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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

WESTERN WATERSHEDS PROJECT,	)	3:14-cv-00134-HDM-VPC
	)	
Plaintiff,	)	
	)	ORDER
vs.	)	
	)	
AMY LUEDERS, BLM Nevada State	)	
Director, BUREAU OF LAND	)	
MANAGEMENT, an agency of the	)	
United States, and U.S.	)	
Department of Interior, an agency	)	
of the United States,	)	
	)	
Defendants.	)	

Before the court are plaintiff Western Watersheds Project ("plaintiff") and defendant U.S. Bureau of Land Management's ("BLM") cross-motions for summary judgment (## 45, 54). Plaintiff and defendant have each submitted responses and replies. A hearing was held on the motions on July 8, 2015, and the case has been submitted.

**Factual Background**

On November 5, 2012, BLM approved the Cave Valley and Lake Valley Watershed Restoration Plan Environmental Assessment ("EA"), which is the subject of this action, to "address the risk of catastrophic wildfire and improve wildlife habitat." #54 at 1:3-4.

1 One of the stated goals of the EA is to reduce fire risk by  
2 removing vegetation that serves as fuel loads for fires.  
3 Additionally, treatments sanctioned by the plan are intended to  
4 improve habitat for greater sage-grouse by removing trees where  
5 they are encroaching on sagebrush habitat, removing noxious weeds,  
6 and thinning overgrown sagebrush. *Id.* at 1:6-7. The EA also  
7 includes rangeland improvements that are designed to better  
8 distribute livestock and improve rangeland health. *Id.* at 8-9.

9       The Cave Valley and Lake Valley watersheds are located south  
10 of Ely in eastern Nevada and cover roughly 583,832 acres. AR 7495.  
11 The primary vegetation types in the watersheds are sagebrush  
12 communities and stands of pinyon pine and juniper. *Id.* From 2005 to  
13 2010, BLM specialists conducted an assessment of the conditions  
14 within the watersheds. AR 7498. BLM's analysis indicated that much  
15 of the areas in the two watersheds were in conditions of moderate  
16 to high departure from natural conditions according to the fire  
17 regime classification scale. AR 7498-99. The analysis concluded the  
18 departure resulted from a combination of drought, fire suppression  
19 efforts, and historic livestock overgrazing.

20       The stated objectives of BLM's planned vegetation treatments  
21 are to 1) move areas towards FRCC 1 (reduce fire risk); 2) improve  
22 habitat for wildlife, especially sage grouse and big game species;  
23 and 3) achieve better distribution for livestock and wildlife, and  
24 improve overall rangeland health. AR 7498. BLM plans to accomplish  
25 these objectives by removing and thinning trees and decaying or  
26 overgrown sagebrush through a variety of treatment methods,  
27 including hand cutting, mechanical methods (e.g., chaining, Dixie  
28 harrow, roller chopper, and moving), chemicals (*i.e.*, herbicides),

1 and prescribed fire. AR 7517-23. Seeding will also be utilized in  
2 areas where the interdisciplinary team determines that existing  
3 understory of vegetation is not sufficiently abundant or diverse.  
4 AR 7524. The proposed rangeland improvements include repairing or  
5 replacing the existing water infrastructure and reconstructing  
6 fences that are in need of repair. AR 7501.

7       The project will impact the habitat of a number of species,  
8 including the greater sage-grouse. There are 15 active leks (mating  
9 grounds) and one lek of unknown status within the Cave and Lake  
10 Valley Watersheds, according to 2011 Nevada Department of Wildlife  
11 survey data. AR 7572. The greater sage-grouse is a BLM Sensitive  
12 Species that has been determined to be warranted for listing under  
13 the Endangered Species Act ("ESA"), but which is precluded by other  
14 species of higher priority. AR 7571 (citing Federal Register/Vol.  
15 75, No. 55/Tuesday, March 23, 2010).

16       Priority and general sage grouse habitat has been identified  
17 by the BLM in coordination with the Nevada Department of Wildlife.  
18 Priority habitat comprises areas that have been identified as  
19 having the highest conservation value to maintaining a sustainable  
20 sage grouse population, which includes breeding, late brood-  
21 rearing, and winter concentration areas. *Id.* General habitat  
22 comprises areas of occupied seasonal and year-round habitat outside  
23 the priority habitat. *Id.* BLM contends the location and status of  
24 known sage grouse leks and priority habitat were used to guide the  
25 development of the proposed action, alternatives, and mitigation  
26 measures of the EA. *Id.*

## 27 **Procedural Background**

28       In August 2008, BLM issued a Cave Valley Watersheds Evaluation

1 Report, which documented the poor conditions of the uplands,  
2 riparian areas, and wildlife habitat throughout the Cave Valley  
3 Watershed. BLM documented similar conditions within the Lake Valley  
4 watershed, in its Lake Valley Watersheds Evaluation Report. BLM  
5 concluded the standards for soils, uplands and riparian areas, and  
6 wildlife habitat were not being met. BLM pointed to the lack of  
7 diverse, native herbaceous grasses and forbs, and the prevalence of  
8 cheatgrass, among other factors.

