this Protest.

[2] *See supra* note 1. BLM's Decision is not—and indeed could not be—supported by the record because the parcel configurations differ between the Decision and underlying Final EA and Final FONSI.

[3] Incredibly, BLM's appraisal documents somehow match the configuration proposed in the Decision and not the Final EA and Final FONSI. Again, with no explanation.

value Colorado's public lands and waters for recreational use, for providing habitat for wildlife, for their wild-land character, and for their economic worth. COWPL advocates for economically and environmentally sensible management of Colorado's public lands and their related resources and assets. Through the monitoring of public-land transactions, decision-making, and management, COWPL advocates for retention of, increased access to, and maintenance of the ecological integrity and true economic value of public lands and their assets.

COWPL and its members use and enjoy the federal lands at issue in the Land Exchange and lands adjacent to the private lands that are the subject of the Land Exchange for recreational, educational, aesthetic, and conservation purposes. COWPL, as well as individual COWPL members, including Rick Tingle and Hawk Greenway, have provided comments on the Land Exchange, at both the scoping stage and during the opportunity for public comments on the Preliminary EA. The Land Exchange will harm COWPL's and its members' interests by conveying publicly accessible public lands to private ownership, by not ensuring that the formerly federal lands are managed to protect natural resources, and by creating precedent that encourages future lopsided land exchanges that are not in the interest of the public, Colorado, the United States, or the wild plant and animal communities that depend on the lands at issue. The Land Exchange injures COWPL and its members because it is poor public policy, violates federal law, and results in the loss of valuable public lands. Voiding the Land Exchange will remedy the injuries to COWPL and its members.

STATEMENT OF REASONS

BLM Has Decided to Give Away Immensely Valuable Public Lands in Exchange for Virtually Worthless Private Properties.

I. Violations of the Federal Land Policy and Management Act

Under FLPMA, public lands must be retained in federal ownership unless certain conditions are met. 43 U.S.C. §§ 1701(a)(1),(9), 1716(a). First, lands may be disposed of by exchange only if "the public interest will be well served by making the exchange." 43 U.S.C. § 1716(a); *see also* 1701(a)(1) (public land must be retained unless disposal will serve the national interest); *Lodge Tower Condo. Ass'n v. Lodge Properties, Inc.*, 85 F.3d 476, 477 (10th Cir. 1996) ("Section 1716 of the Federal Land Policy and Management Act … authorizes the Department of Interior … to exchange public lands for private lands if 'the public interest will be well served by making that exchange.'"). Second, using proscribed standards for determining value under FLPMA, the United States must receive fair market value for public lands and the lands to be exchanged must be of equal value. 43 U.S.C. §§ 1701(9), 1716(b). Finally, BLM must evaluate "the full range of land disposal *and acquisition tools available* to accomplish [its] objectives prior to proceeding with a land exchange proposal." Land Exchange Handbook at 1-8, Section G(1)(a) (emphasis added).

A. The Land Exchange Does Not Serve the Public Interest.

Before approving a land exchange, BLM is required to make a determination that the proposed land exchange is in "the public interest." 43 C.F.R. §§ 2200.0-6(b), 2201.7-1(a). This determination requires that BLM:

> give full consideration to the opportunity to achieve better management of Federal lands, to meet the needs of State and local residents and their economies, and to secure important objectives, including … [p]rotection of fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values; enhancement of recreation opportunities and public access; consolidation of lands and/or interests in lands … for more logical and efficient management and development; consolidation of split estates; expansion of communities; accommodation of land use authorizations; promotion of multiple-use values; and fulfillment of public needs.

43 C.F.R. § 2200.0-6. In evaluating these objectives, BLM must consider both the benefits *and* burdens that might flow from the proposed land exchange. *City of Santa Fe*, 103 IBLA 397 (1988).

The BLM's public-interest determination is guided by a two-pronged test. 43 C.F.R. § 2200.0-6(b)(1)-(2). First, BLM must ensure that "[t]he resource values and the public objectives that the Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the resource values of the non-Federal lands or interests and the public objectives they could serve if acquired." 43 C.F.R. § 2200.0-6(b)(1). Second, BLM must determine that the intended use of the conveyed federal lands will not "significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands." 43 C.F.R. § 2200.0-6(b)(2). Additionally, to safeguard the public interest, the BLM is required to "reserve such rights or retain such interest as needed and … otherwise restrict the use of Federal lands to be exchanged, as appropriate." 43 C.F.R. § 2200.0-6(i). This may include provisions in the conveyance documents that impose restrictions on the use and/or development of lands conveyed out of federal ownership. *Id.*

This public interest test is at the heart of Congress's directive to the federal-land agencies to protect public—rather than private—concerns during and resulting from every land exchange. Accordingly, BLM must support this finding with rationale in the administrative record, and federal courts strictly apply this mandate to protect the public. 43 C.F.R. § 2200.0-6(b) (stating "such finding and the supporting rationale shall be made part of the administrative record.").

Here, BLM has violated this mandate. Because its public-interest determination is not supported by the record, it cannot support the Land Exchange.

i. BLM's Public-Interest Determination Ignores Evidence That the Resource Values of the Federal Lands to be Exchanged Exceed the Values of the Non-Federal Lands to be Acquired.

In short, the public lands BLM is giving up are vastly more valuable than the private ones it will receive in return. To make an affirmative public-interest determination, BLM must first make a finding supported by the administrative record that the resource values and interests of the federal lands proposed for exchange are not more than the resource values of the non-federal lands proposed for acquisition. 43 C.F.R. § 2200.0-6(b). In making this determination, BLM must consider several factors, including: (i) the needs of state and local residents and their economies; (ii) the protection of fish and wildlife habitats, cultural resources, wilderness and aesthetic values; (iii) the enhancement of recreation opportunities and public access; and (iv) consolidation of lands for more efficient management. 43 C.F.R. § 2200.0-6(b). ***In this case, BLM's public-interest determination conflicts with record evidence for each of these public-interest factors.***

a. The Land Exchange Will Not Meet the Needs of State and Local Residents.

BLM seemingly ignored the needs of state and local residents as a whole, and favored the desires of Proponent instead. The EA acknowledges that the public parcels are "located in areas highly valued by big game hunters and outfitters," and that some local private landowners operate hunting lodges or lease portions of their land to earn supplemental income. Final EA at 52, 59. Several outfitters also hold Special Recreation Permits ("SRPs") on the public parcels at issue, which allow them to use the parcels for guided hunting trips. *See id.* at 9–11. If the Land Exchange proceeds, these outfitters will lose this source of income and Proponent will acquire the benefits of exclusive use of these high-value hunting grounds.

Several local landowners will also experience property-value decreases because their properties will no longer have access to adjacent BLM parcels. *See* Final EA at 9–11 (acknowledging that Parcels C-2, D-4, E-3, F-8 are "bordered by a different landowner" than Proponent); Federal Appraisal at 32 (same); Final EA at 102, 109, 110, 111, 112, 114, 116 (parcel maps indicating Parcels C-1, C-2, D-3, D-4, E-3, and F-8 are adjacent to non-Proponent private property); Federal Appraisal at 60 ("Adjacent Land Uses can have a positive impact on ranch prices, as the most desirable properties adjoin public lands on at least one boundary."). Additionally, the loss of grazing allotments on the public parcels to be exchanged will have impacts to both local and other state (i.e., Banning Angus in Steamboat) permittees. *See* Final EA at 9–11, 44. BLM argues that its acquisition of Parcel B will result in an increase of 1,736 acres of grazable federal land. *Id.* at 48. In the same breath, however, it admits that Alternative B "would be a decrease of approximately 0.44 percent in permitted animal unit months ("AUMs") [i.e, the amount of forage required to maintain a cow and her calf for a one-month period] overall in the affected allotments." *Id.* This inconsistency arises from the fact that Parcel B contains lower-quality grazing land than the public parcels BLM is giving up because Parcel B is infested

with invasive plants and weeds. *Compare* Final EA at 47 ("[T]he federal parcels that would be transferred to private ownership are to varying degrees well-suited for livestock grazing"), *with id.* at 66 ("Parcel B has extensive areas within Smith Gulch infested with Scotch thistle, … musk thistle, … bull thistle, … and houndstongue …."). The invasive plants that BLM itself acknowledges "extensive[ly]" infest Parcel B are inedible to cattle, rendering large swaths of Parcel B useless to medium or large animals—which makes the purported increase in acreage technically available for grazing incredibly misleading.[4] Finally, grazing permittees who gain new allotments on Parcel B will incur expenses to improve the new allotments with fences, water tanks, and the road maintenance necessary to build and maintain the improvements, while Proponent, who also operates a cattle operation with existing permits on the federal parcels, Final EA at 46, will gain the exclusive benefits of existing infrastructure on the public parcels and no longer be required to compensate BLM for the use of these lands and improvements, *see* Final EA at 45 (table listing existing range improvements on federal parcels); *id.* at 46 ("Range improvement projects occurring on the proposed exchange parcels were constructed and paid for prior to Buffalo Horn having the associated grazing permits [on the federal parcels].… Buffalo Horn has no investment in the projects …."). With their loss of supplemental income, property values, and grazing rights, the local and state residents whose needs BLM is required to consider are losing far more than they stand to gain. ***FLPMA expressly prohibits BLM from approving such one-sided exchanges.***

b. The Land Exchange Will Not Protect Fish and Wildlife Habitats, Cultural Resources, Wilderness and Aesthetic Values.

