Bd. of County Comm'Rs of San Miguel v. United States Blm

United States District Court for the District of Colorado

February 9, 2022, Decided; February 9, 2022, Filed

Civil Action No. 18-cv-01643-JLK

Reporter

2022 U.S. Dist. LEXIS 30122 *; __ F.Supp.3d __; 2022 WL 472992

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SAN MIGUEL, ROCKY MOUNTAIN WILD, SAN JUAN CITIZENS ALLIANCE, and CONSERVATION COLORADO, Plaintiffs/Petitioners, v. UNITED STATES BUREAU OF LAND MANAGEMENT, UNITED STATES DEPARTMENT OF THE INTERIOR, Defendants/Respondents.

Core Terms

leasing, parcels, sage-grouse, impacts, habitat, consultation, ***species***, stipulations, Biological, oil and gas, environmental, lease sale, Merits, effects, public land, Plaintiffs', degradation, prepare, plans, reinitiation, surface, acres, roads, proposed action, site-specific, Conservation, resources, agencies, analyzed, issuance

Counsel: **[*1]** For Board of County Commissioners of the County of San Miguel, Colorado, The, Rocky Mountain Wild, San Juan Citizens Alliance, Conservation Colorado, Plaintiffs: Travis Earl Stills, LEAD ATTORNEY, Energy & Conservation Law, Durango, CO; Matthew David Sandler, Matt Sandler Law, Louisville, CO.

For United States Bureau of Land Management, United States Department of the Interior, Defendants: Michael Sean Sawyer, U.S. Department of Justice-DC-601 D Street NW, Washington, DC; Rickey Doyle Turner, U.S. Department of Justice-Denver, Denver, CO.

Judges: JOHN L. KANE, SENIOR UNITED STATES DISTRICT JUDGE.

Opinion by: JOHN L. KANE

Opinion

MEMORANDUM OPINION AND ORDER

Kane, J.

The Board of County Commissioners of the County of San Miguel, Colorado; Rocky Mountain Wild; San Juan Citizens Alliance; and Conservation Colorado bring this action against the United States Bureau of Land Management ("BLM") and the United States Department of the Interior ("DOI"). Plaintiffs challenge the BLM's issuance of oil and gas leases for parcels in Southwest Colorado that are located among Gunnison sage-grouse habitat and proposed and existing Areas of Critical Environmental Concern ("ACEC"). Plaintiffs allege the BLM did not fulfill its public-disclosure **[*2]** and informed-decision-making duties under the *National Environmental Policy **Act** ("NEPA"), 42 U.S.C. §§ 4321 et seq.*, that it failed to properly consult with the United States Fish and Wildlife Service ("FWS") pursuant to the ***Endangered Species Act** ("ESA"), 16 U.S.C. §§ 1531 et seq.*, and that it violated the *Federal Land Policy and*

Management Act ("FLPMA"), 43 U.S.C. §§ 1701 et seq. Because the BLM did not comply with NEPA and the ESA, I find in favor of Plaintiffs on six of their related claims and direct the parties to submit briefing on the appropriate remedy.[1]

I. LEGAL FRAMEWORK

A. NEPA Requirements

"The twin aims of NEPA are to require agencies to consider every significant aspect of the environmental impact of a proposed action and to facilitate public involvement." *High Country Conservation Advocs. v. U.S. Forest Serv., 951 F.3d 1217, 1223 (10th Cir. 2020)* (internal quotation marks and citation omitted). "NEPA creates 'a set of action-forcing procedures that require that agencies take a hard look at environmental consequences, and that provide for broad dissemination of relevant environmental information.'" *Id.* (quoting *Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989)*).

Specifically, "NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts . . . ." *New Mexico ex rel. Richardson v. BLM, 565 F.3d 683, 703 (10th Cir. 2009)*. Federal agencies must prepare an Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." *42 U.S.C. § 4332(2)(C)*; *Richardson, 565 F.3d at 703*.[2] An EIS sets out reasonable planning **[*3]** alternatives for a proposed action, generally including a "preferred alternative," and it analyzes the environmental impacts of each. *40 C.F.R. § 1502.14*. An EIS must include a "no action alternative," *id. § 1502.14(c)*, and it must specify the underlying purpose and need for the proposed action, *id. § 1502.13*.

Where it is unclear what a federal action's impact will be or where actions are not likely to significantly affect the quality of the human environment, agencies may first prepare an environmental assessment ("EA"). *Id. § 1501.3*. Both an EA and an EIS must consider a range of reasonable alternatives, *see id.* §§ 1501.5(c)(2), 1502.14, but the depth of discussion and analysis required for an EIS is more extensive than for an EA, *see, e.g., W. Watersheds Project v. BLM, 721 F.3d 1264, 1274 (10th Cir. 2013)*. If an agency determines after preparing an EA that the action will not have significant effects on the quality of the human environment, the agency may issue a Finding of No Significant Impact ("FONSI"). *Richardson, 565 F.3d at 703*; *40 C.F.R. §§ 1501.5*, *1501.6*. But, if it becomes apparent that the action is likely to have a significant impact, an EIS must also be prepared. *Richardson, 565 F.3d at 703*.

A change in circumstances after completion of a NEPA analysis may compel various degrees of response. For example, an agency is required to supplement an existing EIS when "[t]he agency makes **[*4]** substantial changes to the proposed action that are relevant to environmental concerns" or when "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *40 C.F.R. §1502.9(d)(1)*. The decision to prepare a supplemental NEPA document

---

[1] This case was originally assigned to Judge Richard P. Matsch but, following his passing, was reassigned to me on May 30, 2019.

[2] Some federal actions are "categorically excluded" from the EIS requirement because they "normally do not have a significant effect on the human environment." *Id.* §§ 1501.4, 1508.1(d).

mirrors the decision to prepare one in the first instance: "If there remains major Federal action to occur, and if the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." *Marsh v. Oregon Nat. Res. Council, 490 U.S. 360, 374 (1989)* (alterations and internal quotation marks omitted). However, new NEPA documents are not required when previous NEPA documents allowed the agency to take a "hard look" at the potential environmental consequences of the subsequently proposed action. *Pennaco Energy, Inc. v. DOI, 377 F.3d 1147, 1151 (10th Cir. 2004)*; *see also Marsh, 490 at 373* ("[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized.")

The Tenth Circuit has recognized that agencies may use non-NEPA procedures—including completing a Determination of NEPA Adequacy ("DNA")—to decide whether new NEPA documentation is required. **[*5]** *See Pennaco, 377 F.3d at 1162*. Unlike preparing an EA and issuing a FONSI pursuant to NEPA, the DNA is used to terminate the NEPA process without the preparation of a new NEPA document, e.g., a new or supplemental EA or EIS. *See id. at 1152* ("DNAs are forms designed to allow BLM employees to determine whether they properly can rely on existing NEPA documents.").

The NEPA regulations encourage agencies to "tier" their environmental analyses when doing so "would eliminate repetitive discussions of the same issues, focus on the actual issues ripe for decision, and exclude from consideration issues already decided or not yet ripe at each level of environmental review." *40 C.F.R. § 1501.11(a)*. Tiering occurs "[w]hen an agency has prepared an environmental impact statement or environmental assessment for a program or policy and then prepares a subsequent statement or assessment on an action included within the entire program or policy (such as a project-or site-specific action)." *Id. § 1501.11(b)*. Then, the subsequent, or tiered, document "needs only to summarize and incorporate by reference the issues discussed in the broader document." *Id.* Even though tiering is authorized, agencies still must determine whether and when a successive NEPA document is necessary. **[*6]**

Ultimately, "NEPA does not require that an agency give any particular weight to environmental considerations." *Forest Guardians v. U.S. Forest Serv., 495 F.3d 1162, 1172 (10th Cir. 2007)*. "[T]he ***Act*** simply imposes *procedural* requirements intended to improve environmental impact information available to agencies and the public." *Richardson, 565 F.3d at 704* (citing *Marsh, 490 U.S. at 371*). Thus, it "merely prohibits uninformed—rather than unwise—agency action." *Robertson, 490 U.S. at 351*.

B. ESA Requirements

In contrast, the ESA imposes substantive and procedural requirements on federal agencies. *See Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1105 (10th Cir. 2010)*. The ESA declares that it is "the policy of Congress that all Federal departments and agencies shall seek to conserve ***endangered*** ***species*** and threatened ***species*** and shall utilize their authorities in furtherance of the purposes of this chapter." *16 U.S.C. § 1531(c)(1)*. The ***Act*** and the corresponding regulations set out the process for determining whether ***species*** are ***endangered*** or threatened. *See id. § 1533*; 50 C.F.R. pt. 424. When a proposed ***species*** is found to be ***endangered*** or threatened it is added to that list of ***species***, or "listed," *see 16 U.S.C. § 1533*, and its critical habitat must be designated "to the maximum extent prudent and determinable," *50 C.F.R. § 424.12(a)*.

Section 7 of the ESA, titled Interagency Cooperation, directs all federal agencies to engage the Secretary of the Interior[3] in examining the impact of their actions on listed **[*7]** ***species*** and those proposed for listing. Relevant here, federal agencies are to "confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any [proposed] ***species*** . . . or result in the destruction or adverse modification of critical habitat proposed to be designated for such ***species***." *16 U.S.C. § 1536(a)(4)*; *50 C.F.R. § 402.10*. For already listed ***species***, federal agencies must "consult" with the Secretary to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any ***endangered species*** or threatened ***species*** or result in the destruction or adverse modification of [critical] habitat." *16 U.S.C. § 1536(a)(2)*; *50 C.F.R. § 402.01*.

The Fish and Wildlife Service, the relevant bureau of the Department of the Interior, may be involved in agency assessments regarding listed ***species*** via "early consultation," *see* *50 C.F.R. § 402.11*, "informal consultation," *see id.* *§ 402.13*, or "formal consultation," *see id.* *§ 402.14*. Agencies are directed to review their "actions at the earliest possible time to determine whether any action may affect listed ***species*** or critical habitat" so that they may appropriately involve the FWS. *Id.* *§ 402.14(a)*. This "may affect" standard ***acts*** as a trigger for the requisite **[*8]** consultation, and courts have interpreted it as a low threshold, *see, e.g.,* *Colo. Env't Coal. v. Off. of Legacy Mgmt., 819 F. Supp. 2d 1193, 1221-22 (D. Colo. 2011)*.