9       On April 1, 2011, BLM issued a public scoping notice alerting  
10 the public to BLM's completion of its Cave Valley and Lake Valley  
11 analysis and evaluation, and concluding that "actions need to be  
12 taken to enhance the health of various aspects of the watersheds .  
13 . . ." A preliminary environmental assessment was released on  
14 February 17, 2012 and comments were accepted through March 23,  
15 2012. See Preliminary EA; Proposed Decision at 2-3. The BLM  
16 received a number of comments on the preliminary EA from interested  
17 parties, and as a result of that public input the BLM reevaluated  
18 treatments in the wilderness and removed four of the seven  
19 treatment units in the wilderness. AR 7506.

20       BLM issued its final Cave Valley and Lake Valley Watersheds  
21 Restoration Plan Environmental Assessment on November 5, 2012. On  
22 December 26, 2012, plaintiff filed an appeal and petition for stay  
23 with the Department of the Interior, requesting the EA be set  
24 aside, and BLM be required to prepare an Environmental Impact  
25 Statement. On February 14, 2013, the U.S. Department of the  
26 Interior denied plaintiff's petition for stay. In June 2013,  
27 plaintiff filed a notice of dismissal regarding its appeal with the  
28 Department of the Interior and filed a formal complaint in federal

1 court, alleging the BLM violated the National Environmental Policy  
2 Act ("NEPA"), the Federal Land Policy and Management Act ("FLPMA"),  
3 and the Administrative Procedures Act ("APA"). See AR 10465; #1.  
4 The court now considers the parties' cross motions for summary  
5 judgment.<sup>1</sup>

## 6 **Legal Standard**

7 The APA, 5 U.S.C. §§ 701-706, governs the court's agency  
8 review under NEPA and FLPMA. See *ONRC Action v. U.S. Bureau of Land*  
9 *Mgmt.*, 150 F.3d 1132, 1135 (9th Cir. 1998). The court must  
10 determine if the agency action in question was "arbitrary,  
11 capricious, an abuse of discretion, or otherwise not in accordance  
12 with law," or "without observance of procedure required by law." 5  
13 U.S.C. §§ 706(2)(A), (D) (2006). This standard requires the court to  
14 ensure that the agency has taken the requisite "hard look" at the  
15 environmental consequences of its proposed action, the agency's  
16 decision is based on a reasoned evaluation of all the relevant  
17 factors, and the agency has sufficiently explained why the  
18 project's impacts are insignificant. *National Parks & Conservation*  
19 *Assoc. v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (*abrogated on*  
20 *other grounds by Winter v. Natural Res. Def. Council, Inc.*, 555  
21 U.S. 7, 20, 129 S.Ct.365, 172 L.Ed.2d 249 (2008)).

22 This is a highly deferential standard and the court must defer  
23 to an agency's decision that is "fully informed and well-  
24 considered." *Blue Mountains Biodiversity Project v. Blackwood*, 161  
25 F.3d 1208, 1211 (9th Cir. 1998) (internal citation omitted). The

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27 <sup>1</sup> Plaintiff entitled their motion "Plaintiff's Motion for Partial Summary  
28 Judgment." #45. The plaintiff concedes the motion is properly construed  
as a motion for summary judgment on all issues raised by plaintiff.

1 court must be careful not to substitute its own judgment for that  
2 of agency experts. See *Greenpeace Action v. Franklin*, 14 F.3d 1324,  
3 1332 (9th Cir. 1993); *Marsh v. Oregon Natural Resources Council*,  
4 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). The APA  
5 “does not allow the court to overturn an agency decision because it  
6 disagrees with the decision or with the agency’s conclusions about  
7 environmental impacts.” *River Runners for Wilderness v. Martin*, 593  
8 F.3d 1064, 1070 (9th Cir. 2010) (citation omitted). However, the  
9 court need not forgive a clear error of judgment. *Marsh*, 490 U.S.  
10 at 378.

11 An agency decision is arbitrary and capricious where it  
12 “relied on factors Congress did not intend it to consider, entirely  
13 failed to consider an important aspect of the problem, or offered  
14 an explanation that runs counter to the evidence before the agency  
15 [at the time of its decision] or is so implausible that it could  
16 not be ascribed to a difference in view or the product of agency  
17 expertise.” *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir.  
18 2008) (*en banc*) (quotations omitted) (*overruled on other grounds by*  
19 *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129  
20 S.Ct.365, 172 L.Ed.2d 249 (2008)). Plaintiffs have the burden of  
21 showing that any decision or action by the agency was arbitrary and  
22 capricious. *Kleppe v. Sierra Club*, 427 U.S. 390, 412, 96 S.Ct.  
23 2718, 49 L.Ed.2d 576 (1976).