BLM's preferred alternative also blatantly trades away important wildlife habitat, cultural and paleontological resources, wilderness, and aesthetic values *while receiving nothing comparable in return.*

[4] *See* University of Nebraska-Lincoln, Institute of Agriculture and Natural Resources, Scotch Thistle ("The sharp spines [of scotch thistle] deter wildlife and livestock from grazing."), *available at* https://beef.unl.edu/beefwatch/scotch-thistle (last updated May 1, 2019), Musk Thistle ("Musk thistle is not palatable to livestock."), *available at* https://beef.unl.edu/beefwatch/2020/musk-thistle (last updated June 1, 2020); University of Idaho, Rangeland Ecology and Management, Bull Thistle ("Cattle will not graze bull thistle beyond the late bud stage."), *available at* https://www.webpages.uidaho.edu/rx-grazing/Forbs/Bull_Thistle.htm (last visited March 1, 2021); Washington State Noxious Weed Control Board, Houndstongue ("Houndstongue is a very strong competitor of desirable forage and …. is toxic to cattle, horses, goats and other livestock."), *available at* https://www.nwcb.wa.gov/weeds/houndstongue.

1. The Land Exchange Will Result in the Irrevocable Loss of Wildlife Habitat.

For example, under the preferred alternative, Parcels G and E-1, which contain priority and general habitat for the Northwest Colorado Greater Sage-Grouse, would be traded to Proponent. Final EA at 10–11. BLM also proposes to exchange away explicitly described "unique" aspen and riparian communities on Parcels D-3 and C-1, respectively, which support big game and nongame species, including migratory birds. *Id.* at 29, 30, 66, 67, 68, 72, 74, 88. Parcels E-1, E-2, F-2, F-4, F-5, F-6, and G are also classified as elk production areas. *Id.* at 29. In exchange, BLM would receive no comparable wildlife habitat. *Id.* at 71, 74.

Further exacerbating these habitat losses on the federal parcels, BLM's current management mandate to protect these habitats, e.g., by sustainably managing grazing on the parcels, would no longer apply. Once in private hands, Proponent could "manage" these lands as it sees fit (including by developing them)—or not "manage" them at all, thereby jeopardizing the continued value of these wildlife habitats. Finally, increased public use of BLM's newly acquired Parcel B could "disrupt and displace wildlife," *id.* at 30, 73, making BLM's already one-sided exchange even worse for wildlife habitat that remains under BLM management after the Land Exchange. ***This lose-lose proposition is a blatant abdication of BLM's mandate to protect the public's interest in wildlife resources.***

2. The Land Exchange Will Result in the Irrevocable Loss of Cultural and Paleontological Resources.

BLM's audacious public-land give-away didn't stop there. Habitat is not the only thing that would be irretrievably lost in the Land Exchange. Four scientifically important paleontological localities were identified on Parcel C-1, one of which—a dinosaur-limb bone fragment—remains on the property. *Id.* at 77. Thus, BLM admits the transfer of Parcel C-1 "would result in a loss of scientific data." *Id.* Parcel C-1 also contains a site eligible for listing on the National Register of Historic Places. *Id.* at 75. As a result, its transfer "without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance" would result in a finding of adverse effect to the property. 36 C.F.R. § 800.5(a)(2)(vii).

To supposedly mitigate for these effects to paleontological and cultural resources, BLM proposes to re-configure parcel C-1 to leave two 40-acre parcels containing the dinosaur-limb bone fragment and historic property under BLM management. Final EA at 76, 78. Under this proposal, however, these resources will now be surrounded by Proponent's private property, making them inaccessible to the public. *See id.* at 118 (Map 18. Mitigation for Cultural and Paleontological Resources). Accordingly, Proponent would reap the benefits of these parcels without any management obligations and without compensating BLM for this benefit.

Further, as discussed in Section I.A.i.d below, the proposed mitigation measure for cultural and paleontological losses—to reserve two isolated inholdings on Parcel C-1—undermines the stated purpose and need of the entire action: "to improve public access, to consolidate land ownership, and to improve management of public lands under the jurisdiction of the BLM while minimizing public trespass on adjacent private lands." *Id.* at 2. BLM itself admits that small, isolated parcels surrounded by private property "tend to be difficult for [it] to manage because both public and administrative access is often limited." *Id.* at 124. Additionally, the creation of two isolated inholdings makes it more likely that these parcels will be considered for exchange with BLM in the future. The proposed inholdings fall within the jurisdiction of the White River Field Office ("WRFO"). *See id.* at 2, 118. The Resource Management Plan ("RMP") for the WRFO categorizes Parcel C-1 as a "Category II" land and indicates that such parcels may be disposed of or exchanged to "consolidate ownership." *Id.* at 3. ***Thus, the Land Exchange—even with the proposed "mitigation measures"—robs the public of its interest in these cultural and paleontological resources.***

3. The Land Exchange Will Result in the Irrevocable Loss of Lands with Wilderness Characteristics.

Finally, under the Land Exchange, and in flagrant disregard of FLPMA's mandates, BLM will outright sacrifice public lands that are rich with wilderness characteristics and aesthetic values without receiving anything comparable in exchange. The EA explains that Wilderness Study Areas ("WSAs") "are areas that contain wilderness characteristics such as naturalness, solitude, and opportunities for primitive and/or unconfined recreation and are managed to not impair those values until Congress either designates them as wilderness or releases them for other uses." *Id.* at 6–7. Parcel C-1 contains "approximately 334 acres of the Unit 42-Danforth lands with wilderness characteristics [that] would become private property." *Id.* at 65.

However, not only does Parcel B "lack [the] naturalness" that would imbue it with wilderness characteristics, BLM's acquisition of Parcel B in the Land Exchange "would likely allow the public to more easily access both [adjacent] WSAs. It is also likely that it would result in more visits to these WSAs. This could result in impacts to the solitude found within these WSAs, which is an essential wilderness characteristic to retain by BLM policy." *Id.* at 38, 64. Thus, incredibly, in one fell swoop, the Land Exchange would trade away the wilderness characteristics of Parcel C-1 for nothing comparable *and* jeopardize the wilderness characteristics of the two WSAs that are adjacent to Parcel B. Such a result is unfathomable under FLPMA.

At bottom, BLM's proposed one-sided transfer of lands containing characteristics of high public interest—wildlife habitats, cultural and paleontological resources, and wilderness and aesthetic values—in return for nothing of comparable value simply cannot support its affirmative public-interest determination.

c. The Land Exchange Will Not Result in Enhanced Recreational Opportunities and Public Access.

The Land Exchange will also throw away well-established higher-quality recreation opportunities in return for BLM's uncertain promise to improve public access. Parcels C-1, D-3, and F-5 contain "high quality big game hunting opportunities," but BLM proposes to convey these parcels to Proponent and receive no comparable lands in return. *Id.* at 32–33. Indeed, the parcel that BLM will receive in return, Parcel B, is at a lower elevation, is comprised of invasive annual plants, and has no surface water—except in the form of stock ponds, only one of which "holds water for [only] *most of the year*,"—so it does not—and could not—replace the unique wildlife habitat of the higher-elevation parcels proposed for exchange, which BLM admits contain year-round "water, cover, and forage for many big game and non-game animal species," and "support a richer array of migratory bird species." *Id.* at 16, 29, 30, 66–68, 72, 88, 136 (emphasis added). This means public hunting and wildlife viewing opportunities will be diminished by the Land Exchange.

Furthermore, increased public use of Parcel B may also decrease hunting quality and the chance of hunting success on Parcel B and the adjacent WSAs, harming, rather than enhancing, one of the major forms of recreation in the area. But dismissively, BLM flicks away this concern in conclusory fashion and without record evidence: "It is unlikely that, if hunters were to be displaced by the disposal of these parcels, they would all seek the same new area to hunt. It is more likely that displaced hunters would disperse across the vast amount of public lands and seek various new areas to hunt." *Id.* at 36.