If an agency determines that an action may affect listed ***species*** or critical habitat, formal consultation with the FWS is required, except in two scenarios. *50 C.F.R. § 402.14(b)*. First, formal consultation is not necessary if the agency determines based on a biological assessment or informal consultation that the proposed action is not likely to adversely affect any listed ***species*** or critical habitat and the FWS concurs. *Id.* *§§ 402.14(b)(1)*, *402.12(k)(1)*, *402.13(c)*. A biological assessment is conducted by the agency and "evaluate[s] the potential effects of the action on listed and proposed ***species*** and designated and proposed critical habitat." *Id.* *§ 402.12(a)*. Second, formal consultation is not mandated when the FWS issues a preliminary biological opinion after early consultation and later confirms that preliminary opinion as the final biological opinion. *Id.* *§§ 402.14(b)(2)*, *402.11(e)-(f)*. A biological opinion "states the opinion of the [FWS] as to whether or not the Federal action is likely to jeopardize the continued existence of listed ***species*** or result in the destruction or adverse modification of critical habitat." *Id.* *§ 402.02*. In all other cases in which agency action may affect listed ***species*** or critical **[*9]** habitat, formal consultation must occur and will generate the FWS's biological opinion based on "the best scientific and commercial data available." *16 U.S.C. §§ 1536(a)(2)*, *(b)*; *see also* *Rio Grande Silvery Minnow, 601 F.3d at 1105*.

As relevant here, "[r]einitiation of consultation is required and shall be requested by the Federal agency or by the Service . . . :"

* * *

> If new information reveals effects of the action that may affect listed ***species*** or critical habitat in a manner or to an extent not previously considered;
>
> If the identified action is subsequently modified in a manner that causes an effect to the listed ***species***

---

[3] Since this case does not involve marine life, I discuss only the role of the Secretary of the Interior and the Fish and Wildlife Service. *See* *16 U.S.C. § 1532(15)*; *Rio Grande Silvery Minnow, 601 F.3d at 1105 n.2* (citing *50 C.F.R. § 402.01(b)*).

> or critical habitat that was not considered in the biological opinion or written concurrence; or
>
> If a new ***species*** is listed or critical habitat designated that may be affected by the identified action.

Id. § 402.16(a) (numbering omitted). This reinitiation requirement applies to both formal and informal consultation. *See* Ctr. for Native Ecosystems v. Cables, 509 F.3d 1310, 1324-25 (10th Cir. 2007); Conservation Cong. v. Finley, 774 F.3d 611, 619 (9th Cir. 2014).

C. FLPMA and the BLM Oil and Gas Leasing Process

The FLPMA governs how BLM lands are managed. In enacting the FLPMA, Congress declared:

> [I]t is the policy of the United States that-- . . . the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and **[*10]** atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use; [and] . . . the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands . . . .

43 U.S.C. § 1701(a).[4] Thus, the FLPMA directs the Secretary of the Interior to "manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him [or her] . . . when they are available." 43 U.S.C. § 1732(a). The ***Act*** further mandates that the Secretary "shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." *Id.* § 1732(b).

The BLM's land use plans, known here as resource management plans ("RMPs"), are "designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses." 43 C.F.R. § 1601.0-2. After an RMP is approved, "[a]ll future resource management authorizations **[*11]** and actions, . . . and subsequent more detailed or specific planning, shall conform to the approved plan." *Id.* § 1610.5-3(a). The approval of an RMP or an RMP revision "is considered a major Federal action significantly affecting the quality of the human environment" and, as such, requires that an EIS be completed in accordance with NEPA. *Id.* §§ 1601.0-6, 1610.5-6. The BLM is to identify and consider areas having the potential for ACEC[5] designation and protection management throughout the resource management planning process. 43 C.F.R. § 1610.7-2. Additionally, during preparation of the RMP, the BLM considers the effects to listed and proposed ***species*** under the ESA. *See* BLM, *H-1601-1 Land Use Planning Handbook*, Appendix C at 5-6 (Mar. 11, 2005).

The BLM employs a three-stage decision-making process for managing oil and gas leasing and development on the lands it administers. *See* Pennaco,

---

[4] The *Mineral Leasing* ***Act***, 30 U.S.C. §§ 181 et seq., specifies how oil and gas resources as well as other minerals may be developed on lands owned by the Federal Government.

[5] ACECs are "areas within the public lands where special management attention is required . . . to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources, or other natural systems or processes, or to protect life and safety from natural hazards." 43 C.F.R. § 1601.0-5(a).

377 F.3d at 1151-52. First, it develops an RMP. *Id. at 1151*. Second, it determines whether particular leases should be offered and holds a competitive lease sale. *Id.* Lastly, it reviews and approves specific applications for permits to explore or drill. *Id. at 1151-52*.

In preparing an RMP, the BLM identifies goals and objectives for oil and gas development in the planning area and determines which areas **[*12]** of the subject lands are open or closed for potential leasing and the level of constraints that should be imposed for areas open to leasing. *See H-1601-1 Land Use Planning Handbook*, Appendix C at 23-24. These constraints may include lease stipulations that dictate how the surface can or cannot be used. *Id.*

During the second stage, the BLM evaluates whether the offering of particular oil and gas leases is consistent with the RMP and applicable laws and determines whether any new inquiry is necessary. Once the BLM identifies parcels to be offered and completes any required environmental analysis, it posts a sale notice. *43 C.F.R. §§ 3120.4-1*, *3120.4-2*. In response to the notice, parties may submit protests regarding the sale or the offering of a specific parcel, which the BLM then reviews and decides. *See id. § 3120.1-3*. Finally, the competitive lease sale is held and the leases receiving successful bids are issued. *See 30 U.S.C. § 226(b)(1)(A)*; 43 C.F.R. pt. 3120.

The third stage of the BLM's oil and gas leasing process involves a lessee submitting an Application for Permit to Drill ("APD"). An APD is required before the lessee may "commenc[e] any 'drilling operations' or 'surface disturbance preliminary thereto.'" *Pennaco, 377 F.3d at 1151-52* (quoting *43 C.F.R. § 3162.3-1(c)*). At this final stage, the BLM must again **[*13]** complete any required environmental analysis. *See, e.g., Park County Res. Council, Inc. v. U.S. Dep't of Agric., 817 F.2d 609, 612-13 (10th Cir. 1987)*, *overruled in part on other grounds by Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992)*.

II. BACKGROUND

A. Gunnison Sage-Grouse

Gunnison sage-grouse are ground-dwelling birds that are associated with sagebrush habitats. ***Endangered*** and Threatened Wildlife and Plants; Determination for the Gunnison Sage-grouse as a *Threatened or **Endangered** **Species**, 75 Fed. Reg. 59,804, 59805 (Sept. 28, 2010)*. "Sage-grouse are known for their elaborate mating ritual where males congregate on strutting grounds called leks and 'dance' to attract a mate." *Id.* Gunnison sage-grouse are currently found in seven scattered and isolated populations in southwestern Colorado and southeastern Utah. Administrative Record ("AR") 02480.

In January 2013, the Gunnison sage-grouse was proposed for listing as an ***endangered species*** under the ESA. ***Endangered*** *& Threatened Wildlife & Plants; **Endangered** Status for Gunnison Sage-Grouse, 78 Fed. Reg. 2486 (Jan. 11, 2013)* (Proposed Listing Rule). And, in November 2014, the FWS officially listed the Gunnison sage-grouse as threatened and designated critical habitat for the ***species***. *See **Endangered** & Threatened Wildlife & Plants; Threatened Status for Gunnison Sage-Grouse, 79 Fed. Reg. 69,192 (Nov. 20, 2014)*; ***Endangered*** *& Threatened Wildlife & Plants; Designation of Critical Habitat for Gunnison Sage-Grouse, 79 Fed. Reg. 69,311 (Nov. 20, 2014)*.

B. Revisions to the Tres Rios Field Office Resource Management Plan

The BLM's Tres Rios Field Office manages public lands

and minerals in Southwest Colorado, where the lease parcels at issue in this case are located. In December 2007, the BLM proposed revisions to the Tres Rios Field **[*14]** Office's RMP. Pursuant to its NEPA duties, it published and sought public comment on a draft EIS that evaluated various resource management alternatives for the planning area. *See* AR 00328. A supplement to the draft EIS was published in August 2011, and an additional comment period was provided. *Id.*

After reviewing the public comments received, the BLM published its proposed RMP and Final EIS (sometimes referred to as the "FEIS") for the Tres Rios Field Office in September 2013. *See* AR 00314. The Final EIS considers four land-management alternatives, including a "Preferred Alternative" (Alternative B). *See* AR 00328-29, 00358-00400. As part of the RMP revision process, 22 sites were evaluated for designation as Areas of Critical Environmental Concern. AR 02334. Nineteen of those areas were found to meet the relevance and importance criteria. *Id.* However, due to an "oversight," the alternatives analyzed in the Final EIS only include 4 of the 19 areas. AR 02335.[6]

The Final EIS assesses the potential for oil and gas development and the associated environmental consequences for each of the alternatives presented. *See* AR 00821-62. Under the Preferred Alternative:

> Approximately 2,040,800 acres **[*15]** are available for lease, of which 1,032,230 acres are stipulated with [Timing Limitations ("TL")], 1,133,320 acres stipulated with [Controlled Surface Use ("CSU")], and approximately 1,097,500 acres stipulated with [No Surface Occupancy ("NSO")]. Areas that are administratively not available for leasing total approximately 136,073 acres. . . .
>
> Projected oil and gas development for the BLM and [U.S. Forest Service] combined under Alternative B . . . includes approximately 575 well pads on future leases. Approximately, 90 well locations are projected to be non-productive and reclaimed after production testing. Projected GSGP formation well pads would total 410 on future leases.
>
> Wells potentially displaced by NSO stipulations may total approximately 170. A total of 53 projected wells may be eliminated because their locations would be allocated to lands administratively not available for leasing.
>
> Approximately 2,800 acres would be cleared to accommodate projected well pads and access roads.

AR 00845.

In accordance with the Final EIS, the standard lease terms applied to Tres Rios Field Office oil and gas leases "require operators of oil and gas leases to minimize adverse impacts to air, water, **[*16]** land, visual, cultural, and biological resources and other land uses and users, and to comply with all applicable laws, regulations and formal orders of the agency managing the leased lands." AR 00382. Further stipulations, i.e., TL, NSO, and CSU stipulations, "may be applied as necessary to a lease parcel to specify how leasing and subsequent development would occur." AR 00381. Under a TL stipulation, "[u]se or occupancy of the land surface for fluid mineral (oil and gas) exploration or development is prohibited during a specified period of the year." AR 00382. An NSO stipulation prohibits use or occupancy of the surface in order to protect identified resources. *Id.* And a CSU stipulation allows use or occupancy, but operational constraints may be imposed or the location of proposed facilities and activities may be modified. *Id.*

[6] To correct that oversight, the BLM committed to evaluating the other 15 potential ACECs in a future plan amendment. AR 02336.