24 Summary judgment is appropriate if there are no genuine issues  
25 of material fact and the moving party is entitled to judgment as a  
26 matter of law. Fed. R. Civ. P. 56(a); see also *Celotex Corp. v.*  
27 *Catrett*, 477 U.S. 317, 325 (1986). In APA actions, however, the  
28 court’s review is based on the agency’s administrative record. See

1 *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883-84 (1990). The  
2 court's role is to determine whether the agency's record supports  
3 the agency's decision as a matter of law under the APA's arbitrary  
4 and capricious standard of review. *See Nw. Motorcycle Ass'n v. U.S.*  
5 *Dep't of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994) ("[T]his case  
6 involves review of a final agency determination under the [APA];  
7 therefore, resolution of this matter does not require fact finding  
8 on behalf of this court. Rather, the court's review is limited to  
9 the administrative record . . . ."); *see also Occidental Eng'g Co.*  
10 *v. INS*, 753 F.2d 766, 769 (9th Cir. 1985).

11 **Plaintiff's Motion**

12 Plaintiff contends the vegetation project BLM outlines for the  
13 Cave and Lake Valley watersheds violates NEPA because it fails to  
14 adequately examine how its cumulative impact, along with that of  
15 past, present, and reasonably foreseeable future actions, affects  
16 the greater sage-grouse. Additionally, plaintiff contends BLM's  
17 proposed rangeland improvements violate NEPA because BLM failed to  
18 take a hard look at the ecological consequences of executing the  
19 plan.

20 Plaintiff asserts BLM's EA and mitigated finding of no  
21 significant impact ("FONSI") are inadequate, and BLM instead should  
22 have prepared a full environmental impact statement ("EIS"). NEPA  
23 requires federal agencies "to the fullest extent possible" to  
24 prepare an EIS for "every . . . major Federal actio[n]  
25 significantly affecting the quality of the human environment." 42  
26 U.S.C. § 4332(2)(C) (2000 ed.). A full EIS contains a statement by  
27 the responsible official on (i) the environmental impact of the  
28 proposed action; (ii) any adverse environmental effects which

1 cannot be avoided should the proposal be implemented; (iii)  
2 alternatives to the proposed action; (iv) the relationship between  
3 local short-term uses of man's environment and the maintenance and  
4 enhancement of long-term productivity, and (v) any irreversible and  
5 irretrievable commitments of resources which would be involved in  
6 the proposed action should it be implemented. *Id.*

7       An agency may prepare an EA "to decide whether the  
8 environmental impact of a proposed action is significant enough to  
9 warrant preparation of an EIS . . . . An EA is a 'concise public  
10 document that briefly provide[s] sufficient evidence and analysis  
11 for determining whether to prepare an EIS or a finding of no  
12 significant impact.' (FONSI)." *Blue Mountains Biodiversity Project*,  
13 161 F.3d at 1212 (quoting 40 C.F.R. § 1508.9). EAs may "tier" to  
14 other NEPA documents, but tiering does not eliminate the EIS  
15 requirement when a proposed project significantly affects the  
16 environment. 40 C.F.R. §§ 1502.20, 1508.28. If an agency decides  
17 not to prepare an EIS, it must provide a detailed statement of  
18 reasons explaining why the proposed project's impacts are  
19 insignificant." *Blue Mountain Biodiversity Project*, 161 F.3d at  
20 1212.

21       "An EIS must be prepared if 'substantial questions are raised  
22 as to whether a project . . . may cause significant degradation of  
23 some human environmental factor.'" *Id.* (Internal citations  
24 omitted). Plaintiff need not show that significant effects *will*  
25 occur, it is enough to raise "substantial questions" whether a  
26 project *may* have a significant effect on the environment. *Id.*

27       An agency's decision to forego issuing an EIS may be justified  
28 by the adoption of mitigation measures to offset potential



1 environmental impacts. *Babbitt*, 241 F.3d at 733-34 (citations  
2 omitted). If, pursuant to the EA, an agency determines that an EIS  
3 is not required under applicable regulations, it must issue a  
4 FONSI, "which briefly presents the reasons why the proposed agency  
5 action will not have a significant impact on the human  
6 environment." *Department of Transp. v. Public Citizen*, 541 U.S.  
7 752, 757-58, 124 S.Ct. 2204 (2004). The issue for the court to  
8 consider is whether the mitigation measures form such an adequate  
9 buffer against the purported negative effects that the impact is  
10 too minor to warrant an impact statement. *Greenpeace Action v.*  
11 *Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992).