Parcel B also has "high potential for oil and gas" development, a large private (48%) mineral estate for which BLM would permit surface use, and an existing pipeline right-of-way; and it would remain available for leasing and subject to valid existing rights. *Id.* at 11, 12, 25, 27, 41, 79. It takes very little insight to conclude that development of these resources could additionally threaten the quality of recreational experiences on Parcel B and the adjacent WSAs. Nevertheless, BLM blithely accepts these risks in exchange for "*the potential to provide new public access* to the boundaries of two WSAs and other BLM lands in that area." *Id.* at 23 (emphasis added). Even so, BLM admits that it will not determine if, how, or when motorized or non-motorized access (or potentially seasonal motorized access) on Parcel B will be improved until after a subsequent NEPA analysis. *Id.* Thus, BLM itself admits that the actual benefits of the trade cannot be quantified. But it supports Alternative B anyway. ***However, trading actual benefits for potential ones does a disservice to the public interest and violates FLPMA's mandate to consider both the benefits and burdens of the exchange.***

d. The Land Exchange Will Not Consolidate Lands for More Efficient Management.

The record also demonstrates that the Land Exchange does not achieve BLM's goal of consolidating lands. Yet BLM supported it anyway. As noted above, the stated purpose and need

of the entire action is: "to improve public access, to consolidate land ownership, and to improve management of public lands under the jurisdiction of the BLM while minimizing public trespass on adjacent private lands." *Id.* at 2. However, BLM proposes to retain two isolated inholdings on Parcel C-1 despite admitting that small, isolated parcels surrounded by private property "tend to be difficult for [it] to manage because both public and administrative access is often limited." *Id.* at 124. Additionally, not all federal parcels proposed for exchange further the goal of consolidation. In fact, Parcels C-1 and D-3 lie on the outside edges of Proponent's land and are contiguous with public land. *See id.* at 102 (Map 2. Alternative B). Accordingly, transfer of these parcels would fragment rather than consolidate BLM lands. *See id.* at 18 (Parcel D-3 "abuts BLM lands"), 34 ("Parcel C-1 is at the distal end of a large 'island' of BLM land surrounded by private property"). This isn't consolidating lands—it's making a mess of the public's interest. ***And it is in stark violation of FLPMA regulations.***

ii. BLM's Public-Interest Determination Conflicts with Established Management Objectives for the Greater Sage-Grouse.

The Northwest Colorado Greater Sage-Grouse Approved Resource Management Plan Amendment ("ARMPA") designates certain BLM-administered lands as greater sage-grouse habitat management areas. *Northwest Colorado Greater Sage-Grouse Approved Resource Management Plan Amendmen*t, U.S. Department of the Interior, Bureau of Land Management, Northwest Colorado District Office, Colorado State Office (September 2015). Priority habitat management areas ("PHMA") attach the highest value to maintaining sustainable greater sage-grouse populations and include breeding, late brood-rearing, and winter concentration areas. *Id.* at I-5. General habitat management areas ("GHMA") are lands where some special management is needed to sustain greater sage-grouse populations. *Id.* They are typically areas of seasonal or year-round habitat outside of priority habitat. *Id.*

The federal lands proposed to be exchanged in Alternative B include both PHMA and GHMA. Specifically, federal Parcels E-1 and G both include PHMA, Final EA at 10-11, and federal Parcel G includes GHMA, *id.* at 11. Yet no greater sage-grouse habitat is identified on private Parcel B. *Id.*

The ARMPA requires BLM to retain public ownership of greater sage-grouse PHMA. ARMPA at 2–22. It doesn't do that here. Exceptions to this rule may only be considered where disposal of the lands will (i) provide a net conversation gain to the greater sage-grouse, and (ii) have no direct or indirect adverse impact on greater sage-grouse conservation. *Id.* Those exceptions don't apply. For PHMA in isolated federal parcels, tract disposals are only permitted where they are beneficial or neutral to long-term management of greater sage-grouse populations. *Id.* at 2–23. Similarly, greater sage-grouse GHMA may only be disposed of in accordance with the goals and objectives of the ARMPA, including the objective to maintain or increase greater sage-grouse abundance and distribution. *Id.*

Therefore, the Land Exchange violates the terms of the ARMPA. It trades away the highest value greater sage-grouse habitat and receives no comparable lands in return. Further, the EA does not explain how the land exchange will provide a net conservation gain to the greater sage-grouse, nor does it discuss how the loss of this valuable habitat will be mitigated or protected in private ownership. ***This amounts to an unequivocal violation of FLPMA.***

iii. BLM's Public-Interest Determination Conflicts with its Mandate to Reserve Rights Necessary to Protect the Public Interest in Maintaining Sage-Grouse Habitat.

Even if BLM is permitted to offer greater sage-grouse habitat for exchange, the regulations still require it to restrict the use of exchanged lands in order to protect the public interest:

> (i) Reservations or restrictions in the public interest. In any exchange, the authorized officer shall reserve such rights or retain such interests as are needed to protect the public interest or shall otherwise restrict the use of Federal lands to be exchanged, as appropriate. The use or development of lands conveyed out of Federal ownership are subject to any restrictions imposed by the conveyance documents and all laws, regulations, and zoning authorities of State and local governing bodies.

43 C.F.R. § 2200.0-6.

It hasn't. BLM has failed to propose any measures to uphold the public interest in maintaining the highest value greater sage-grouse habitat. In fact, the agency seldom attaches such conditions—to avoid alienating the interests of the private exchange party. *See* Scott K. Miller, *Missing the Forest and the Trees: Lost Opportunities for Federal Land Exchanges*, 38 Colum. J. Envtl. L. 197, 204 (2013) ("The problem is that the BLM and Forest Service have missed many opportunities to guide the use of the land they convey to serve the public's—and their own—interests. The Agencies' land exchange regulations are strong and specific . . . But an investigation of their handbooks and internal memos reveals more potent instructions that all but prohibit agency officials from meeting their regulations' charge."). ***To comply with the regulations, BLM must retain an interest in federal Parcels E-1 and G to ensure the lands are adequately protected.***

B. The Land Exchange Appraisals Do Not Comply with FLPMA Valuation Standards.

BLM's adoption of the appraisals at issue in this Land Exchange offends the public trust and breaks the law.

BLM may not exchange federal land for private land unless it receives "fair market value" for the lands being disposed. 43 U.S.C. § 1701(a)(9). "Market value" means the "probable price" in a "competitive and open market" where parties "act[] prudently and knowledgeably, and the price is not affected by undue influence." 43 C.F.R. § 2200.0-5(n). In establishing market value, BLM is required to, among other things, (1) "[d]etermine the highest and best use of the property" and (2) assume private ownership. *Id.* § 2201.3-2(a). Highest and best use is "the most probable legal use of a property, based on market evidence as of the date of valuation, expressed in an appraiser's supported opinion." *Id.* § 2200.0-5(k). Under the Uniform Appraisal Standards for Federal Land Acquisitions ("UASFLA"), each "highest and best use" must be analyzed using four criteria: physical possibility; legal permissibility; financial feasibility; and degree of profitability. UASFLA, § 4.3.1 (2016); 43 C.F.R. § 2201.3.

In addition to ensuring lands are valued at market prices, BLM may only conduct a land exchange when the public and private properties proposed to be exchanged are of "equal value." 43 U.S.C. § 1716(b). To ensure this requirement is met, appraisals are performed on all the properties at issue. *Id.* § 1716(d)(1). As detailed in the regulations, "lands or interests to be exchanged shall be of equal value or equalized in accordance with the methods set forth in § 2201.6 of this part." 43 C.F.R. § 2200.0-6(c). These equalization methods include modifying or eliminating certain lands from a proposed exchange and the use of cash equalization payments. *Id.* § 2201.6(a). A cash equalization may not "exceed 25 percent of the value of the Federal lands to be conveyed." *Id.* § 2201.6(b).

Appraisals are guided by BLM regulations, BLM's handbook, the UASFLA, and the Uniform Standards of Professional Appraisal Practice ("USPAP"). 43 C.F.R. § 2201.3.

i. AVSO's Market Value Determination for the Non-Federal Parcel Is Flawed.

BLM regulations require market value to be based on "highest and best use of the property being appraised." 43 C.F.R. § 2201.3-2(a). The concept is not hard to understand. Highest and best use is "the most probable legal use of a property, based on market evidence as of the date of valuation, expressed in an appraiser's supported opinion." *Id.* § 2200.0-5(k). The highest and best use is required to be: (i) physically possible; (ii) legally permissible; (iii) financially feasible; and (iv) maximally productive. UASFLA, § 4.3.1 (2016); 43 C.F.R. § 2201.3; Non-Federal Appraisal at 30. The highest and best use "will ordinarily be the property's existing use, unless determined otherwise by market evidence." Non-Federal Appraisal at 30.