The Final EIS recognizes that implementation of the proposed RMP, and specifically oil and gas leasing and development, may affect and is likely to adversely affect Gunnison sage-grouse and its proposed critical habitat. AR 00555. The document assures that "applicable lease stipulations, design criteria, and other referenced direction[] would be applied to leasing **[*17]** and development stages," which would reduce the negative impacts to the sage-grouse and its habitat. *Id.* But those conservation efforts would "not completely eliminate potential adverse impacts from the development of valid existing lease rights or remove the potential for management discretion to approve exceptions to [RMP] stipulations and sage-grouse management guidelines." *Id.*

Notably, the Final EIS calls itself a "programmatic" and "strategic" document. AR 00388, 00402. It discusses the foreseeable environmental effects on a broad scale and does not speculate on the site-specific impact of implementing the planning decisions through unknown future projects. AR 00402 ("The actual effects (impacts) would depend on the extent of each project, the environmental conditions at the site (which can vary widely across the public lands), and the mitigation measures and their effectiveness."). The Final EIS assumes that its broad analysis and conclusions would be used to "tier" to future analyses, meaning it would be "a starting point for future site-specific project planning in the planning area." *Id.*

In November 2013, the BLM submitted a Biological Assessment to the FWS in accordance with **[*18]** the ESA. *See* AR 02516, 02635. The Biological Assessment discusses potential effects of the proposed RMP on various ***species***, including the Gunnison sage-grouse and its proposed critical habitat. AR 02664-66. In March 2014, the FWS issued a Conference Opinion under *50 C.F.R. § 402.10* on the Gunnison sage-grouse. *See* AR 02468. The FWS concluded that, even with conservation measures and use stipulations related to oil and gas development, implementation of the RMP would likely result in adverse impacts to the sage-grouse and its proposed critical habitat. AR 02498-02501; 02503-04. But the FWS resolved that, given the broad programmatic level of the RMP, its implementation was "not likely to jeopardize the continued existence of the [sage-grouse]." AR 02503. Significantly, the Conference Opinion twice warns that subsequent actions affecting the sage-grouse would be subject to ESA Section 7 consultation. *Id.* ("All subsequent actions that affect [Gunnison sage-grouse] will be subject to future section 7 analysis and consultation requirements unless we find that the ***species*** is not warranted for listing."); AR 02503-04 ("Any subsequent action implemented under the revised plan that may affect the [Gunnison sage-grouse] or proposed **[*19]** critical habitat must go through separate section 7 consultation.").

Shortly after the Gunnison sage-grouse was officially listed as threatened under the ESA, the BLM represented to the FWS that no significant changes in the information considered had occurred and, on that basis, the BLM requested that the FWS adopt its Conference Opinion as its final biological opinion. AR 03135; *see also 50 C.F.R. § 402.10(d)*. Relying on the BLM's representation, the FWS adopted its Conference Opinion as its Biological Opinion for the revision of the RMP and the impacts on the Gunnison sage-grouse. AR 02466-67.

In June 2015, the BLM issued a Record of Decision, selecting the Preferred Alternative analyzed in the Final EIS as the approved RMP for the Tres Rios Field Office. AR 03233. The lands that were designated in the approved RMP as open to potential leasing include the

parcels now at issue.[7] Like the Final EIS, the approved RMP sets out which oil and gas leasing stipulations apply to specified lands to protect the Gunnison sage-grouse and its habitat. *See* AR 01692-94, 03240, 03364-65. In doing so, however, the BLM noted that the "boundaries can change based on the most current information" and "site-specific evaluations would **[*20]** verify the need for" particular stipulations. AR 01673.

In August 2016, the BLM published a Gunnison Sage-Grouse Rangewide Draft RMP Amendment and Draft EIS, which applied to the recently revised Tres Rios Field Office RMP. *See* AR 03490. The BLM explained that the RMP Amendment was necessary due to the 2014 FWS listing of the Gunnison sage-grouse as threatened under the ESA. AR 03500. While the Tres Rios Field Office RMP includes protective lease stipulations, alternatives under the Rangewide Draft RMP Amendment would increase the stringency and applicability of these stipulations.[8] The BLM has not completed this amendment process.

C. March 2017 Lease Sale

On March 9, 2017, the BLM held an oil and gas lease sale for 15 parcels in the Tres Rios Field Office area. Before carrying out the sale, the BLM prepared two Determinations of NEPA Adequacy, finding that the 2013 Final EIS for the Tres Rios Field Office RMP sufficiently covered the sale such that the BLM did not need to prepare a new environmental analysis to move forward. In another case assigned to me—Case No. 17-cv-02432-JLK, the same Plaintiffs in this case assert similar claims challenging the issuance of ten of the **[*21]** leases from the March 2017 sale.[9]

D. March 2018 Lease Sale

In December 2017, the BLM issued a Notice of a Competitive Oil and Gas Lease Sale, providing notice that in March 2018 it would be holding a lease sale for 8 parcels of land in La Plata and San Miguel Counties. *See* AR 06204. As with the March 2017 sale, the BLM prepared a DNA to establish whether it could properly rely on its existing NEPA analysis in leasing the parcels. *See* AR 06450. The DNA concluded that the 2013 Final EIS for the Tres Rios Field Office RMP "fully cover[ed]" the sale of the leases and constituted the BLM's compliance with the requirements of NEPA. AR 06458. As a result, the BLM did not prepare a new environmental analysis at the leasing stage. AR 06453. The DNA states: "The ***act*** of leasing does not authorize any development or use of the surface of lease lands without further application by the lessee and approval by [the] BLM." AR 06454-55. It also indicates that, if APDs are received in the future, the BLM will conduct "additional site-specific NEPA analysis before approving an APD or authorizing surface-disturbing activity." AR 06452.

---

[7] The BLM administers the mineral estate of the parcels, and the BLM and other landowners manage the surface estate. *See* AR 06453.

[8] For example, the Tres Rios Field Office RMP has an NSO stipulation for occupied critical Gunnison sage-grouse habitat but, for unoccupied habitat, surface occupancy is only prohibited within a 0.6-mile radius of a newly identified lek. *See* AR 01692-93. In one alternative under the Rangewide Draft RMP Amendment, no surface occupancy or use would be allowed within a 4-mile radius of sage-grouse leks. *See* AR 04397, 04407. The Rangewide Draft RMP Amendment could also place greater restrictions on the allowable uses of transportation routes within non-habitat areas. *See* AR 04135-36.

[9] An order on Plaintiffs' claims in Case No. 17-cv-02432-JLK is being issued contemporaneously with this Order.

The BLM initially considered offering ten parcels for lease at the early **[*22]** 2018 sale but decided to defer six parcels. *See* AR 06441-42, 06451-52. The DNA documents that two parcels were deferred, one in order to allow for additional review of appropriate protections for Gunnison sage-grouse habitat and the other because the parcel's nominator was no longer interested in leasing it. AR 06451-52. The DNA also explains the process for deferring parcels from the sale, stating:

> On occasion, the BLM may defer offering proposed parcels for lease after posting of the Sale Notice. A decision to defer the sale of some or all of the parcels may occur up to the day of the lease sale. In such cases, the BLM prepares an addendum to the Sale Notice. The deferral of a parcel does not permanently withdraw the parcel from leasing, but merely indicates that further consideration is needed before a decision is a [sic] made regarding whether to offer the parcel at a future lease sale.

AR 06452.

The day after the DNA was signed, the BLM issued a Record of Decision approving the offering of the cleared parcels at the early 2018 sale and finding the DNA's conclusions to be correct. *See* AR 06524. The sale went forward on March 8, 2018, and the three parcels at issue in this case received **[*23]** bids and later had leases issued for them.[10] The challenged parcels range in size from 80 acres to 640 acres and cover a total of 1,400.31 acres. The lease for each parcel contains limited stipulations, such as NSO restrictions within certain distances of perennial waters and nesting sites of raptor ***species***. *See, e.g.*, AR 06587, 06597. The leases do not, however, generally contain stipulations to protect the Gunnison sage-grouse from the effects of preproduction activities on the parcels or the roads leading to the parcels.

E. Plaintiffs' Claims

In this case, Plaintiffs bring two claims under the ESA, five under NEPA, and one under the FLPMA.

• Claim one alleges the BLM's failure to consult with the FWS as required by the ESA is arbitrary, capricious, and not in accordance with law.

• Claim two alleges the BLM failed to satisfy its duty under the ESA to conserve and recover Gunnison sage-grouse.

• Claim three alleges the BLM relied on a DNA and violated NEPA "by failing to use the NEPA process to take a hard look at its lease-tier decisionmaking." Compl. at 24.

• Claim four alleges Defendants ***acted*** arbitrarily and capriciously by deciding to lease the at-issue parcels without determining whether **[*24]** NEPA's significance criteria for preparation of an EIS were met.

• Claim five alleges Defendants ***acted*** arbitrarily and capriciously by failing to fulfill its NEPA duty to consider a reasonable range of alternatives in order to protect the

---

[10] The three challenged parcels are: COC 78801, COC 78802, COC 78806. These parcels were also referred to by preliminary parcel numbers 7981, 7982, and 7986, respectively. Plaintiffs' Complaint asserts that it seeks to invalidate Defendants' decision to lease all four parcels that were included in the March 2018 sale. Compl. ¶ 3, ECF No. 1. However, Plaintiffs' filings in this case never mention the fourth parcel in La Plata County (COC 78800, also referred to by its preliminary number 6434). The Complaint alleges instead that the at-issue parcels are all located in San Miguel County and references a parcel that was withdrawn from the sale (COC 78807, also referred to as 7987). Compl. ¶ 19, 65. As a result, I consider Plaintiffs claims with respect to the three San Miguel County parcels only.

public lands and Gunnison sage-grouse.

• Claim six alleges Defendants violated NEPA and its implementing regulations by not providing a purpose and need or explanation of the proposed leasing project in a NEPA document.

• Claim seven alleges the BLM unlawfully made its leasing decision because it failed to take a hard look at the resulting direct, indirect, and cumulative impacts.

• Claim eight alleges Defendants ***acted*** arbitrarily and capriciously by failing to comply with their "substantive duty to prevent unnecessary or undue degradation of the public lands." Compl. at 31.

III. JURISDICTION

Before turning to the merits of Plaintiffs' claims, I must confirm that the requirements for jurisdiction are met. Defendants contend that Plaintiffs lack standing for their ESA claims and that, even if Plaintiffs have standing, those claims are not ripe for review.

A. Standing

Plaintiffs bear the burden of establishing the three requisite elements for standing—injury, **[*25]** causation, and redressability. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)*. Thus, Plaintiffs must show: "an actual or imminent injury that is concrete and particularized rather than conjectural or hypothetical; a causal connection that is 'fairly traceable' to the conduct complained of; and a likelihood of redressability in the event of a favorable decision." *Catron Cnty. Bd. of Comm'rs v. FWS, 75 F.3d 1429, 1433 (10th Cir. 1996)* (quoting *Lujan, 504 U.S. at 559*).