12 **The EA**

13 BLM's final EA tiers to the cumulative impacts analysis in the  
14 Ely Proposed Resource Management Plan ("RMP")/Final Environmental  
15 Impact Statement ("FEIS"), as well as the Programmatic  
16 Environmental Impact Statement on Vegetation Treatments Using  
17 Herbicides on Bureau of Land Management Lands in 17 Western States  
18 ("Vegetation PEIS"), and the Ely District Integrated Weed  
19 Management Plan & Environmental Assessment ("Ely Weed Plan"). See  
20 AR 7503. These documents have been subject to NEPA review: the Ely  
21 RMP/FEIS and Vegetation PEIS were issued by BLM in 2007; the Weeds  
22 EA was issued in 2010. *Id.* In addition to tiering to these plans,  
23 the EA directly discusses past, present, and future actions within  
24 the watershed and surrounding area. AR 7620-23. Concerning greater  
25 sage-grouse specifically, the EA notes and incorporates two  
26 instructional memorandums issued by the Washington Office of the  
27 BLM and providing direction for the management and protection of  
28 sage grouse habitat. AR 7571.

1           “Tiering, or avoiding detailed discussion by referring to  
2 another document containing the required discussion, is expressly  
3 permitted” and encouraged under NEPA, so long as the tiered-to  
4 document has been subject to NEPA review. *Kern v. U.S. Bureau of*  
5 *Land Mgmt.*, 284 F.3d 1062, 1073 (9th Cir. 2002); 40 C.F.R.  
6 § 1502.20. Tiered analyses are viewed as a whole to determine  
7 whether they address all the impacts. *S. Or. Citizens Against Toxic*  
8 *Sprays, Inc. v. Clark*, 720 F.2d 1475, 1480 (9th Cir. 1983). Only  
9 where neither the general nor the site-specific documents address  
10 significant issues is environmental review rejected. *Te-Moak Tribe*  
11 *v. U.S. Dep’t of the Interior*, 608 F.3d 592, 602-7 (9th Cir. 2010).

12           A) Ely RMP and FEIS

13           The Ely RMP and FEIS, issued November 2007, covers the Ely  
14 District. The Ely Field Office manages approximately 11.5 million  
15 acres of public lands out of the approximately 13.9 million acres  
16 within the boundaries of the planning area. AR 2907. The RMP and  
17 FEIS explain that the vegetation types within the Ely District have  
18 been changing, with pinyon and juniper trees taking over areas that  
19 were previously occupied by a more healthy mix of vegetation.<sup>2</sup> AR  
20 3018. As a result, many sagebrush communities have lost the grasses  
21 and forbs that used to form the understory, making it more likely  
22 that a catastrophic wildfire could occur. *Id.* Section 4.28 of the  
23 FEIS discusses potential cumulative impacts of BLM’s Proposed Plan  
24 when combined with past, present, and future activities within the  
25 planning area. AR 3991. This discussion includes a reference to  
26 “Conservation plans for greater sage-grouse,” to include “active

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28           <sup>2</sup>           The Cave and Lake Valley Watersheds exist entirely within the Ely  
                  District. AR 7495.

1 management techniques to improve habitat for greater sage-grouse .  
2 . . .” AR 4007.

3 The FEIS also contains a section devoted to special status  
4 species and discusses Greater sage-grouse and their presence within  
5 the Ely Field Office. AR 3400-01. BLM identified 293 leks within  
6 the area of the Ely Plan and also identified seasonal habitat and  
7 winter habitat for greater sage-grouse. AR 3401; AR 5678 (map  
8 showing greater sage-grouse leks, summer range, winter range, and  
9 nesting range). BLM also analyzed the impacts of its proposed  
10 actions on greater sage-grouse. See AR 3680 (“On a landscape level,  
11 restoration activities to achieve appropriate ranges of vegetation  
12 conditions would reduce habitat degradation and fragmentation, and  
13 promote ecological health and resiliency.”).

14 However, “the interrelated projects either have produced or  
15 [will] continue to result in direct mortality, displacement of  
16 individuals, habitat loss or alteration, habitat fragmentation, and  
17 possible population reductions of some special status species.” AR  
18 4033. The Ely FEIS thereby noted impacts requiring site-specific  
19 analysis and mitigation.

20 B) Vegetation PEIS

21 In response to the growing threat of wildfire and invasive  
22 vegetation and noxious weeds, the President and Congress directed  
23 the United States Department of the Interior and BLM to take more  
24 aggressive actions to reduce catastrophic wildfire risk on public  
25 lands. AR 2162. The result was the Vegetation PEIS. The Vegetation  
26 PEIS describes an integrated pest management program that applies  
27 to approximately 6 millions acres annually of public lands in 17  
28 western U.S. states. AR 2139.