The Department of Interior's Appraisal and Valuation Services Office ("AVSO") issued its appraisal report for the non-federal Parcel B on January 30, 2019 ("Non-Federal Appraisal"). Parcel B is an 1,835.26-acre private inholding surrounded by BLM lands. Non-Federal Appraisal at 6. It was appraised as a single large vacant parcel of 1,835.26 acres using the Sales Comparison Approach and in conformance with the USPAP and the UASFLA. *Id.* at 2–3. The

parcel was inspected on October 18, 2018 and on January 10, 2019, *id.* at 12, and AVSO arrived at a market value of $2,200,000 (roughly $1200/acre), *id.* at 3.

The Non-Federal Appraisal determined that the highest and best use of Parcel B is for "[r]ural residential homesites (up to eleven lots use by right), with complementary agriculture, recreation, and/or mining." *Id.* at 6, 31. However, this determination ignores (i) that the current use (and for the last 10 years)—and therefore presumed highest and best use—is for "hunting and grazing," Non-Federal Appraisal at 24; and (ii) even putting current use aside, BLM itself believes that its most probable and reasonable use of Parcel B is for recreation (including hunting) and grazing, not rural residential development, *see e.g.*, Final EA at 35 ("Parcel B would provide improved access to approximately 15,000 acres of BLM public land [and] … itself provide a spectrum of recreational opportunities, not limited to big game hunting, but also including hiking, backpacking, horseback riding, and camping throughout the year."), *id.* at 46 ("Under Alternative B the increase [in grazing allotments] would be 1,736 acres and roughly 137 AUMs associated."). Remarkably, despite AVSO's determination of highest and best use as rural residential, the appraisal itself used properties for comparison that "are typical ranches for the area, *and are similar to the subject as they are well suited for seasonal livestock grazing and mountain recreation (especially hunting)*." *Id.* (emphasis added).

AVSO's determination of highest and best use overvalues Parcel B based on the assumption that development of rural homesites is physically possible, financially feasible, and maximally productive. Even though it has never happened there and almost certainly will not. Indeed, AVSO's own appraisal undermines this conclusion. The property is several hours from the largest nearby cities—Denver and Salt Lake City—in an area with an economic base of ranching, mining, energy production, and recreation. Non-Federal Appraisal at 15. The area in which Parcel B is situated is "less affluent, and dominated by working class residents." *Id.* The parcel also lacks irrigated acreage or live water amenities. *Id.* at 6, 22. Though electric and telephone service are available within one-quarter mile and "could be extended to the boundary for rural residential homesite(s) at some cost," there are currently no amenities. *Id.* at 6, 23, 30. Additionally, since Parcel B is surrounded by BLM lands, BLM approval would be required to extend these utilities across public land. *See id.* at 45. The property is in an area of "high potential for oil and gas," [5] Final EA at 41, and is subject to reservations for mineral rights on approximately half of the holding, a right-of-way easement for a natural gas pipeline, and a plat for an unconstructed 40-acre reservoir. Non-Federal Appraisal at 13. Additionally, motorized access is via BLM Road 1712, which is native surface, has sections that "require[] high-clearance, with four-wheel drive necessary during wet conditions," and "would have to be

[5] AVSO's Appraisal attempts to downplay Parcel B's potential for development of these resources, as only "moderate." Appraisal at 23. This is false. BLM repeatedly admits that "*[a]ll* parcels [proposed for exchange] are located in an area that has high potential for oil and gas and the Federal oil and gas mineral estate is available for leasing." Final EA at 41; Preliminary EA at 39 (emphasis added).

upgraded to provide adequate access to the holding for development with year-round housing." *Id.* at 22, 30.

Even AVSO acknowledges that since Parcel B is an inholding "with limited access and utilities," "considerable costs would be incurred for development at the maximum density allowed," and "subdivision at the maximum density allowed would not generate an incremental profit over and above value as one holding." *Id.* at 30, 31. Accordingly, BLM's conclusion about Parcel B's market value is "not in accordance with" FLPMA's highest-and-best use standard and also "runs counter to the evidence before the agency." *Colo. Envt'l Coal.*, 185 F.3d at 1167. ***In sum, the Non-Federal Appraisal is deceptive at best, and, at worst, mocks FLMPA's valuation standards.***

ii. Proponent's Donation of Parcels B-2, B-3, B-4, and B-5 Violates FLPMA's Equal Value Rules.

Because FLPMA requires that the lands to be exchanged be "of equal value," 43 U.S.C. § 1716(b); 43 C.F.R. § 2200.0-6(c), the only way an unequal exchange may proceed is if the values are "equalized" by modifying the lands involved in the land exchange or through cash equalization payments, 43 C.F.R. § 2201.6(a)-(c). Cash equalization payments cannot exceed 25% of the value of the federal parcels. *Id.* at § 2201.6(b).

Here, the federal parcels (including Parcel F-5, which is not included in preferred Alternative B, but was included in the Decision and appraisals, and omitting Parcel D-3, which was included in Alternative B but was not included in the appraisals or Decision, *see supra* note 1) were assessed at a market value of $1,590,000, and non-federal Parcel B was assessed at a market value of $2,200,000. Given the inequity in values, a cash equalization or waiver would be necessary to proceed with the exchange as structured in the appraisals. But such equalization is unavailable because the difference ($610,000) exceeds the 25% limit of the value of federal lands (i.e., $397,500). Instead, at some point in the process and without public notice and comment, *see* Section II.D.ii below, the parties agreed to divide Parcel B into five subparcels (i.e., Parcels B-1, B-2, B-3, B-4, and B-5), with Proponent exchanging only Parcel B-1 and donating Parcels B-2, B-3, B-4, and B-5, valued at $610,000. *See* Appraisal Supplement at 1–2; General Public Letter; Decision at 1. Accordingly, a supplemental appraisal for the new Parcel B configuration was conducted. The supplement to the Non-Federal Appraisal was issued on July 19, 2019 ("Appraisal Supplement"). *Id.* AVSO again arrived at a $1200/acre valuation, for a total value of $1,590,000 for the 1,327.06-acre Parcel B-1 and $610,000 for the 508.20 to-be-donated acres (i.e., Parcels B-2, B-3, B-4, and B5). Appraisal Supplement at 2.

BLM abuses its discretion and violates the law in accepting this proposal. The regulations are clear: to ensure compliance with the equal-value mandate of FLPMA, only limited cash-equalization payments and, in some circumstances, waivers of cash equalizations are permitted. *See* 43 C.F.R. § 2201.6(b) & (c). BLM cannot bypass this regulatory restriction simply by purporting to accept a donation of the balance of Parcel B. But BLM accepted Proponent's offer

anyway, seeking to circumvent these rules by dividing Parcel B at a late stage of the administrative process and characterizing Parcels B-2, B-3, B-4, and B-5 as a donation. In doing so, BLM abused its discretion. The donation is plainly part of the Land Exchange: but for the Land Exchange, Proponent would not be divesting itself of a portion of Parcel B and donating it to BLM. ***The agency's acceptance of the balance of Parcel B as a donation is glaring error.***

iii. AVSO's Market Value Determination for the Federal Parcels Is Flawed.

AVSO's appraisal of the federal parcels fared no better. AVSO issued its appraisal report for the federal parcels on January 10, 2019. ("Federal Appraisal"). The federal parcels (C-1, C-2, D-4, E-1, E-3, F-1, F-2, F-3, F-4, F-5, F-6, F-7, F-8, and G)[6] range in size from 20.17 to 1,679.57 acres, but were appraised as a single larger parcel of 2,652 acres using the Sales Comparison Approach and in conformance with the USPAP and the UASFLA. Federal Appraisal at 2–3, 6. The parcel was inspected on January 10, 2019, and AVSO arrived at a market value of $1,590,000 (roughly $600/acre). *Id.* at 3. ***BLM committed legal error by significantly undervaluing the federal parcels.***

a. The Highest and Best Use of the Federal Parcels Includes Vehicle Access.

BLM's market-value appraisal of the federal parcels failed to comply with appraisal standards. The appraisal discounts the federal parcels, particularly the two larger parcels, C-1 and F-5, because it concludes that vehicle access is lacking. However, the appraisal ignores the known future use of the federal parcels—conjunction with Proponent's ranch and the vehicle access that will result.