Defendants argue that Plaintiffs have failed to demonstrate either an injury in fact or redressability. The Supreme Court has recognized that "[w]hile generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice." *Summers v. Earth Island Inst., 555 U.S. 488, 494 (2009)*; *see also Sierra Club v. Morton, 405 U.S. 727, 738 (1972)* (confirming the legal interest "may reflect aesthetic, conservational, and recreational as well as economic values" (citation and internal quotation marks omitted)). More specifically, the Tenth Circuit has "frequently found standing based on a procedural injury in cases in which environmental groups have alleged that an agency failed to follow the required procedures in taking an action that negatively impacted members' concrete interest in protecting and enjoying the affected land." *New Mexico v. DOI, 854 F.3d 1207, 1215 (10th Cir. 2017)*.

Here, Plaintiffs **[*26]** explicitly allege that the BLM failed to follow the required ESA procedures in leasing the three parcels at issue, negatively impacting their and their members' interests in informed decision making and enjoyment of the land. Plaintiffs have submitted five extensive declarations in support of those allegations. *See* Opening Merits Br., Exs. 2-6, ECF Nos. 24-2 to 24-6. Briefly summarized, the declarations establish:

> • Plaintiff San Miguel County depends on its procedural right to informed federal decision making and is injured by not having proper NEPA and ESA analyses to rely on in its own decision making. Holstrom Decl. ¶¶ 10, 23-25, 27, 29-30, ECF No. 24-6. Specifically, San Miguel County's authority to regulate land use—including roads, wildlife, health, and water—is impacted by NEPA, the ESA, and the FLPMA and is hindered by the BLM's issuance of leases without adequately addressing or studying their effects. *Id.*
>
> • Clait Braun, a member of Plaintiff Rocky Mountain

Wild, has spent his forty-year career as a wildlife biologist observing and studying the Gunnison sage-grouse. Braun Decl. ¶¶ 1-2, 28-31, ECF No. 24-2. His scientific interest is impacted by the BLM's decision making. *Id.* ***[*27]*** ¶¶ 26-27. The San Miguel population of Gunnison sage-grouse is of particular importance to survival of the ***species***, and threats to the population include the development of oil and gas and other minerals, off-road vehicle use, utility corridors, livestock grazing, and fire and fuels management. *Id.* ¶¶ 9-13, 15.

• Megan Mueller is a member of and employed as a senior conservation biologist for Rocky Mountain Wild and has worked on Gunnison sage-grouse issues since 2007. Mueller Decl. ¶¶ 2, 4, ECF No. 24-3. She has participated in research and activities to enforce compliance with NEPA and ESA requirements and helped to achieve the listing of the Gunnison sage-grouse under the ESA in 2014. Mueller Decl. ¶¶ 3-8. Ms. Mueller personally enjoys observing Gunnison sage-grouse in the area and plans to pursue opportunities to do so in the future. *Id.* ¶¶ 9-11. Other Rocky Mountain Wild members share her interest in viewing and protecting the Gunnison sage-grouse. *Id.* ¶¶ 19-20. Ms. Mueller requires a lawful NEPA and ESA review from the BLM to provide her "with a scientifically sound basis to review the potential impacts of [the leasing] decision, to educate [Rocky Mountain Wild] members about **[*28]** the potential impacts, and to work to influence the relevant decision makers to withdraw the proposed leases from the lease sale, or to put adequate lease stipulations in place to protect Gunnison sage-grouse from significant impacts." *Id.* ¶ 18.

• Mark Pearson has camped, hiked, and viewed wildlife in San Miguel County for the past 35 years and intends to continue enjoying the area. Pearson Decl. ¶ 11, ECF No. 24-4. He is a member and the Executive Director of Plaintiff San Juan Citizens Alliance and has participated in the public land management process personally and on behalf of the group's members. *Id.* ¶¶ 2-3, 5, 7. For projects implicating the federal government, Mr. Pearson relies on the interdisciplinary analysis in NEPA documents to inform himself, the Citizens Alliance, elected officials, and local governments. *Id.* ¶ 23. He emphasizes the importance of this analysis, stating: "[a]lthough [it] may remain subject to debate, it provides a reliable basis for an informed public to engage our local, state, and federal decisionmakers." *Id.* Conversely, uninformed decisions harm the interests of the San Juan Citizens Alliance and its members. *Id.* ¶ 16.

• Luke Schafer is a member of and **[*29]** West Slope Director for Conservation Colorado. Schafer Decl. ¶ 2, ECF No. 24-5. In that role he focuses on management of public lands and mobilizing conservation-minded citizens to encourage public agencies like the BLM to protect public lands. *Id.* Conservation Colorado participates in the decision-making processes related to land use planning and has worked on sage-grouse conservation efforts for over 17 years. *Id.* ¶¶ 3-4. Mr. Schafer asserts that he and the group's members and staff enjoy recreational activities on public lands in Southwest Colorado and within the purview of the BLM's Tres Rios Field Office. *Id.* ¶¶ 8-11. He asserts that "[a] lawful NEPA analysis and ESA consultation will allow [him] and [Conservation Colorado] to honestly assess the impacts of leasing in this sensitive area, allow [them] to more effectively participate in the administrative processes, and hopefully result in a decision not to lease in an area that will have unacceptable environmental impacts." *Id.* ¶ 13.

Through these affidavits, Plaintiffs have shown actual or

imminent injuries that are "concrete and particularized rather than conjectural or hypothetical" as well as "a likelihood of redressability **[*30]** in the event of a favorable decision." *Catron Cnty., 75 F.3d at 1433* (citing *Lujan, 504 U.S. at 559*).

Defendants' arguments challenging Plaintiffs' standing are essentially the same as their defenses on the merits: They contend that engaging in ESA consultation at the leasing stage would have been unproductive as there was no new or different information to evaluate. The Tenth Circuit has previously found environmental groups to have standing under similar circumstances. In *WildEarth Guardians v. U.S. Environmental Protection Agency*, for instance, WildEarth argued that the Environmental Protection Agency ("EPA") had a duty to consult under the ESA and that such consultation may have led to measures that would have reduced the risk to ***endangered*** fish. *759 F.3d 1196, 1207 (10th Cir. 2014)*. The defendants challenged WildEarth's standing, asserting that WildEarth had not shown causation or redressability because any consultation would not have influenced the agency's final decision. The Tenth Circuit sided with WildEarth. *Id. at 1206-07*. The court explained that, "[t]o show redress[a]bility for an alleged procedural violation of the ESA, a plaintiff 'need[s] to show only that the relief requested—that the agency follow the correct procedures—may influence the agency's ultimate decision.'" **[*31]** *Id. at 1207* (quoting *Salmon Spawning & Recovery All. v. Gutierrez, 545 F.3d 1220, 1226 (9th Cir. 2008)*). The court then distinguished arguments related to the merits of the case from those determinative of standing:

> WildEarth contends that the EPA could have made a decision that would have further reduced mercury and selenium emissions from the Plant. [The] EPA argues otherwise, but that is a contention that WildEarth has standing to present. If WildEarth ultimately failed to persuade us of its contention, it would lose on the merits. In resolving a standing issue, however, we must start from the premise that the plaintiff will prevail on its merits argument.

Id. As in *WildEarth Guardians*, Defendants' arguments here go to the merits of Plaintiffs' ESA claims. Plaintiffs have shown that additional consultation by the BLM may influence its decision to lease the at-issue parcels or at least its decisions regarding which stipulations to include in the leases.

Consequently, based on the Declarations submitted by Plaintiffs and Tenth Circuit precedent, I find Plaintiffs have standing to pursue their ESA claims.

B. Ripeness

Defendants additionally argue that Plaintiffs' ESA claims are not ripe.[11] In evaluating whether claims are ripe, I must examine "both the fitness of the issues for **[*32]** judicial decision and the hardship to the parties of withholding court consideration." *S. Utah Wilderness All. v. Palma, 707 F.3d 1143, 1158 (10th Cir. 2013)* (internal quotation marks omitted) (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998)*). The central focus is "whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.* (quoting *Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1097 (10th Cir. 2006)*).

---

[11] In Case No. 17-cv-02432, Defendants filed a Motion for Partial Dismissal (ECF No. 7) on the grounds that Plaintiffs' ESA claims are not ripe. Judge Matsch denied the Motion after concluding it was premature. *See* 5/2/18 Minutes at 2, *San Miguel Cnty. v. BLM*, No. 17-cv-02432 (D. Colo.) ("*San Miguel I*"), ECF No. 16. In this case, Defendants rely on the arguments made in their briefing for that Motion. Resp. Merits Br. at 19, ECF No. 26.

As with their objections to standing, Defendants' contentions regarding ripeness mirror their merits-related arguments and are more appropriately addressed as such. Defendants insist that, while the 2018 lease sale was an agency action, "it did not present unanalyzed potential impacts on the grouse or its critical habitat because BLM did not yet have lessees, let alone specific development proposals." Reply in Supp. of Mot. to Dismiss at 2, *San Miguel I*, ECF No. 14; Resp. Merits Br. at 25. In addition, Defendants argue Plaintiffs' ESA claims are not ripe for three particular reasons: (1) the BLM and the FWS have not yet completed the ESA review that will be required before any development of the lease parcels is approved; (2) the BLM prohibits all ground-disturbing development activities until that review is complete; and (3) the BLM has the authority **[*33]** to deny an APD that would result in jeopardizing Gunnison sage-grouse or its critical habitat and to impose conditions of approval to comply with the ESA. Resp. Merits Br. at 19. Defendants' justifications fall short.

The question is not whether any future review that may be done will be adequate; it is whether a review and consultation should have been done at the leasing stage. There are no future contingent events necessary to make that question justiciable. In fact, the Tenth Circuit has made clear:

> [I]n a typical mineral leasing case, environmental plaintiffs do not have to wait until drilling permits have been issued before they may bring suit. Federal courts have repeatedly considered the ***act*** of issuing a lease to be final agency action which may be challenged in court.

S. Utah Wilderness All., 707 F.3d at 1159. Defendants admit that a final agency action has occurred. Nevertheless, they claim the leases are just pieces of paper that have no effect since the BLM can deny any APDs that are submitted and since ground-disturbing activities are prohibited until after development-level review and approval.[12] Defendants overlook the reality that, since the leases' surface occupancy restrictions do not cover the entirety of **[*34]** the parcels, a lessee "cannot be prohibited from surface use of the leased parcel once its lease is final." *Richardson, 565 F.3d at 718* (interpreting *43 C.F.R. § 3101.1-2*[13]). This is true

---

[12] Pursuant to *43 C.F.R. § 3162.3-1(c)*, "[n]o drilling operations, nor surface disturbance preliminary thereto, may be commenced prior to the authorized officer's approval of the permit."