1           The scope of BLM programs focused on managing vegetation and  
2 reducing the amount of hazardous fuel levels increased as a result  
3 of the Vegetation PEIS. AR 2163. Additionally, the use of  
4 herbicides such as Tebuthiuron were approved for use on public  
5 lands in the State of Nevada. AR 2194.

6           C) Ely Weed Plan

7           In July 2010, BLM issued the Ely Weed Plan. AR 6363. The plan  
8 addresses the introduction and spread of noxious weeds and invasive  
9 species. AR 6366. BLM completed a survey in 2008 to assess the  
10 types and locations of weeds within the Ely District. AR 6367-71.  
11 To control the introduction and spread of weeds, BLM developed an  
12 Integrated Weed Management Plan, which involves education,  
13 prevention, and treatment of weeds using various methods, including  
14 manual removal, mechanical methods, prescribed burns, and  
15 herbicides. AR 6372-79.

16           D) Cumulative Impact Analysis

17           Plaintiff outlines a number of problems it perceives with the  
18 cumulative effects analysis provided by BLM in its EA. Although BLM  
19 "identif[ied] an appropriately broad cumulative effects study area  
20 . . . ." plaintiff asserts BLM failed to provide an examination of  
21 the cumulative impacts of its plan combined with past, present, and  
22 reasonably foreseeable future actions. #45 at 13. Plaintiff  
23 contends 1) previous plans have reduced sage-grouse habitat to  
24 dust; 2) BLM never discussed the efficacy of prior projects; 3) the  
25 FONSI provides conclusory assertions and no analysis; and 4) BLM  
26 fails to consider recent wildfires and other fires in and around  
27 the project area. *Id.* at 13-19.

28           Consideration of cumulative impacts requires some detailed

1 information resulting in a useful analysis. *Klamath-Siskiyou*  
2 *Wildlands Center v. Bureau of Land Mng't*, 387 F.3d 989, 993 (9th  
3 Cir. 2004) (citation omitted). "General statements about possible  
4 effects and some risk do not constitute a hard look absent a  
5 justification regarding why more definitive information could not  
6 be provided." *Id.* "An agency may, however, characterize the  
7 cumulative impacts of past actions in the aggregate without  
8 enumerating every past project that has affected the area". *Ctr.*  
9 *for Env'tl. Law and Policy*, 655 F.3d 1000, 1007 (9th Cir. 2011).

10 1) Past Projects Must be Viewed in Light of Their Objectives

11 To demonstrate past projects have been ineffective, Plaintiff  
12 points to the condition of Lincoln County Sage-Grouse Habitat  
13 Restoration Plan two years after completion. After the ground  
14 treatment, the vegetation in the area had been reduced to dust.  
15 This plan, however, must be viewed in context of its listed  
16 objectives, which contemplated at least 5-10 years for the habitat  
17 to be improved. Indeed, this analysis is consistent with language  
18 throughout the EA and the tiered documents: the initial impact of  
19 the restoration plans is deleterious to the environment inasmuch as  
20 that special status species can be negatively impacted and  
21 vegetation requires time to regrow, either naturally or through  
22 seeding. See AR 7595. BLM contends it *mitigates* this impact,  
23 however, through timing and geographic restrictions, as well as  
24 adaptive management listed in the EA. See AR 7511 ("Given the  
25 longer time scale of this project and the need to be flexible in  
26 how treatments are applied in given areas, adaptive management  
27 would be used for implementation of the Cave Valley and Lake Valley  
28 Watershed Restoration Project."); AR 7511-17 (describing treatment

1 design restrictions crafted to minimize impacts); AR 2212-17  
2 (describing detailed standard operating procedures to avoid harm to  
3 the environment); AR 6437-41 (describing weed prevention measures  
4 to minimize impacts).

5 2) The Discussion of Cumulative Impacts and Mitigation Methods  
6 is Sufficient

7 Plaintiff contends BLM has failed to adequately demonstrate  
8 the efficacy of its mitigation measures, and that the discussion of  
9 cumulative impacts is conclusory. The court need not determine that  
10 BLM has created a flawless plan. Indeed, "[w]hen specialists  
11 express conflicting views, an agency must have discretion to rely  
12 on the reasonable opinions of its own qualified experts . . . ."  
13 See *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989).

14 The EA lists alternative treatment methods (including taking  
15 no action) and determined the proposed plan has the best likelihood  
16 of meeting the stated environmental objectives, including  
17 protecting Greater sage-grouse and restoring their habitat. The  
18 discussion of cumulative impacts includes the tiered analysis from  
19 the previous plans, as well as site-specific analysis.