As explained above, a market-value determination is anchored in the property's "highest and best use," which is often based on the reasonable future use of the property. Here, the reasonable future use of the federal parcels arises from their inclusion in Proponent's hunting ranch. This has been the purpose of the Land Exchange from the beginning. Preliminary EA at 1 ("Buffalo Horn Property, LLC … approached the White River Field Office … in 2008 about a land exchange …"); Final EA at 1 (same); Feasibility Report at 1 (same). The appraisal itself confirms that the highest and best use is the properties' future use as: "[a]griculture, recreation, and/or *assemblage with adjacent private land* (due to the lack of access for rural homesites)." Federal Appraisal at 6 (emphasis added). The Federal Appraisal also acknowledges that "the most logical buyer" of the federal parcels is Proponent. *Id.* at 44. Given this probable future use, and despite the Federal Appraisal's failure to say so, even BLM acknowledges that the federal parcels will have vehicle access. *Id.* ("Buffalo Horn … own[s] most or all of the surrounding

[6] Notably, this appraisal includes Parcel F5, despite its removal from the preferred alternative without public notice and comment. *Compare* Final EA at 12, *and* Preliminary EA at 11, *with* Federal Appraisal. This matter is discussed more fully in Section II.D.ii below.

private land *and also control[s] potential vehicular access to many parcels*." (emphasis added)); *Id.* at 21 ("Buffalo Horn can drive motorized vehicles on at least five roads and reach all four sides of … parcel [C-1] on these routes.").

Nevertheless, BLM shamelessly and unlawfully discounted the market value of the federal parcels by adjusting comparable sales downward as much as 50% by claiming that the federal parcels "do not have direct vehicular access" since "vehicular ingress/egress to some of the tracts are privately owned" and legal access would have to be obtained from the neighboring landowners at "significant cost." *Id.* at 28. This ignores the fact that Parcels C-1, D-3, and F-5 do in fact have public access, with Parcels D-3 and F-5 being accessible by vehicle followed by a short hike. Final EA at 18 (C-1 "is accessed by the public by hiking or horseback riding" and "the public can travel with a full-sized motor vehicle approximately 1.7 miles on a BLM route to a well pad. From the well pad the public can hike or travel on horseback approximately 0.2 miles and 350 vertical feet to reach Parcel D-3"); ("Access to [F-5] is the same as the access to Parcel E-2 except the public can travel another 4 miles on a BLM motorized route and then travel non-motorized either by hiking or by horseback riding another 3 to 3.5 miles and into the WSA to reach Parcel F-5."). And for the majority of the other parcels, the neighboring landowner from whom permission must be sought is, in fact, Proponent. *See id.* at 102 (Map 2. Alternative B), 113, 115, 116, 117 (parcel maps indicating Parcels E-1, F-1, F-2, F-3, F-4, F-6, F-7, and G are surrounded by Proponent's land). Such a misapplication of the appraisal rules is mind-boggling.

The Appraisal also notes that a total of 400 legal lots could be created using all of the federal parcels. *Id.* at 43. However, by failing to acknowledge vehicular access to the parcels, BLM also neglected to consider the parcels' probable future use for homesites. *See id.* at 6 (highest and best use is agriculture, recreation and/or assemblage with adjacent private land "due to lack of access for rural homesites."). BLM's failure to consider rural homesite development is further underscored by its admission elsewhere that both counties in which the federal parcels exist "require proof of vehicular access to the lot from a public *or private road* in order to obtain a building permit to construct [residential] units." *Id.* at 43 (emphasis added). Notably, had BLM valued the federal parcels as having vehicle access—under the assembled-ranch or rural-homesite highest-and-best-use scenario—the market value would have been far greater than $600 per acre, and the Land Exchange would not have satisfied FLPMA's equal-value requirement. ***Accordingly, BLM plainly violated FLPMA's standard for determining market value.***

b. AVSO Manipulates Market Values to Arrive at a Lower Valuation for the Federal Parcels.

Besides its erroneous determination of highest and best use, the Federal Appraisal manipulates the market value of the federal parcels in several other ways.

1. AVSO Ignores the Value of Certain Federal Parcels' Continuity with Adjacent Public Lands.

First, because UASFLA appraisal standards require that estimates be based on an assumption that the parcel is in private ownership, partial blocks of federal lands are treated as separate and independent from adjoining federal tracks. UASFLA 1.12. This approach ignores considerations regarding partial acquisitions. USPAP acknowledges that removing acreage from a larger holding impacts the value of the remaining pieces.

Partial acquisition rules under USPAP acknowledge that removing acreage from a larger holding impacts the value of the remaining pieces; thus, the rules require appraisers to undertake not one, but two appraisals, triggering the "Before and After Rule"—an appraisal of the conditions before the transaction and another one anticipating the conditions after. The second appraisal must also consider the damages and benefits accrued to the remainder lands from the partial acquisition. But AVSO ignored these standards. This resulted in a gross undervaluation of federal parcels C-1 and F-5 (and would have for D-3 had it had been included in the Federal Appraisal) as high-value hunting ground precisely because of these parcels' contiguity with other public lands.

2. AVSO Unlawfully Aggregates the Federal Parcels Into A Single Parcel.

Second, the appraisal instructions "aggregated" all of the federal parcels into one larger parcel. However, the highest and best use is different for each federal parcel. For example, a 20-acre federal parcel completely surrounded by Proponent's land has a different highest and best use than the largest parcels included in the appraisal, C-1 and F-5—and D-3 had it been included in the Federal Appraisal—all of which are connected to other federal lands and contain "unique" habitat. Final EA at 29, 30, 66, 67, 68, 72, 74, 88. Indeed, the April 2016 Feasibility Analysis ("Feasibility Analysis") supports this—it ascribes a different highest and best use to parcel C-1 than the other federal parcels (i.e. recreation versus assemblage), resulting in an initial valuation twice as high for parcel C-1. Feasibility Analysis at 4. Therefore, the aggregation of the parcels resulted in a skewed application of comparable properties as discussed further in Section I.B.iii.c below.

3. AVSO Ignores the Value of Combining the Federal Parcels with Proponent's Existing Ranch.

Third, the Federal Appraisal was limited to assessing BLM property, ignoring the value resulting from combining the federal parcels with Proponent's existing ranch. This failing becomes particularly acute in light of AVSO's conclusion that one of the possible highest and best uses of the federal parcels is "assemblage with adjacent private land." Federal Appraisal at 6. Proponent's ranch is private property that is contiguous with all, and completely surrounds many, of the federal parcels. *See* Final EA at 101 (Map 1. Alternative A), 102 (Map 2.

Alternative B). Indeed, the only reason Proponent is pursuing the Land Exchange is to enlarge its existing private ranch by adding the federal parcels.

With the Land Exchange, Proponent will own a significantly larger piece of property that will no longer have isolated federal inholdings and will expand onto adjacent federal land. Nonetheless, the Federal Appraisal does not consider this added value to Proponent and its ranch. *See* Land Exchange Handbook at 7-3, Section D(7) (requiring "discussion addressing the value impacts of the proposed exchanges on adjoining or related properties"). Rather, the Federal Appraisal limits the value of the federal parcels to agriculture and/or recreation, ignoring the value flowing to the federal parcels from its relationship with Proponent's Ranch. Federal Appraisal at 6 (highest and best use is "[a]griculture, recreation, and/or assemblage with adjacent private land").

These manipulations make a mockery of the FLPMA appraisal standards and cannot support AVSO's value determination.

c. AVSO Inconsistently Applies the Comparable Sales to the Federal and Non-Federal Parcels.

In addition to making erroneous determinations on highest and best uses for the federal and non-federal parcels and manipulating the federal parcels' value with suspect and unsupported appraisal methodologies, AVSO inconsistently applies the comparable sales to the parcels in several important ways:

- **The value of continuity with federal lands is not applied consistently.** Downward adjustments are made from the $1,000 and $1,487 per-acre sales of Sales Two and Four to "slightly less than $1,000 acre" and "slightly lower than $743 per acre," respectively, because AVSO concludes these properties are "slightly superior to the apprised [federal] property" since they "mostly border public lands." Federal Appraisal at 60. However, this approach ignores that federal Parcels C-1, F-5, and D-3 are also adjacent to public lands. *Id.*; Final EA at 101 (Map 1. Alternative A), 102 (Map 2. Alternative B). And curiously, Sales Two and Four are also used in the Non-Federal Appraisal but AVSO concludes that (i) Sale Two should be adjusted upward to $1,075 per acre to arrive at a value for Parcel B, and (ii) Sale Four supports a value of Parcel B "slightly less than $1,487 per acre." Non-Federal Appraisal at 48. But there is simply no basis for a nearly $700 per acre difference in the values of the federal and non-federal parcels—particularly when several of the federal parcels do in fact have continuity with federal lands.