[13] The regulation provides:

> A lessee shall have the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold subject to: Stipulations attached to the lease; restrictions deriving from specific, nondiscretionary statutes; and such reasonable measures as may be **[*35]** required by the authorized officer to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed. To the extent consistent with lease rights granted, such reasonable measures may include, but are not limited to, modification to siting or design of facilities, timing of operations, and specification of interim and final reclamation measures. At a minimum, measures shall be deemed consistent with lease rights granted provided that they do not: require relocation of proposed operations by more than 200 meters; require that operations be sited off the leasehold; or prohibit new surface disturbing operations for a period in excess of 60 days in any lease year.

43 C.F.R. § 3101.1-2. Defendants interpret this language as giving them the "authority to impose any condition of approval needed to comply with Section 7 of the ESA or to deny any development proposal that would result in jeopardizing the grouse or adversely modifying its critical habitat." Reply in

despite the existence of development-level review. *See id.* ("[The] BLM could not prevent the impacts resulting from surface use after a lease issued . . . ."). Thus, there are no final "uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *S. Utah Wilderness All., 707 F.3d at 1158* (quoting *Initiative & Referendum Inst., 450 F.3d at 1097*). As Plaintiffs correctly assert, the contested leases "convey[] an interest in federal land, allow[] surface occupancy, increase[] commercial use of BLM roads, intensify[] activity in a region where oil and gas and uranium development is ongoing, allow[] activities that do not require additional approval, and foreclose[e] [the] BLM's ability to prohibit development on these leases." Opening Merits Br. at 26, ECF No. 24.

As a result, I conclude that Plaintiffs' ESA claims are ripe for adjudication and jurisdiction is proper.

IV. STANDARD OF REVIEW

Plaintiffs brought their claims pursuant to the *Administrative Procedure **Act** ("APA"), 5 U.S.C. §§ 701-706*, and the citizen-suit provision of the ESA, *16 U.S.C. § 1540(g)*. Nevertheless, the APA standard of review applies to all of their claims. *Biodiversity Legal Found. v. Babbitt, 146 F.3d 1249, 1252 (10th Cir. 1998)* (explaining that courts rely on the standards of review provided in the APA in examining whether an agency's actions violate the ESA); *Rio Grande Silvery Minnow, 601 F.3d at 1105 n.3* (specifying **[*36]** that APA standards govern challenges to an agency's failure to undertake ESA consultation in the first instance); *Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1164 (10th Cir. 2002)* (applying APA scope of review to a NEPA-violation claim); *Richardson, 565 F.3d at 704, 719* (reviewing NEPA and FLPMA claims under APA standard).

The APA mandates that a reviewing court "hold unlawful and set aside agency action, findings, and conclusions" that fail to comply with statutory, procedural, or constitutional requirements or that are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *5 U.S.C. § 706*. An agency's decision is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)*; *see also Colo. Wild v. U.S. Forest Serv., 435 F.3d 1204, 1213 (10th Cir. 2006)*.

"[T]he grounds upon which the agency ***acted*** must be clearly disclosed in, and sustained by, the record." *Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575 (10th Cir. 1994)*. I must review that record and determine whether the agency "examined all relevant data and articulated a satisfactory explanation for its action, **[*37]** including a rational connection between the facts found and the choice made." *Id. at 1576*.

V. ANALYSIS OF THE MERITS

Plaintiffs' claims in this case allege the BLM failed to comply with its duties under NEPA, the ESA, and the FLPMA before leasing the at-issue parcels. After careful

---

Supp. of Mot. to Dismiss at 5, *San Miguel I*, ECF No. 14. However, the Tres Rios Field Office RMP EIS acknowledges that "[l]easeholders have the right to explore, develop, and produce mineral resources from any valid existing lease." AR 00404. And, at oral argument, Defendants admitted that the leases constituted an irretrievable commitment of resources. *See* 03/12/2020 Oral Arg. Hr'g.

review of the record and the parties' arguments, I find the BLM did not consider all the foreseeable impacts of leasing the parcels as required by NEPA and did not fulfill its ESA consultation duties regarding the Gunnison sage-grouse. I am not, however, persuaded that the BLM violated the FLPMA by not specifically analyzing the potential for unnecessary and undue degradation at the leasing stage.

A. NEPA Claims

The 2013 Final EIS for the Tres Rios Field Office RMP expressly classifies its environmental analysis as "programmatic" and "strategic." AR 00388, 00402. The Final EIS considered the appropriateness of opening a total of over 2.1 million acres to potential oil and gas leasing. *See* AR 00382-83. Of that total acreage, the parcels at issue in this case cover approximately 1,400 acres, or roughly 0.06%. Before issuing the associated leases, the BLM did not conduct any additional NEPA analysis. Instead, it issued a **[*38]** DNA in support of its determination that the Final EIS sufficiently fulfilled its NEPA duties related to the sale of the leases. AR 06458.

Plaintiffs' NEPA claims allege that the BLM's broad environmental analysis at the planning stage was insufficient to provide the "hard look" required for issuing the leases. Plaintiffs insist the BLM should have prepared another NEPA document before the lease sale, instead of merely completing the DNA, and that, by failing to do so, the BLM violated the APA. As I explain below, I find there were additional foreseeable impacts for the BLM to consider at the leasing stage such that the BLM did not comply with its responsibilities under NEPA. This conclusion is supported by Tenth Circuit precedent, the content of the DNA, and the circumstances necessitating the Rangewide RMP Amendment.

The Proper Inquiry in the Tenth Circuit

In the Tenth Circuit, there is no bright-line rule as to when site-specific environmental analysis must occur in the oil and gas leasing context. *See* Richardson, 565 F.3d at 717-18. In some cases, it must take place at the leasing stage, *see* id. at 718-19, and in others, it is appropriate to wait until the development stage, *see* Park County, 817 F.2d at 623-24. Three Tenth Circuit cases frame the applicable **[*39]** standard: *Park County Resource Council, Inc. v. U.S. Department of Agriculture; Pennaco Energy, Inc. v. DOI*; and New Mexico ex rel. Richardson v. BLM.

In *Park County*, the Tenth Circuit concluded that lease-tier NEPA analysis was not required where, prior to issuing a lease, an extensive EA had been prepared and a FONSI had been issued. 817 F.2d at 621-22. The EA exceeded 100 pages and "explore[d] various leasing alternatives, including issuance of leases without stipulations, issuance of leases with stipulations, and issuance of no leases." *Id. at 612*. "Based on this EA, [the] BLM determined that, with appropriate lease stipulations aimed at protecting the environment, lease issuance itself" did not require an EIS. *Id. at 621*. Given that prior review and the fact that extensive drilling had not occurred in the area of the lease parcel in question, the Tenth Circuit concluded that a pre-leasing EIS would have been a waste of resources and that "there clearly was a rational basis to defer preparation of an EIS until a more concrete proposal was submitted to [the] BLM." *Id. at 624*.

In contrast, in *Pennaco*, the Tenth Circuit affirmed a decision of the Interior Board of Land Appeals ("IBLA") finding that the BLM was required to conduct additional NEPA analysis before issuing leases for the **[*40]** extraction of coal bed methane. *377 F.3d at 1162*. The BLM had completed DNAs determining that two existing

environmental analyses satisfied NEPA requirements with regard to the issuance of the challenged leases. *Id. at 1152*. The IBLA reversed the BLM's decision and concluded that the DNAs "fail[ed] to even identify, much less independently address, any of the relevant areas of environmental concern or reasonable alternatives to the proposed action and thus do not satisfy [the] BLM's NEPA obligations in this case." *Id. at 1154* (quoting the IBLA decision). The district court found the existing NEPA analyses upon which the BLM relied were sufficient and consequently ruled that the IBLA's decision was arbitrary and capricious. *Id. at 1154-55*. The Tenth Circuit disagreed and ordered the district court to reinstate the IBLA's decision, holding that "the administrative record contains substantial evidence to support the IBLA's conclusion that the proposed action raised significant new environmental concerns that had not been addressed by existing NEPA documents." *Id. at 1157, 1162*. In arriving at its conclusion, the Tenth Circuit found that the issuance of the oil and gas leases had granted the lessees certain rights. *Id. at 1160*.

Similarly, in *Richardson*, the Tenth Circuit **[*41]** determined that the issuance of an oil and gas lease without an NSO stipulation gave the lessee the right to surface use that could not be prohibited once the lease was finalized and so the leasing action constituted an "irretrievable commitment of resources." *Richardson, 565 F.3d at 718* (quoting *42 U.S.C. § 4332(2)(C)(v)*). Based on that determination, the court held that the leasing stage was the earliest practicable point for assessing all reasonably foreseeable impacts under NEPA, so the BLM should have conducted a site-specific analysis before issuing the lease. *Richardson, 565 F.3d at 718-19*. The court noted that considerable exploration had already been done on parcels adjacent to the one being leased, that a natural gas supply was known to exist below those parcels, and that the record showed that the lessee had concrete plans to build on the parcel as well as others it already leased. *Id. at 718*.

Thus, in determining when site-specific analysis must occur, courts must consider the full context of the agency's decision and whether "all reasonably foreseeable impacts" were assessed "at the earliest practicable point . . . before an irretrievable commitment of resources [was] made." *Richardson, 565 F.3d at 718* (citations and internal quotation marks omitted). When there has been an "irretrievable **[*42]** commitment of resources"—as Defendants concede has occurred in this case—the "operative inquiry [is] simply whether all foreseeable impacts of leasing [were] taken into account before leasing could proceed." *Id. at 717*. Since the BLM conducted only the RMP-level NEPA analysis before leasing the at-issue parcels here, I must evaluate whether that broad analysis sufficiently took into account all of the reasonably foreseeable impacts of the leasing decision.

Reasonably Foreseeable Impacts Not Taken into Account at the Planning Stage

The NEPA question is straightforward, and it has a clear answer: Once the BLM identified the exact parcels to be offered at the March 2018 lease sale, new information was available that made it possible for the BLM to foresee and consider additional impacts that were not evaluated in the programmatic-level RMP and Final EIS. The EIS recognizes that the actual impacts of various projects "would depend on the extent of each project, the environmental conditions at the site (which can vary widely across the public lands), and the mitigation measures and their effectiveness." AR 00402. The BLM's identification of the lease parcels' specific locations, acreage, and timing **[*43]** enabled it to examine these site-specific considerations. The BLM could have assessed—for the first time—the parcels' relative positions to each other, to Gunnison sage-

grouse habitats, to proposed and existing ACECs, to cultural resources, and to existing leased parcels in the area. Designation of the parcels also provided information on post-leasing activity likely to occur prior to the development stage, such as staking, surveying, and accessing the parcels. In both *Richardson* and *Park County* the Tenth Circuit considered the existence (or lack) of oil and gas development near the proposed leases to be relevant in deciding whether NEPA analysis was required at the leasing stage. *See Richardson, 565 F.3d at 718*; *Park County, 817 F.2d at 623-24*. The amount of development near the parcels at the time of leasing was information not previously known or reviewed.