20 Section 4.28 of the Ely RMP/FEIS has an extensive discussion  
21 of the potential cumulative impacts of the plan when combined with  
22 past, present, and future activities within the planning area. AR  
23 3991. The Ely FEIS lists and considers the impact of mining  
24 projects, grazing, wildfire, the expansion of pinyon and juniper  
25 stands, and the spread of invasive species and noxious weeds. AR  
26 3993-97, AR 4005-12. The Ely FEIS lists and describes the projects  
27 before discussing their collective impacts on air resources, water  
28 resources, soil resources, vegetation resources, fish and wildlife,

1 special status species, wild horses, cultural resources, visual  
2 resources, renewable energy, recreation, livestock grazing, geology  
3 and mineral extraction, fire management, noxious and invasive weed  
4 management, and special designations. See AR 3993-4073.

5       The analysis provided within the Ely FEIS is not conclusory,  
6 as each separate impact is considered in context of the proposed  
7 plan, the influence of interrelated projects, the expected  
8 cumulative impacts, and the variation between the impacts caused as  
9 a result of the proposed plan versus various alternatives (such as  
10 no action). *Id.* Concerning vegetation specifically, the FEIS states  
11 “[m]ost of the interrelated projects have produced or would result  
12 in the removal of native vegetation and potential spread of  
13 invasive species, either through physical disturbance or alteration  
14 of vegetation communities.” AR 4023. Concerning sage-grouse  
15 specifically, the Ely FEIS states “local greater sage-grouse  
16 populations may be reduced in numbers because of development in and  
17 around breeding habitat (i.e., leks) regardless of the habitat  
18 improvement that may occur elsewhere.”<sup>3</sup> AR 4033. Concerning fire  
19 management specifically, the FEIS states that prescribed fire could  
20 create greater short term risk of uncontrolled fire, but in the  
21 long term the treatments “would reduce the current fuel loading of  
22 these areas and the associated risks of larger fires.” AR 4058.  
23 Additionally, the treatments could result in short-term reductions  
24 in wildlife habitat, but “the long-term effects would be more

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26       <sup>3</sup> BLM did not shy away from negative analysis. The Ely FEIS was produced  
27 before the BLM issued instructional memoranda detailing steps to  
28 protect the greater sage-grouse. As discussed *infra*, BLM integrated the  
protective strategies into the Cave and Lake Valley EA to mitigate the  
impacts of the treatment plan.

1 forage and habitat." *Id.*

2       The EA also tiers to the Vegetation PEIS, which contains a  
3 discussion of the cumulative impacts of chemical and other  
4 treatments such as mechanical treatments and prescribed fire. AR  
5 2519-65. The discussion explains the treatments would "improve the  
6 mix of habitats so that vegetation would be more resilient to  
7 disturbance and sustainable over the long term." AR 2534. The  
8 Vegetation PEIS considers the possibility of weed populations  
9 developing resistance to particular herbicides over time and  
10 includes the mitigation strategy BLM has devised to reduce that  
11 risk. AR 2535. (Describing how the BLM would 1) rotate herbicides,  
12 2) apply these herbicides with the understanding that they can lead  
13 to weed resistance if used yearly for several consecutive years, 3)  
14 use mechanical and biological management options to eliminate weed  
15 escapes that may represent the resistant population, 4) use passive  
16 methods of weed control to reduce or eliminate factors leading to  
17 the spread of weeds, and 5) keep accurate records of herbicide  
18 application.)

19       The Vegetation PEIS also discusses how downy brome  
20 (cheatgrass) and other annual grasses have replaced sagebrush and  
21 other native vegetation and thus created poorer habitat for sage  
22 grouse and other wildlife species. AR 2431. Vegetation treatments  
23 improve this habitat by "creating openings in dense and crowded  
24 sagebrush and rabbitbrush stands, removing invasive species, and  
25 promoting production of perennial grasses and forbs." *Id.* (*citing*  
26 *Paige and Ritter 1999, USDI BLM 1999, Sage Grouse Conservation*  
27 *Planning Team 2001*). Further, "[t]reatments can improve habitat  
28 structure, complexity, and layering to the benefit of species that



1 rely on a diversity of plant types and cover to meet their daily  
2 needs." AR 2432.

3         The BLM analyzed scientific literature regarding the potential  
4 benefits and detrimental effects of using herbicide treatments on  
5 sage grouse. *Id.* The control of sagebrush with tebuthiuron can  
6 improve habitat for sage grouse, but can also deplete sage grouse  
7 nesting and brood-rearing habitat. *Id.* The Vegetation PEIS cites a  
8 2006 study that found tebuthiuron treatment of sagebrush reduced  
9 the canopy and increased production of forbs and that sage grouse  
10 preferred the treated areas. *Id.* (*citing* Dahlgren et al. 2006); see  
11 also AR 340 (Connelly et al. 2000) ("[A]pplication of herbicides in  
12 early spring to reduce sagebrush cover may enhance some brood-  
13 rearing habitats by increasing the amount of herbaceous plants used  
14 for food (Autenrieth 1981)").