- **Access is weighted unevenly in the appraisals.** Access controlled by a neighbor is discounted heavily in the Federal Appraisal even though comparable sales indicate the willingness of private buyers to pay substantially more for such

access. For example, comparable Sale One was acquired by the adjacent landowner for a land-only price of $1,200 per acre. Federal Appraisal at 49. The buyer of Sale Two, which sold for a land-only price of $1,000 per acre "owns an adjacent ranch to the southeast, with legal and physical access to [Sale Two] provided from [the buyer's] private roads." Federal Appraisal at 51. Similarly, the purchaser of Sale Four paid a land-only price of $1,487 per acre to re-acquire land on which it had retained an easement (and therefore already had access) "to add to his adjacent holdings to the south and northwest." Federal Appraisal at 55. Despite the near-identical access that these buyers had to their purchases as Proponent has to the federal parcels (i.e., from their own private roads), the value of Sales One and Four were adjusted 50% downward because of "superior access," leading to a value for the federal lands of $600 and slightly lower than $743 per acre, respectively. *Id.* The downward adjustments from the values of Sales One and Four for lack of public access blatantly ignores the indisputable record evidence that these purchasers' circumstances are identical to those of Proponent. As with the purchasers of Sales One, Two, and Four, Proponent owns adjacent land with legal and physical access to the federal parcels and seeks to acquire the federal parcels to add to its current holdings. *See* Section I.B.iii.a. Whether the public has access is simply irrelevant. These parcels have substantial value to adjacent landowners who can access them without public roads while increasing their holdings.

- **The access criterion used is different for the federal and non-federal parcels.** The access criterion used to select the comparable sales in the Non-Federal Appraisal is "*adequate access* for rural homesites." Non-Federal Appraisal at 33 (emphasis added). In stark contrast, the criterion for the federal parcels is "*especially if they lack adequate access* for rural homesites." Federal Appraisal at 46 (emphasis added). But there is no explanation for why buyers not seeking assemblage with adjacent lands they already own are willing to pay market prices for lands with substandard vehicular access as long as there are recreational values. And even if this is the case, there is no explanation as to why this same presumption, which is relied on for the valuation of Parcel B, is not extended to the federal parcels. As discussed in Section I.B.iii.a above, the federal parcels will have access after assemblage—and they have far greater recreational value than the non-federal parcel, *see* Section I.A.i.c.

- **Homesite development is only considered for the non-federal parcel.** Rural homesite development is considered for Parcel B but not the federal parcels. *Compare* Non-Federal Appraisal at 31, *with* Federal Appraisal at 43–44. However, if the federal parcels were privately owned—as the appraisal instructions and FLPMA regulations dictate they be treated for valuation purposes—rural homesite development would be a legally permissible, physically possible, and financially feasible highest and best use, particularly because

Proponent can already reach the federal parcels and will now be able to expand vehicular access throughout its now-more-expansive holdings.

- **The appraisals value future development differently.** The Federal Appraisal adjusts the value of the federal parcels downward by 31–55% to account for the "loss in value due to a lack of legal access to the land for development with rural homesites." Federal Appraisal at 57. In other words, because AVSO concludes development cannot occur on the federal parcels it downgrades the value of these parcels. Even if this were true—which it is not as discussed in the bullet above and Section I.B.iii.a—the Non-Federal Appraisal ignores that the same condition exists on Parcel B, albeit for different reasons. Parcel B will have no future development potential once it transfers to the public domain.

These inconsistencies in the use of comparable sales between the Federal and Non-Federal Appraisals only serve to further exacerbate AVSO's violations of FLPMA and cannot support the current property valuations.

d. AVSO Ignored Other Recent Comparable Acquisitions by Proponent in Determining the Federal Parcels' Value.

The Federal Appraisal indicates that AVSO considered two recent (2013) Buffalo Horn purchases for analysis, but neither were ultimately used. *See* Federal Appraisal at 47. Importantly, use of these appraisals would have required AVSO to assign a value to the federal parcels far higher than the $600 per acre value AVSO settled on. Indeed, Proponent purchased 611 acres in August 2013 for a land-only price of $1,786 per acre and 446 acres in October 2013 for a land-only price of $1,534 per acre. *See id.* at 47 (providing details of Proponent's purchases at comparables 11 and 12). Both of these parcels were surrounded by Proponent's private property and supported grazing and hunting—facts that match exactly with those of the federal parcels. *Id.* However, the glaring omission of these comparables from the valuation analysis is not even mentioned by AVSO. AVSO's failure to analyze these comparables is a unmistakable violation of FLPMA's requirement to conduct a comparative market analysis. *See* 43 C.F.R. § 2201.3-3.

Had BLM not manipulated the values of the federal parcels in the ways described above, the parcels proposed for exchange would not have been of equal value. Thus, yet again, BLM blatantly violated the mandates of FLPMA.

C. BLM Failed to Consider Alternative Means of Acquiring the Non-Federal Parcel.

The BLM Land Exchange Handbook provides that BLM must evaluate "the full range of land disposal *and acquisition tools available* to accomplish [FLPMA] objections prior to proceeding with a land exchange proposal." Land Exchange Handbook at 1-8, Section G(1)(a)

(emphasis added). The Land Exchange Handbook requires these tools be evaluated in the Feasibility Analysis. *Id.*

BLM violated this requirement by failing to consider any acquisition tool for Parcel B other than a land exchange. Specifically, in the Feasibility Analysis, BLM never presented or considered alternative tools for acquisition of Parcel B. Only the Land Exchange, as originally proposed, was described. Indeed, despite noting that "Parcel B is the BLM's highest priority for acquisition because it would provide improved public access to two Wilderness Study Areas (WSAs)," BLM did not consider the use of acquisition funds to purchase the private land through the Land and Water Conservation Fund, the Great Outdoors Colorado trust fund ("GOCO"), or any other state or local government program. Feasibility Analysis at 1. ***BLM's failure to consider any acquisition tool other than the Land Exchange is in clear violation of the Land Exchange Handbook requirements.***

II. Violations of the National Environmental Policy Act

NEPA is a procedural statute enacted "to reduce or eliminate environmental damage and promote 'the understanding of the ecological systems and natural resources important to' the United States." *Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 756 (2004). These goals are accomplished through two main directives.

First, NEPA requires that all federal agencies take a "hard look" at environmental impacts of their proposed actions. *New Mexico v. BLM*, 565 F.3d 683, 704 (10th Cir. 2009). "[T]he agency's 'hard look' [must] be undertaken objectively and in good faith, not as a subterfuge designed to rationalize a decision already made or to purposefully minimize negative side effects." *Colorado Envtl. Coal. v. Salazar*, 875 F. Supp. 2d 1233, 1250 (D. Colo. 2012) (citations omitted).

Second, NEPA mandates agency transparency by informing and involving the public in the process. *Baltimore Gas and Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983) (agency must "disclose[] the environmental impact of its actions"); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989) ("NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time"); *Diné Citizens Against Ruining Our Environment v. Klein*, 747 F.Supp.2d 1234, 1256 (D. Colo. 2010) ("One of NEPA's core purposes is to ensure 'that an agency will inform the public that it has considered environmental concerns in its decision-making process.'"). As the Tenth Circuit held, "[b]y focusing both agency and public attention on the environmental effects of proposed actions, NEPA facilitates informed decision-making by agencies and allows the political process to check those decisions." *New Mexico*, 565 F.3d at 703. "NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh*, 490 U.S. at 371.

A. BLM Did Not Consider a Reasonable Range of Alternatives.

The alternatives analysis is "the heart" of the environmental impact statement ("EIS"). *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1174 (10th Cir. 1990) (citing 40 C.F.R. § 1502.14). The alternatives analysis is so critical that, "[t]he existence of reasonable but unexamined alternatives renders an EIS inadequate." *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059 (citing *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995). Even if an EIS were not required for this exchange (although as explained in Section II.C below, one was), "[t]he EA, while typically a more-concise analysis than an EIS, must still evaluate … alternatives as required by NEPA section 102(2)(E) and the environmental impact of the proposed action and alternatives." *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174 (D. Colo. 2014). Accordingly, the EA must "study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E).

The range of appropriate alternatives that BLM must consider is determined by the purpose of the project. *See Committee to Preserve Boomer Lake Park v. Dep't of Transp.*, 4 F.3d 1543, 1550 (10th Cir. 1993) (stating "if an alternative does not satisfactorily fulfill the purpose of the project, … then the alternative may be rejected."). Moreover, appropriate alternatives must be non-speculative and bounded by some notion of feasibility. *Utahns for Better Transportation v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1173 (10th Cir. 1996).