In particular, the BLM did not adequately take into account all the reasonably foreseeable impacts to the Gunnison sage-grouse from leasing the at-issue parcels. As Plaintiffs note, there is occupied critical habitat in close proximity to the parcels and to the roads used to access the parcels. Most of the parcels appear to be accessed by roads that travel through areas of occupied critical habitat. **[*44]** *See* Compl. at 3; AR 06425. The BLM's overarching defense is that there were not sufficient development plans for it to conduct further analysis of the impacts of the leases and any additional analysis would have been premature and redundant of the Final EIS. Defendants argue that they cannot evaluate the impact of lessees accessing the parcels on the sage-grouse until after an APD has been submitted because the point of access depends on where site development occurs and the BLM may authorize the construction of new roads or grant a right-of-way. Such blanket policies cannot coexist with NEPA. When the characteristics of the specific parcel are considered, including the size, location, and applicable stipulations, it may only be feasible for the parcels to be accessed in certain ways or for development to occur in very limited areas. Defendants further assert that the access roads are available for public use and, without additional approval, lessees can only use the land as other individuals would. An expected increase in traffic on the particular roads nevertheless constitutes additional information not previously considered. And the mere fact of public use of the lands and roads **[*45]** does not relieve the BLM of its obligation to consider the reasonably foreseeable impacts of issuing the challenged leases. Even though no APDs have been submitted for the parcels in question, the proximity of other oil and gas development to the parcels and Gunnison sage-grouse habitats should have also been considered at the leasing stage.[14]

In short, the BLM failed to assess "all 'reasonably foreseeable' impacts . . . at the earliest practicable point." *Richardson, 565 F.3d at 718*. Before issuing the leases, the BLM should have conducted additional environmental analysis pursuant to NEPA to investigate the previously unexamined impacts associated with the lease parcels' size, locations, configurations, and timing.

Plaintiffs contend the administrative record supports a finding that the BLM's leasing decision is likely to have significant effects on the quality of the human environment such that an EIS must be prepared. My

---

[14] Another flaw Plaintiffs highlight in Defendants' plan to put off environmental analysis until the development stage is that the leasing stage is the obvious time to conduct an initial review of the potential for collocation of facilities. The RMP provides: "For new lease or new development areas, new mineral development facilities should be collocated and/or centralized. Facilities include roads, well pads, utilities, pipelines, compressors, power sources, fluid storage tanks, and other associated equipment. Collocation of wells (more than one well per pad) should be required where feasible." AR 03317. As Plaintiffs state, there is no basis to wait for an APD to consider collocation or centralization of these facilities. *See* Opening Merits Br. at 31.

ruling here does not go so far. I simply conclude that, in this case, the BLM's DNA was insufficient, and *some* NEPA analysis should have been conducted at the leasing stage.

Inadequacies of the NEPA Analysis Documented in the DNA

The DNA the BLM prepared concluded that the Final EIS "fully **[*46]** cover[ed]" the sale of the leases and constituted the BLM's compliance with its NEPA duties. AR 06458. But the document itself verifies that the BLM defied NEPA's requirements.

The BLM's contention that there were not sufficient development plans for it to conduct additional environmental analysis is undermined by the fact that it conducted some level of review of the leases' impact. The DNA indicates the BLM withdrew or deferred one parcel from the lease sale "to allow for additional review of appropriate protections for Gunnison sage-grouse habitat." AR 06451-52. And, apparently, the ten parcels initially considered for the sale were evaluated for whether the sale of each should go forward. But, apart from the DNA's explanation that "further consideration is needed before a decision is a made regarding whether to offer the parcel[s] at a future lease sale," AR 06452, the record does not document the scope of the BLM's review. The DNA notes that "[t]he sufficiency of the existing analysis in the [Tres Rios Field Office ("TRFO")] PRMP/FEIS was verified during site-visits to the parcels conducted by BLM TRFO staff in July 2018 [sic]," AR 06454, and that "[s]ite visits to the proposed **[*47]** parcels were conducted by members of a BLM TRFO interdisciplinary team of resource specialists (ID Team) on July 25, 2017," AR 06456. What data was obtained or evaluated and other details about the conclusions reached are not evident from the record.[15] What is clear is that further analysis of the specific parcels at the leasing stage was both feasible and useful to the extent that the BLM chose to undertake it. This contradicts the BLM's claim that there was insufficient information to warrant additional inquiry before leasing the challenged parcels.[16]

---

[15] The record contains few other glimpses into the BLM's internal pre-sale analysis. *See, e.g.*, AR 04701 ("Interdisciplinary (ID) Team Checklist" simply identifying which resource issues need analysis); AR 06165 (working memorandum explaining that parcel 7387 would be removed from the sale both because the nominating party was no longer interested and "based on the low oil and gas potential in the area"); AR 06443 (email documenting that parcels 7983, 7984, 7985, 7987 would be removed from the sale since "there is not currently a potential drainage situation from offsetting wells").

[16] A lack of concrete development plans does not explain why the BLM did not conduct an EA to confirm that an EIS was unnecessary. The BLM has frequently prepared EAs and FONSIs for specific lease sales, setting out its determination that the proposed lease sales conformed with the applicable RMP and EIS. *See, e.g.*, *WildEarth Guardians v. BLM, 322 F. Supp. 3d 1134, 1139 (D. Colo. 2018)* ("***Acting*** under an RMP encompassing northeastern Colorado, BLM issued an August 2014 environmental assessment ('EA') analyzing the environmental consequences of a proposed May 2015 auction of numerous oil and gas leases in that region."); *Amigos Bravos v. BLM*, Nos. 6:09-cv-00037-RB—LFG & 6:09-cv-00414-RB—LFG, 2011 WL 7701433, at *6 (D.N.M. Aug. 3, 2011) ("BLM prepared environmental assessments (EAs) to consider the impacts of each of the lease sales; the agency then made findings of no significant impact (FONSIs) and authorized the sales. . . . The EA/FONSIs determined that the proposed lease sales conformed with the 2003 RMP/EIS and that more detailed EISs were not required because the authorization of the lease sales would not have a significant environmental impact."). But, here, "the BLM did not prepare . . . an EA, did not issue a FONSI, and did not prepare any

The BLM's responses to two questions in the DNA further establish the need for additional NEPA analysis at the leasing stage. The first NEPA-Adequacy Question asks:

> Is the new proposed action a feature of, or essentially similar to, an alternative analyzed in the existing NEPA document? Is the project within the same analysis area, or if the project location is different, are the geographic and resource conditions sufficiently similar to those analyzed in the existing NEPA document(s)? If there are differences, can you explain why they are not substantial?

AR 06453. The BLM responded:

> Yes. The proposed **[*48]** action is included in an alternative analyzed in the TRFO PRMP/FEIS. The proposed lease parcels are within the area analyzed by the PRMP/FEIS and leasing and subsequent development of oil and gas resources are specifically analyzed throughout the PRMP/FEIS. (See chapters 3 and 4.) Section 3.19 of the PRMP/FEIS describes the acres of currently leased and unleased federal minerals under BLM, Forest Service, and split-estate surface ownership. The PRMP/FEIS describes leasing and the types of stipulations which could be applied as resource mitigation and explains that stipulations, Conditions of Approval, and other existing law can mitigate resource concerns during development. The PRMP/FEIS also describes average acres of disturbance for development of well pads, roads, pipelines, and other facilities. Other resource sections in the PRMP/FEIS describe the type and qualitative impact of development on particular resources. All lands considered in this action are open to leasing under the PRMP/FEIS and stipulations have been attached in conformance with the PRMP/FEIS.

Id. This answer seems to completely ignore any possibility that new analysis might be required by the differences between **[*49]** the "programmatic" and "strategic" purpose of the RMP EIS and the focus on more specific locations called for at the leasing stage. The fact that the parcels are "within the area" analyzed by the EIS (i.e., 2.6 million acres) does not mean that the EIS adequately dealt with or took a "hard look" at the characteristics of the *specific* parcels—indeed, the EIS expressly said it did not.

While stipulations may have been attached to the leases in conformance with the RMP and Final EIS, the BLM's failure to conduct additional NEPA analysis calls into question its determination of which stipulations should apply to each lease. In setting out which oil and gas leasing stipulations would apply to which lands, the Final EIS explains:

> These boundaries can change based on the most current information at the time of the Proposed Action. More than one stipulation can apply to a particular land area . . . . The stipulation resource databases provide basic resource information by which these multiple determinations can be made and site-specific evaluations would verify the need for these applications.

AR 01673. The Final EIS confirms that lease stipulations "would be applied to leasing and development **[*50]** stages, contributing to the conservation of sage-grouse habitat." AR 00555. The BLM had new, site-specific information when it leased the challenged parcels, and yet it decided which stipulations to include (or not include) without any additional NEPA analysis. The categorical statements in the BLM's response to the DNA's first question—that the Final EIS describes "the types of stipulations which

---

environmental analysis that considered not issuing the leases in question." *Pennaco, 377 F.3d at 1162*.

could be applied as resource mitigation"—do not persuade me that no new analysis was required. A broad discussion of the types of possible stipulations does not address what stipulations would be appropriate to apply when leasing this specific set of parcels. When the BLM decided which stipulations to apply to the leases at issue here, it made those decisions as to each parcel for the first time, and it did so without the full NEPA-compliant disclosure and analysis.

The BLM's answer to NEPA Adequacy Question 4 in the DNA is similarly problematic. Question 4 asks: "Are the direct, indirect, and cumulative effects that would result from implementation of the new proposed action similar (both quantitatively and qualitatively) to those analyzed in the existing NEPA document?" AR 06455. The BLM **[*51]** answered:

> Yes. The impacts of oil and gas leasing, as well as other resource management actions, were addressed in the PRMP/FEIS based on a reasonable foreseeable development (RFD) scenario of approximately 2,950 new wells in 15 years. Only twenty-six new federal wells have been approved in the two years since the RMP was signed. This represents an average of one new well every month, which is only 5% of the RFD's predicted monthly average. Thus, the impacts to date from oil and gas development are much lower than those anticipated under the approved plan and are within the range of those analyzed in the PRMP/FEIS.