15         Thus, the BLM tiered to documents previously subject to NEPA-  
16 review that analyzed the cumulative impacts of treatment and the  
17 effects of past, present, and reasonably foreseeable future  
18 actions. Tiering of this sort is permitted by Ninth Circuit law. 40  
19 C.F.R. § 1502.20. The Ely RMP/FEIS and Vegetation PEIS are much  
20 larger in scope, and in fact wholly inclusive of, the Cave and Lake  
21 Valley Watershed EA. The analysis of cumulative impacts within the  
22 larger plans is relevant because the Cave and Lake Valley  
23 Watersheds represent two of sixty-one total watershed management  
24 units on the Ely District. AR 7495. The discussion of cumulative  
25 impacts must consider the EA in perspective with the larger,  
26 comprehensive resource management plan.

27         The court must determine whether the EA, combined with the  
28 tiered programmatic EIS, provides the information reasonably

1 necessary to enable the decision-maker to consider the  
2 environmental factors and to make a reasoned decision. *Oregon*  
3 *Environmental Council v. Kunzman*, 714 F.2d 901, 904 (9th Cir.  
4 1983). As discussed above, the tiered-to BLM documents cited  
5 independent research and weighed the pros and cons of treatment  
6 before concluding the proposed plans were advantageous.

7 BLM did not, however, simply tier to these previous plans. The  
8 EA also discusses past, present, and reasonably foreseeable future  
9 actions in the Cave Lake Valley EA, and implemented specific  
10 mitigation methods to be utilized. See AR 7563-7623 (establishing  
11 an environmental baseline for the watersheds and discussing the  
12 expected impact of the treatment plan on vegetation, special status  
13 plant and animal species, soil resources, etc.).

14 The EA mentions several current and future plans specifically  
15 in outlining contributors to cumulative impacts. A watershed  
16 restoration plan for the South Steptoe Watershed north of the  
17 project area was recently approved, and several fuel treatment  
18 projects have already been conducted. AR 7621. There have been  
19 67,588 acres of wildfire within the cumulative effects study area.  
20 *Id.* Present actions include wildfire management, and reasonably  
21 foreseeable future actions include additional watershed treatment  
22 plans such as the South Spring Valley and Hamblin Valley  
23 watersheds. *Id.* With regard to fuels and fire management, past  
24 projects "have been relatively small in size and, while beneficial  
25 in accomplishing the objective for the specific treatment . . .  
26 they are not substantial enough to contribute to a reduction in  
27 departure within the overall watershed." AR 7622.

28 BLM is not required to individually analyze every project that

1 might contribute to cumulative impacts. An agency may “characterize  
2 the cumulative effects of past actions in the aggregate without  
3 enumerating every past project that has affected an area.” *Ctr. For*  
4 *Envntl. Law and Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000,  
5 1007 (9th Cir. 2011) (citation omitted). Plaintiff contends BLM’s  
6 EA is deficient because it contains no analysis concerning the  
7 cumulative impact of two other plans: the Lincoln County Sage  
8 Grouse Habitat Restoration Plan and the South Spring Valley  
9 Sagebrush Habitat Restoration Project. The court is not persuaded.  
10 BLM’s analysis of impacts considers those impacts in the aggregate.  
11 Additionally, a failure to consider projects significantly smaller  
12 in size and scope is an insufficient ground upon which to  
13 invalidate the EA.<sup>4</sup> See *Bering Strait Citizens for Responsible Res.*  
14 *Dev. v. U.S. Army Corps of Eng’rs*, 524 F.3d 938, 954-55 (9th Cir.  
15 2008) (“[The plaintiff] has pointed to no past, present, or  
16 reasonably foreseeable future projects comparable in environmental  
17 impact to the Rock Creek Mine Project.”).

18 Plaintiff misconstrues the analysis and comprehensive  
19 structure of BLM’s EA. BLM designed the project with treatment  
20 restrictions within its design to avoid significant impacts.  
21 Viewing the EA in light of the tiered previous NEPA documents, the  
22 BLM’s memoranda detailing steps to be taken to better protect the  
23 greater sage-grouse, and the express language of the assessment,  
24 the court finds plaintiff has failed to demonstrate unmitigated  
25 cumulative impacts. Plaintiff asserts BLM intends to treat

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27 <sup>4</sup> The Lincoln County project is roughly 9,500 acres. The South Spring  
28 Valley project is roughly 3,100 acres. The Cave Lake Valley project  
covers an area of nearly 600,000 acres and involves treatments covering  
roughly 120,000 acres.

1 sagebrush areas and destroy irreplaceable greater sage grouse  
2 habitat. A review of the EA demonstrates treatment of sagebrush  
3 areas will be extremely limited, and subject to exacting  
4 restrictions to protect the greater sage grouse.