BLM states in the EA that the purpose of the Land Exchange is to "improve public access, to consolidate land ownership, and to improve management of public lands under the jurisdiction of the BLM while minimizing public trespass on adjacent private lands." Final EA at 2. ***But in violation of NEPA, BLM failed to consider several alternatives that would serve the public interest and be consistent with the stated purpose of the exchange, including: (i) exchanging only the isolated federal inholdings, (ii) reserving high-quality greater sage-grouse habitat, and (iii) using alternative funding mechanisms to acquire non-federal Parcel B or lands around the isolated federal inholdings.***

i. BLM Did Not Consider an Alternative That Only Consolidated the Isolated Federal Inholdings.

BLM failed to consider an alternative by which only the isolated federal holdings would be exchanged, and high-quality parcels that are already accessible to the public would be retained. Several of the federal properties proposed to be exchanged are already accessible to the public, including Parcels C-1, F-5, and D-3. Retaining these properties would advance the purpose of the exchange by maintaining properties accessible to the public in federal hands while consolidating land ownership and minimizing public trespass on adjacent private lands. ***Failure to consider this alternative is a NEPA violation.***

ii. BLM Did Not Consider an Alternative That Reserved High-Quality Greater Sage-Grouse Habitat.

Several of the federal properties proposed in the exchange, including Parcels G and E-1, contain high-quality greater sage-grouse habitat. BLM failed to consider any alternatives that would either retain the greater sage-grouse habitats under federal control or place deed restrictions on the parcels in order to ensure the preservation of the habitats. *See also* Sections I.A.ii, iii. ***Failure to consider this alternative is a NEPA violation.***

iii. BLM Did Not Consider Alternative Means of Acquiring Non-Federal Parcel B Using Other Funding Mechanisms.

As noted in Section I.C, above, BLM failed to consider any acquisition tool other than a land exchange. For example, BLM did not consider the use of acquisition funds to purchase the private land through the Land and Water Conservation Fund, the GOCO, or any other state or local government program. Exchanging only the federal inholdings and using acquisition funds to purchase the remainder of Parcel B or to purchase land around the isolated federal properties would also have the potential to accomplish the objectives of the EA. ***Failure to consider this alternative is a NEPA violation.***

B. BLM Did Not Consider Cumulative Impacts.

Under NEPA, federal agencies must fully review all direct, indirect, and cumulative environmental impacts of the proposed project. 40 C.F.R. § 1502.16, 1508.8, 1508.25(c). A cumulative impact is defined as "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." *Id.* § 1508.7. "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id.* A "meaningful cumulative impact analysis" must identify the following:

> (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions—past, present, and proposed, and reasonably foreseeable—that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.

San Juan Citizens All. v. Stiles, 654 F.3d 1038, 1056 (10th Cir. 2011) (quoting *Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006)). An agency "must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum." *Sierra Club v. U.S.*, 255 F. Supp.2d 1177, 1185 (D. Colo. 2020) (quoting *Grand Canyon Trust v. FAA*, 290 F.3d 339, 342 (D.C. Cir. 2002)). The Tenth Circuit has "expressed the test for whether particular actions could be considered cumulative impacts of the proposed action as whether the actions were so interdependent that it would be unwise or irrational to complete

one without the others." *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 430 (10th Cir. 1996) (internal quotation omitted); *see, e.g.*, *Diné Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831, 853 (10th Cir. 2019) (BLM required to consider cumulative impacts of wells expected to be drilled—as stated in reasonably foreseeable development plan scenario developed by agency—when conducting EA for applications for drill permits).

The EA contains a section in which BLM purports to undertake a cumulative impacts analysis. Final EA at 82–90. But close inspection reveals this is a ruse. In its Final FONSI, BLM concludes that the Land Exchange "would not have a significant effect on the human environment, individually or cumulatively with other actions in the general area." Final FONSI at 2. However, at least one cumulative impact that BLM ignores in its analysis is the impact of the Land Exchange on other land exchanges in the region, including possible future land exchanges with Proponent.

The Land Exchange will make it easier for Proponent to successfully pursue future assaults on public lands by consolidating its current holdings, encroaching upon currently contiguous, large blocks of federal land, and creeping toward other federal and state parcels that Proponent can seek to surround and strangle into isolated inholdings over time. This is clearly apparent: Proponent's acquisition of Parcels C-1 and either F-5 or D-3 as part of the Land Exchange tees up exactly this kind of metastasizing private property. Acquisition of each of these parcels chips away at surrounding federal lands and the retention of two federal inholdings within C-1 makes the isolated parcels easy targets for future consolidation attempts by Proponent. *See also* §§ I.A.i.b, d, II.C.iii. ***BLM's failure to consider such obvious potential cumulative impacts also violates NEPA.***

C. An EIS Was Required.

NEPA requires federal agencies to circulate for public review an EIS for all "major Federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. Federal agencies may first prepare an EA that includes "sufficient evidence and analysis" to determine whether impacts of the proposed project are significant enough to warrant an EIS. 40 C.F.R. §§ 1508.3, 1501.4(c), (e), 1508.9(a). To evaluate when the impacts of a project are significant, an agency must consider all "direct," "indirect," and "cumulative" impacts. *Id.* §§ 1508.7, 1508.8(a) & (b), 1508.25(c), 1508.27(b)(7). This includes evaluating both the "context" and "intensity" of the project's impacts. *Id.* § 1508.27(a)-(b). The "context" element requires an agency to analyze the short- and long-term effects of the action as a whole and for the affected region, the affected interests, and the locality. *Id.* § 1508.27(a). The "intensity" factors include a project area's proximity to unique cultural resources, controversial effects, the degree to which an action may establish a precedent, cumulative impacts on the environment, and the impacts to a threatened species. *Id.* § 1508.27(b).

If an agency determines that an EIS is unnecessary after considering all of these relevant factors, it must issue a FONSI that provides a convincing statement of reasons why the action "will not have a significant effect on the human environment." *Id*. §§ 1508.9, 1508.13. An EIS is required, however, whenever an agency finds "possible" significant impacts. *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1224 (10th Cir. 2002); *Airport Neighbors Alliance v. U.S.*, 90 F.3d 426, 429 (10th Cir. 1996). ***Here, the record demonstrates multiple significant impacts associated with the Land Exchange, including to cultural and paleontological resources, the community, future land exchanges, and BLM sensitive species. Nevertheless, BLM proceeded with an EA instead of an EIS—in direct contravention of NEPA requirements.***

i. An EIS Was and Is Required Because the Geographic Area of the Buffalo Land Exchange is Proximate to Cultural and Paleontological Resources.

Unique characteristics of the affected land, including "proximity to historic or cultural resources," influence the severity of the impact of an agency action and must be evaluated when determining whether to prepare an EIS. 40 C.F.R. § 1508.27(b)(3). The NEPA regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement. *Id.* at §§ 1508.8, 1508.27. As noted in Section I.A.i.b above, Parcel C-1 contains both cultural and paleontological resources. Final EA at 75, 77. As the NEPA regulations make clear, BLM cannot rely on the proposed mitigation measures (i.e., retaining two 40-acre inholdings on Parcel C-1), to avoid a significance finding. ***Here, the presence of important cultural and paleontological resources requires BLM to prepare an EIS rather than an EA. Because an EIS was not performed, BLM violated NEPA.***

ii. An EIS Was and Is Required Because the Effects of the Buffalo Horn Land Exchange are Highly Controversial.

An action is considered significant if its effects on the quality of the human environment are "highly controversial." 40 C.F.R. § 1508.27(b)(4). Controversy in the NEPA context denotes a "substantial dispute as to the size, nature, or effect of the action." *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002). The number of public comments regarding the impact of the action may evidence highly controversial effects of a land exchange. *San Luis Valley Ecosystem Council v. U.S. Forest Service*, 2007 WL 1463855, at *10 (D. Colo. May 17, 2007) (finding effect of land exchange to be highly controversial); *see, e.g.*, *Center for Biological Diversity v. National Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008) (significant comments opposing agency action satisfied controversy factor).

The BLM received 54 public-scoping comments and 84 EA comments from individuals, businesses, non-governmental entities, and other public agencies. Final EA at 8. The majority of the scoping comments were against the proposed exchange. Comments on the Preliminary EA were mixed. Many commenters that were in support of the proposed exchange stated that they

supported the preferred alternative laid out in the Preliminary EA, Alternative B, and several commenters specifically noted that the reason they supported Alternative B was because it excluded Parcel F-5 (which, as described in Section II.D.ii, BLM added back into the Land Exchange in its Decision). ***Because of the level of controversy associated with the preferred Alternative B, BLM must prepare an EIS. Relying on the EA alone violates NEPA.***

iii. An EIS Was and Is Required Because the Buffalo Horn Land Exchange Will Establish a Precedent and Represents a Decision in Principle.