Id. This general response regarding actual drilling in the Tres Rios Field Office boundaries compared to the RMP's projections may be helpful to a point, but it does not address other potentially relevant issues, such as the proximity of existing and recently developed wells to the proposed parcels. In *Richardson*, the Tenth Circuit rejected the BLM's argument that no supplemental EIS was required because the same or less surface area would be developed under the proposed plan as had been considered in the EIS. *565 F.3d at 706-07*. The court refused to "accept that because the *category* of impacts **[*52]** anticipated from oil and gas development were well-known after circulation of the Final EIS, any change in the location or extent of impacts was immaterial." *Id. at 707*. It further explained that "NEPA does not permit an agency to remain oblivious to differing environmental impacts, or hide these from the public, simply because it understands the general type of impact likely to occur." *Id.* Here, the fact that drilling in the entire area covered by the Tres Rios Field Office RMP was less than anticipated may be unimportant if, for example, all of it is concentrated in a certain area. The BLM simply did not address the key issue of location.

The information in the DNA confirms that the BLM could have and should have conducted additional NEPA analysis before leasing the parcels. This analysis would have advanced the goals of NEPA by increasing transparency and ensuring the BLM made informed decisions in determining which parcels to lease and which stipulations were necessary for each lease.

The Rangewide RMP Amendment as Further Evidence of the DNA's Inadequacy

When the at-issue leases were being considered and were ultimately sold, a Rangewide RMP Amendment was in process. In the August 2016 Rangewide **[*53]** Draft RMP Amendment, the BLM explained that an "RMP Amendment is necessary in order to address the changed circumstances and new information resulting from the 2014 FWS listing of the [Gunnison sage-grouse] as 'threatened' under the ESA." AR 03500. The Draft Amendment noted that the "inadequacy of regulatory mechanisms in land use plans was identified as a major threat in the FWS listing decision," and

therefore "the BLM needs to incorporate objectives and adequate conservation measures into RMPs to contribute to the conservation and assist with the recovery of the [Gunnison sage-grouse]." AR 03498. The Draft further states: "[C]onservation measures could include restrictions on resource uses and programs that affect [Gunnison sage-grouse], as well as measures to reduce the impacts resulting from BLM programs and authorized uses." *Id.* The Rangewide RMP Amendment would likely increase the stringency and coverage of oil and gas lease stipulations and place greater restrictions on transportation routes affecting the Gunnison sage-grouse. *See supra*, note 6; AR 04135 ("Some uses, such as motorized or mechanized travel could be eliminated from roads or trails that negatively impact [sage-grouse]. **[*54]** Timing limitations, seasons of use, and temporary closures could also be used to protect [sage-grouse], especially during critical times of the year, such as for breeding, nesting, and brood-rearing.").

Defendants assert that the BLM "excluded from the lease sale all lands . . . that might be affected by decisions in the range-wide RMP Amendment process." Resp. Merits Br. at 35 (citation omitted). The DNA issued by the BLM does not plainly support such a determination.[17] Nor does the record. Where the very purpose of the Rangewide RMP Amendment was to address the changed circumstances since the 2014 Gunnison sage-grouse listing and improve the regulatory mechanisms in land use plans, it should have been apparent that additional NEPA analysis was necessary before conducting the March 2018 lease sale.

In sum, the "BLM cannot point to any substantive NEPA analysis in the Administrative Record that informs the decisionmakers, the public, and the political process of the impacts, alternatives, and mitigation measures involved with leasing [the at-issue] tracts of federal land for oil and gas production." Opening Merits Br. at 46. The BLM should have conducted an environmental analysis to investigate **[*55]** the reasonably foreseeable impacts of issuing the specific leases in question. Because it did not consider all the reasonably foreseeable impacts at the earliest practicable point, it did not fulfill its NEPA duties and consequently violated the APA.

Plaintiffs therefore prevail on their third claim. They also succeed on their fifth, sixth, and seventh claims, as any future NEPA analysis—unlike the DNA—will necessarily state a proper purpose and need, consider a reasonable range of alternatives, and assess the full impacts of its leasing decision. However, since I do not find that an EIS was required, Plaintiffs' fourth claim does not stand.

B. ESA Claims

Under the ESA, the BLM was obligated to review the leasing of the at-issue parcels "at the earliest possible time" to determine whether that action "may affect" the Gunnison sage-grouse. *50 C.F.R. § 402.14(a)*. Upon a determination that leasing the parcels "may affect" the sage-grouse, the BLM was required to consult with the FWS or issue a specific biological assessment. *See id. §§ 402.11*, *402.12*, *402.13*, *402.14*. In this case, the BLM did not make an express "may-affect" determination at the leasing stage and did not consult with the FWS or issue a biological assessment at that point. **[*56]**

---

[17] For instance, numerous comments in the DNA note that the access routes for the parcels would go through lands being analyzed by the RMP Amendment. AR 06505-06, 06511. The BLM's responses to the comments ignore the issue and claim that the BLM does not have enough information at the leasing stage to give it any consideration. AR 06505-06, 06512. As I stated above, this devised limitation does not square with NEPA.

Plaintiffs assert that the BLM's decision to issue the leases was an agency action that "may affect" the Gunnison sage-grouse, a listed ***species***, and therefore that the BLM violated the ESA by failing to properly consult with the FWS at the leasing stage. Defendants concede that the lease sale was an "agency action" under the ESA and acknowledge that the BLM and the FWS did not consult at the lease-tier stage in connection with the 2018 sale. However, Defendants maintain that the decision not to consult at the leasing stage was reasonable because the BLM previously consulted with the FWS for the Tres Rios Field Office RMP and the 2018 lease sale did not present any new, unanalyzed information regarding the potential effects on the Gunnison sage-grouse or its critical habitat. Defendants broadly claim:

> [T]he issuance of a lease alone can have no further unanalyzed effect on the ***species***, because BLM prohibits all ground-disturbing activity associated with lease development until an APD is approved, and maintains authority to impose conditions on an APD necessary to comply with the requirements of the ESA, and to deny approval of any proposed development activity that would jeopardize the **[*57]** grouse or adversely modify its critical habitat.

Resp. Merits Br. at 30 (footnote omitted). Defendants assure that if the BLM receives an APD, it will then determine whether any specific development activities "may affect" the Gunnison sage-grouse or its critical habitat and consult with the FWS accordingly.

To support their arguments, Defendants put a questionable spin on the FWS's RMP-level Conference Opinion, which was later adopted as the FWS's Biological Opinion. The Conference Opinion concludes that "given the uncertainty of the timing, location, size, and extent of future actions it is not possible to meaningfully predict adverse effects [on Gunnison sage-grouse] caused by implementation of the revised [ ]RMP at this programmatic scale." AR 02503. For that reason, the Biological Opinion twice directs that subsequent actions affecting Gunnison sage-grouse would require further consultation, stating:

> • "*All* subsequent actions that affect [the Gunnison sage-grouse] will be subject to future section 7 analysis and consultation requirements unless we find that the ***species*** is not warranted for listing," AR 02503 (emphasis added); and
>
> • "*Any* subsequent action implemented under the revised plan **[*58]** that *may affect* the [Gunnison sage-grouse] or proposed critical habitat must go through separate section 7 consultation," AR 02503-04 (emphasis added).

These statements in the Biological Opinion acknowledge a duty to engage in Section 7 consultation regarding any future action that "may affect" Gunnison sage-grouse. But Defendants interpret these portions of the Biological Opinion to apply only to subsequent activities at the development level. According to Defendants, the BLM and the FWS concluded at the RMP stage that the additional review would occur only at the development stage. *See* Resp. Merits Br. at 20-21 ("As part of this consultation, BLM and the [FWS] agreed that additional ESA review would take place once site-specific impacts become foreseeable or known - *i.e.*, at the lease-development or project stage (when BLM receives an APD)." (citing AR 02503-05)); *id.* at 25 ("The agencies recognized that further ESA review would occur for any specific lease-development activities, when proposed in an APD."); 03/12/2020 Oral Arg. Hr'g.[18] The plain language of the Biological Opinion

[18] Defendants' argument approaches misrepresentation. Their Response Brief includes the following quote purportedly from the FWS: "At this broad programmatic level, the best

does not corroborate this view of the FWS's expectations. And Defendants have been unable to point to any other [*59] information in the record validating their interpretation. Moreover, as Plaintiffs have argued, the agencies may not simply agree to postpone statutory duties.

Defendants' assertions that issuance of a lease cannot have any additional unanalyzed effect are too far-reaching. Whether any unanalyzed effect is present depends on the details of the prior consultation and the unique conditions of the ***species***. Contrary to Defendants' arguments and as I found for Plaintiffs' NEPA claims, there was new information available to the BLM at the leasing stage. The FWS's Biological Opinion at the RMP level considers the effects of development activities on Gunnison sage-grouse generally. *See* AR 02491-96. The Biological Opinion rightly points out that, at the programmatic level, the agencies did "not have sufficient information about where, when, or to what extent, actions may occur that may affect [the Gunnison sage-grouse] or its occupied critical habitat." AR 02499. At the leasing stage, however, the BLM could assess at least some of this information for the specific parcels. Location and size details became available, and it was known when the leases would commence and that they are valid [*60] for ten years. The BLM could also evaluate the extent of potential activity due to the increased traffic anticipated from the lessees' staking, surveying, and accessing the parcels. And, significantly, the lease parcels could have been considered in conjunction with any other prospective and existing leases and facilities. The locations, size, and timing of the leases provided more information than was reviewed at the RMP stage, and thus, that information should have triggered new consideration under the ESA.

Although the challenged parcels do not encompass lands designated as occupied critical habitat, they are in close proximity to Gunnison sage-grouse habitat and compound impacts from the lands already leased in the area. Additionally, the FWS's Biological Opinion suggests sage-grouse may be present elsewhere. AR 02501 ("We know [sage-grouse] have used areas of mapped unoccupied habitat . . . ."). The Opinion cautions that "[f]uture section 7 consultation may reveal site specific or cumulative effects that we cannot foresee at this time." *Id.*

In its July 2017 comments on the March 2018 lease sale, Colorado Parks and Wildlife ("CPW"), the state agency charged with conserving and maintaining [*61] wildlife and habitat, stated:

> While no parcels for the March 2018 sale are located within mapped GUSG habitats, parcels 7981, 7982, 7983, 7984, and 7985 bisect two areas of occupied GUSG habitat. Note that these parcels add cumulatively to parcels previously leased by BLM in this area in 2017 . . . . CPW remains concerned about indirect disturbance to GUSG from drilling operations and increased noise and disturbance from truck traffic on existing and potential new roads in GUSG habitat. CPW raised these concerns in our comments on the March 2017 sale . . . .