The degree to which an action may "establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration" must be evaluated when considering whether an action's impacts are significant. 40 C.F.R. § 1508.27(b)(6). "The purpose of [this] section is to avoid the thoughtless setting in motion of a 'chain of bureaucratic commitment that will become progressively harder to undo the longer it continues.'" *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1162–1163 (9th Cir. 1998) (quoting *Sierra Club v. Marsh*, 769 F.2d 868, 879 (1st Cir. 1985); *see, e.g.*, *Sierra Club v. Marsh*, 769 F.2d 868, 879 (1st Cir. 1985) (requiring an EIS after finding that proposed action would result in "pressure to develop the rest of the island [that] could well prove irreversible"); *Anderson v. Evans*, 371 F.3d 475, 493 (9th Cir. 2004) (requiring an EIS when the agency failed to consider that its decision may affect future agency deliberations).

As explained in the context of the cumulative-impacts analysis above in Section II.B, the Land Exchange, particularly Proponent's acquisition of Parcels C-1 and either F-5 or D-3, will make it easier for Proponent to successfully pursue further assaults on public lands in the future by consolidating its current holdings, encroaching upon currently contiguous, large blocks of federal land, and creeping towards other federal and state parcels that Proponent can seek to surround and strangle into isolated inholdings over time. *See also* §§ I.A.i.b, d. ***The potential for the Land Exchange to establish precedent and pressure for BLM to accept future exchanges with Proponent requires BLM to prepare an EIS. Reliance on the EA alone violates NEPA.***

iv. An EIS Was and Is Required Because the Buffalo Horn Land Exchange Will Result in Cumulative Impacts on the Environment.

When an action is "related to other actions with individually insignificant but cumulatively significant impacts" on the environment, significance exists and an EIS is required. 40 C.F.R. § 1508.27(b)(7). When evaluating this factor, an agency cannot avoid a finding of significance by "terming an action temporary or by breaking it down into small component parts." *Id.* ***As noted in Section II.B, the Land Exchange's potential to lead to additional land exchanges with Proponent and others that will further fragment public lands requires the preparation of an EIS to evaluate the cumulative impacts of these exchanges. Reliance on the EA alone violates NEPA.***

v. An EIS Was and Is Required Because there Will Be Significant Impacts to the Greater Sage-Grouse.

The impacts of an agency action that may "adversely affect" a threatened species or its habitat must be evaluated by the agency in determining whether to prepare an EIS. 40 C.F.R. § 1508.27(b)(7). It is BLM's policy to initiate proactive conservation measures that reduce or eliminate threats to BLM sensitive species to minimize the likelihood of and need for listing of those species under the Endangered Species Act. *See Thomas Roosevelt P'ship v. Salazar*, 616 F.3d 497, 505 (D.C. Cir. 2010). Accordingly, BLM's Manual on Special Status Species requires BLM to work to improve the condition of special status species and their habitats to a point where their special status recognition is no longer warranted, and ensure that any actions or projects it authorizes "further the conservation of ... Bureau sensitive species." BLM, Special Status Species Management Manual, §§ 2, 6 (Dec. 12, 2008).

The Northwest Colorado Greater Sage-Grouse is a BLM sensitive species. Final EA at 69. As discussed above in Section I.A.ii, federal Parcels E-1 and G both include PHMA, Final EA at 10–11, and federal Parcel G includes GHMA, *id.* at 11. However, no greater sage-grouse habitat is identified on private Parcel B, and BLM proposes no mitigation to compensate for the loss of greater sage-grouse habitat on Parcels E-1 and G. *Id.*

Additional BLM sensitive species that are known to inhabit or derive important use from the federal parcels in the Land Exchange are the Brewer's sparrow, the white-tailed prairie dog, and the burrowing owl. *Id.* at 69. However, like the greater sage-grouse, under the Land Exchange, BLM will dispose of these species' habitats without receiving anything comparable in return and without mitigation to ensure that conservation measures that reduce or eliminate the threats to these species continue. *See* Section I.A.i.b. ***The potential for significant impacts to BLM sensitive species requires BLM to prepare an EIS. Reliance on the EA alone violates NEPA.***

D. BLM Failed to Provide Critical Information Required to Facilitate Meaningful Public Participation.

The public's participation in public land management is fundamental to NEPA's purpose. 40 C.F.R. § 1500.1(b) ("public scrutiny [is] essential to implementing NEPA"). In order to advance public participation, NEPA "guarantees that relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). This information must be made available to allow the public to react at a meaningful time. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989). Here, BLM failed to provide COWPL and the general public critical information at a meaningful time when it: (i) provided a federal appraisal that included a different configuration than was present in the Final EA, and (ii) continuously changed the configuration of included parcels without notice and comment.

i. BLM Provided a Federal Appraisal that Includes a Different Configuration Than Is Present in the Final EA.

The Preliminary EA and Final EA identify different configurations of land for the proposed exchange than the Federal Appraisal and Decision do. Specifically, the Federal Appraisal includes Parcel F-5, but this parcel is not included in the preferred alternative in either the Preliminary or Final EA. The inconsistencies in BLM's parcel configurations have prevented genuine public participation by limiting meaningful information during the public-comment period. Further, when public participants requested additional information on the appraisals from BLM during a scoping meeting, a BLM representative conceded that the agency did not know what the exact configuration of the final exchange would be and did not have the appraisals. Even now, BLM has failed to provide an appraisal that matches the preferred alternative in the Final EA and Final FONSI. Instead, it provides the Final EA and Final FONSI in support of its Decision, which does not match. BLM's failure to do so violates 43 C.F.R. § 2201.7-1, which requires BLM to complete the appraisal before approving an exchange proposal.

Additionally, without a proper appraisal, public participants have not been given an opportunity to meaningfully participate in the NEPA process and BLM has not fulfilled its obligation to ensure that public lands are assessed at market value and the value of the properties are equal under FLPMA. See 43 U.S.C. §§ 1701(a)(9), 1716(b) & (d). ***Unless or until it provides an appraisal that matches its preferred alternative, BLM is in violation of NEPA.***

ii. BLM Continuously Changed the Configuration of Included Parcels Without Notice and Comment.

In addition, BLM has continuously changed the configuration of parcels included in the Land Exchange without opportunities for notice and comment. That's a violation of law. The Preliminary EA proposed multiple alternatives, including the preferred Alternative B, which consisted of a collection of federal parcels totaling 2,815 acres, including a 1,759.57-acre parcel C-1. Private Parcel B was listed at 1,835.26 acres.

After the public comment period on the Preliminary EA had closed, however, the Federal Appraisal evaluated an inconsistent collection of federal parcels that combined parcels from both alternatives A and B totaling 2,652 federal acres, and the smaller configuration of C-1 that removed the two 40-acre parcels BLM proposed to retain for mitigation. Parcel B remained unchanged in the Non-Federal Appraisal. In the Supplemental Appraisal, however, Parcel B was split into five sub-parcels to address the inequality in valuation between the federal and non-federal parcels. Parcel B-1 was 1,327.06 acres and the to-be-donated parcels totaled 508.20 acres.

Then, in the Final EA, BLM again proposed multiple alternatives, with Alternative B reverting to the acreages provided in the Preliminary EA. (i.e., 2,815 acres of federal land; 1,835.26 acres for Parcel B). Yet, the General Public Notice and Decision that were issued with

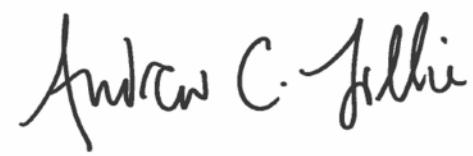
the Final EA explained that BLM had in fact approved an exchange of 2,652 acres of federal land, including Parcel F-5 and 1,759.57 acres of Parcel C-1, for 1,327.06 acres of non-federal land and a donation of 508.20 acres non-federal land. BLM's continuous changes to the configuration of parcels after the public notice and comment period had closed obscured the actual proposal and prevented the meaningful public participation and scrutiny of BLM's decision, as required under NEPA. 40 C.F.R. § 1500.1(b). ***This, again, is a NEPA violation.***

CONCLUSION

The Land Exchange is illegal and amounts to an onslaught on public lands underwritten by the agency that is supposed to protect them. It does not comply with applicable laws. Therefore, BLM must rescind its approval and reverse its Decision.

If you have any questions or wish to discuss the issues raised in this Protest, please contact the undersigned on behalf of Colorado Wild Public Lands, Inc.

Sincerely,



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