AR 04814. Defendants read these comments to relate only to future development and not leasing, and they assert the concerns must have been resolved since CPW did not protest the sale. These presumptions are shaky. Truck traffic on existing roads could be

---

information available is not sufficient to determine any specific level of anticipated take. However, project specific [*i.e.*, APD stage] section 7 consultation analyses, subsequent to the proposed action, will reexamine this issue." Resp. Merits Br. at 28 (citing AR 02504). The actual quote from the FWS says nothing about the APD stage; that insertion is a fabrication by Defendants.

associated with pre-development activities. *See id.* And CPW's decision not to repeat its concerns, after doing so for both the March 2017 and 2018 sales, does not mean they were resolved.

The BLM could have requested reinitiation of the previous RMP-level consultation with the FWS. As explained above, "[r]einitiation of consultation is required and shall be requested by the Federal **[*62]** agency or by the Service . . . [i]f new information reveals effects of the action that may affect listed ***species*** or critical habitat in a manner or to an extent not previously considered." *50 C.F.R. § 402.16(a)*. Reinitiation must occur "when the effects to ***species*** that are revealed or caused are *different* from those effects previously considered." *Cables, 509 F.3d at 1324*. When it adopted its 2014 Conference Opinion as its Biological Opinion in relation to the RMP, the FWS expressly recognized that "[r]einitiation of formal consultation is required and shall be requested by the [BLM] or by the [FWS] . . . [i]f new information reveals effects of the action that may affect listed ***species*** in a manner or to an extent not previously considered . . . ." AR 02467. But neither agency made such a request. Defendants emphasize that the FWS did not request that the BLM reinitiate consultation on either the 2017 or 2018 lease sale. Defendants cite cases stating that the FWS's failure to object to the action agency going forward with an action is some indication that reinitiation of consultation was not mandatory or that the agency's failure to reinitiate consultation was reasonable. *See Wyo. Outdoor Council v. Bosworth, 284 F. Supp. 2d 81, 95 (D.D.C. 2003)* ("[T]here is nothing in the record showing that the **[*63]** FWS requested reinitiation or otherwise disagrees with the Forest Service's determination that the plaintiffs' information does not trigger reinitiation."); *Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency, 11 F. Supp. 2d 529, 550 (D.V.I. 1998)* (concluding that the Federal Emergency Management Agency did not have to reinitiate consultation in part because the FWS did not request reinitiation). But the FWS's decision not to request reinitiation is not dispositive. The BLM had an independent duty to reinitiate consultation if new information revealed the action may affect listed ***species*** in a manner or to an extent not previously considered, irrespective of any request from the FWS. *See 50 C.F.R. § 402.16(a)* ("Reinitiation of consultation is required and *shall* be requested by the Federal agency *or* by the Service . . . ." (emphasis added)); *see also All. for Wild Rockies v. Probert, 412 F. Supp. 3d 1188, 1201 (D. Mont. 2019)* ("Reinitiation under *§ 402.16* . . . *obligates* either the action agency or the Fish and Wildlife Service to ***act***.").

Defendants may be correct that the BLM will know more specifics at the development stage, but I conclude that the BLM had new information at the leasing stage that revived its duties under the ESA. The BLM ignored those duties, and thus it violated the ESA such that Plaintiffs are entitled to judgment on their first and second claims.[19]

C. FLPMA [*64] Claim

As stated above, the FLPMA dictates that the BLM, in managing federal public lands, "take any action necessary to prevent unnecessary or undue degradation of the lands." *43 U.S.C. § 1732(b)*. Plaintiffs

---

[19] Plaintiffs argue that the administrative record is generally insufficient and request the Court to confirm that the record as transmitted and certified does not support a finding upholding the agency action. As I understand Plaintiffs' argument, they contend the record does not show that the BLM actually made a "may affect" determination with respect to the leasing decision, as required by the ESA. *See* Opening Merits Br. at 74-76. This argument returns to Plaintiffs' substantive argument under the ESA, which I have addressed here.

claim that the BLM failed to fulfill this duty by issuing the challenged leases without preparing any analysis of foreseeable degradation and without "adopt[ing] any lease-tier stipulations to address road systems, horizontal drilling, well spacing, stimulation techniques, unauthorized drainage of unleased and private minerals, and other currently foreseeable impacts and commitments of resources that would escape review at the site[-]specific tier." Compl. ¶ 135. Although I have found that the BLM failed to comply with NEPA in issuing the leases, I conclude Plaintiffs have not demonstrated that the BLM violated its obligation under the FLPMA.

The FLPMA's substantive unnecessary and undue degradation mandate is distinct from the procedural requirements imposed by NEPA. *See, e.g., Ctr. for Biological Diversity v. DOI, 623 F.3d 633, 645 (9th Cir. 2010)* ("A finding that there will not be significant impact [under NEPA] does not mean either that the project has been reviewed for unnecessary and undue degradation or that unnecessary or undue degradation will not occur." (quoting **[*65]** *Kendall's Concerned Area Residents, 129 I.B.L.A. 130, 140 (1994)*)); *Biodiversity Conservation All. v. BLM*, No. 09-cv-08-J, *2010 WL 3209444, at *17 (D. Wyo. June 10, 2010)* ("Disclosure of significant impacts under NEPA does not equate to [unnecessary and undue degradation] under [the] FLPMA."). The strong language in the FLPMA's mandate requires the BLM to "take *any* action necessary." *43 U.S.C. § 1732(b)* (emphasis added). But, as Defendants correctly note, the FLPMA "leaves the BLM a great deal of discretion in deciding how to achieve [its] objectives . . . because it does not specify precisely how the BLM is to meet them, other than by permitting the BLM to manage public lands by regulation or otherwise." *Gardner v. BLM, 638 F.3d 1217, 1222 (9th Cir. 2011)* (citations, alterations, and internal quotation marks omitted); *see also Biodiversity Conservation All., 2010 WL 3209444, at *27* (affirming a decision of the IBLA that found there was no support in the statute, regulations, or case law for converting the unnecessary and undue degradation mandate "into a *procedural requirement* that BLM identify a specific threshold beyond which any impacts would be considered unnecessary or undue" (citation omitted)).

The BLM considered its obligation to prevent unnecessary and undue degradation in the RMP and Final EIS as well as the DNA. *See* AR 00797 (recognizing that "mineral regulations require that mining activities result in **[*66]** no undue or unnecessary degradation"); AR 00863 (stating that the FLPMA "provides penalties for undue or unnecessary degradation"); AR 01254 (noting that, while "development of locatable minerals is generally allowable . . . , additional measures may be applied to plans and notices to prevent undue and unnecessary degradation in areas with concerns for specific resources or management designations"); AR 06516 ("The application of the standard lease terms and protective stipulations to any leases that might be issued for the proposed parcels will help to ensure that any future oil and gas development on the parcels occurs in full compliance with the FLPMA . . . ."). The BLM also confirmed during the RMP process that all subsequent site-specific proposals would only be approved after consideration of the potential unnecessary and undue degradation.[20] Plaintiffs

---

[20] In the "Director's Protest Resolution Report" issued by the BLM in connection with the Tres Rios Field Office RMP and EIS, the BLM stated:

> The unnecessary and undue degradation mandate under *Section 302(b) of FLPMA* cited by the protester is applied to all actions **[*67]** on public lands at the site[-]specific level. Regardless of the proposed land use plan level actions articulated in the [Proposed] RMP/FEIS, all

roundly disagree with the BLM's approach and conclusions, but they have not established that the issuance of the challenged leases without additional conditions will result in unnecessary or undue degradation of public lands. *See* *Biodiversity Conservation All., 2010 WL 3209444, at *28-29*.

Consequently, while I agree that it may be desirable for the action agency to conduct integrated NEPA, ESA, and FLPMA analyses at the earliest possible time, the FLPMA does not impose such a requirement. And Plaintiffs have not met their burden of showing that the BLM violated its duty to prevent unnecessary or undue degradation of public lands under the FLPMA.

D. Defendants' Motion to Strike

Finally, Defendants have moved to strike six arguments they allege Plaintiffs present for the first time in their Merits Reply Brief. *See* Mot. to Strike, ECF No. 28. I have relied on only two of the identified arguments in this Order. The first is the BLM's failure to conduct cumulative impact analysis for the 2018 lease sale. And the second is Plaintiffs' request that I order the BLM to conduct an EIS. Neither of these arguments was raised for the first time in Plaintiffs' **[*68]** Reply Brief. In both their Complaint and their Opening Brief, Plaintiffs repeatedly emphasized that the BLM had failed to analyze the cumulative impacts of the 2018 sale. *See, e.g.*, Opening Merits Br. at 3, 12, 23, 35-36, 46. Defendants' Response Brief even counters that cumulative impacts were analyzed at the plan level in the Final EIS. As for Plaintiffs' request that an EIS be required, their Opening Brief includes an entire section on why an EIS should be required, *see id.* at 61-68, and specifically mentions "setting aside the leases and requiring BLM to prepare an EIS based on NEPA's action-forcing procedures," *id.* at 77.

Thus, I deny Defendants' Motion to Strike in part on its merits and otherwise deny it as moot.

VI. RELIEF

Plaintiffs argue that the appropriate relief is to vacate the BLM's actions and declare the leases void *ab initio*. Defendants disagree and contend they cannot address the implicated factors without knowing the outcome on the merits of the claims. They assert that the appropriate form of relief depends on "the extent of the legal error [found by the Court] as well as the equities, and the public interest in crafting relief." Resp. Merits Br. at 61. Defendants **[*69]** therefore request that I allow additional briefing on the proper remedy if I find in favor of Plaintiffs on any of their claims.

While I agree with Plaintiffs that vacatur of the agency decision is a typical form of relief, I find it prudent to withhold ruling until the parties have fully briefed the issue. As a result, I direct the parties to submit additional briefing on the proper remedy consistent with my rulings here.

VII. CONCLUSION

Accordingly, considering the APA standard, I conclude that the BLM violated its obligations under NEPA and the ESA and find in favor of Plaintiffs on their first, second, third, fifth, sixth, and seventh claims as specified in this Order. On Plaintiffs' fourth claim brought under NEPA and eighth claim brought under the FLPMA, I find in favor of Defendants. To determine the appropriate remedy based on these rulings, I order the parties to submit supplemental briefing. Defendants are

---

> subsequent site[-]specific actions on public lands will only be approved after an environmental review, which includes consideration of the unnecessary and undue degradation of a proposal.
>
> AR 03175.

DIRECTED to submit their brief on or before March 2, 2022. Plaintiffs' response to the Defendants' brief is due on or before March 16, 2022. The parties' briefs shall be no more than fifteen pages in length. Additionally, Defendants' Motion to Strike (ECF No. 28) is DENIED **[*70]** in part on its merits and is otherwise denied as moot. Judgment on Plaintiffs' claims will enter when an order on the appropriate remedy is issued.

DATED this 9th day of February, 2022.

/s/ John L. Kane

JOHN L. KANE

SENIOR U.S. DISTRICT JUDGE

End of Document