5 As indicated in the EA and described at the hearing, there are  
6 15 treatment units designated for sagebrush restoration, totaling  
7 145,682 acres. AR 7542; see also AR 7541. In 12 of the 15 sagebrush  
8 treatment units (S.1-S.12), BLM is planning only to remove pinyon  
9 and juniper and is not planning to treat sagebrush directly. See AR  
10 7638-71. In the three remaining units, BLM is planning to treat  
11 sagebrush directly, primarily through mechanical methods. See AR  
12 7673-7680. Tebuthiuron will only be used to treat sagebrush in part  
13 of one unit (S.13). The total acreages of sagebrush that could  
14 potentially be treated for those three units are 10,105, 3,537, and  
15 14,463, respectively. AR 7673, 7676, 7679. The number of acres  
16 treated is likely to be lower because BLM plans to treat only 60-  
17 75% of the area designated for potential treatment in the  
18 Restoration Plan. AR 7542. Treatment will be further restricted to  
19 protect greater sage grouse habitat by the timing and design  
20 restrictions enumerated on AR 7512.<sup>5</sup>

21 E) Hard Look and FONSI

22 In determining whether an action will have significant  
23 impacts, an agency must take a "hard look" at the impacts of the  
24 project based on the significance factors in the Council on  
25 Environmental Quality's ("CEQ") regulations. *Native Ecosystems*  
26 *Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1239 (9th Cir. 2005).

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<sup>5</sup>These restrictions are described in detail. See *infra* pp. 22-23.

1 Significance is determined based on the context and intensity of  
2 the proposed action. *Id.* (citing 40 C.F.R. § 1508.27). Context  
3 means the "significance of an action must be analyzed in several  
4 contexts such as society as a whole . . . , the affected region,  
5 the affected interests, and the locality." 40 C.F.R. § 1508.27(a).  
6 Intensity concerns the "severity of impact," which includes  
7 consideration of *inter alia*, the unique characteristics of the  
8 geographic area and the degree to which the possible effects on the  
9 environment are highly uncertain or involve unique or unknown  
10 risks. *Id.* At § 1508.27(b).

11 An agency may make a finding of no significance if it proposes  
12 an action that would have significant impacts but also proposes  
13 mitigation to reduce or offset the effects of the action to below a  
14 significant level. *See, e.g., Wetlands Action Network v. U.S. Army*  
15 *Corps of Eng'rs*, 222 F.3d 1105, 1121 (9th Cir. 2000) ("In  
16 evaluating the sufficiency of mitigation measures, we focus on  
17 whether the mitigation measures constitute an adequate buffer  
18 against the negative impacts that result from the authorized  
19 activity to render such impacts so minor as to not warrant an  
20 EIS.") (abrogated on other grounds by *Wilderness Society v. United*  
21 *States Forest Service*, 630 F.3d 1173 (9th Cir. 2010)). In such  
22 circumstances, the agency must make a finding "that the mitigation  
23 measures would render any environmental impact resulting from the  
24 [action] insignificant." *Wetlands Action Network*, 222 F.3d at 1122.  
25 BLM's NEPA Handbook refers to such a finding as a "mitigated  
26 FONSI." AR 4448.

27 Alternatively, an agency may incorporate mitigation into the  
28 project design so that significant impacts are avoided, rather than

1 mitigated after the project is developed. See *Envtl. Prot. Info.*  
2 *Ctr.*, 451 F.3d at 1015. In such situations, the agency need not  
3 separately evaluate whether mitigation adopted after the fact would  
4 reduce impacts to a level of non-significance. See *id.*

5 The Ninth Circuit has expressed concern where an EA has failed  
6 to explain the nature of unmitigated impacts. See *Te-Moak Tribe*,  
7 608 F.3d at 605. BLM acknowledged in the Ely RMP/FEIS and the EA  
8 that the initial impact of the plan may be negative as vegetation  
9 is treated because time will be required for it to regrow. In order  
10 to address these concerns, the EA integrates timing and treatment  
11 design restrictions. AR 7511-7531. These restrictions include  
12 measures to mitigate the impact on greater sage grouse habitat:  
13 treatments are not allowed within four miles of active leks from  
14 March 1 - July 15 during breeding, nesting, and early brood rearing  
15 seasons.<sup>6</sup> AR 7512. The EA also states sagebrush treatments should  
16 be minimized in areas that consist of pygmy rabbit or winter sage  
17 grouse habitat. *Id.* Additionally, "in each watershed, do not treat  
18 more than 20% of sage grouse breeding habitat within a 30-year  
19 period, which is the approximate time for a sagebrush stand to  
20 recover. Additional treatments should be deferred until the treated  
21 area provides suitable habitat (15%-25% sagebrush cover and greater  
22 than 10% herbaceous cover) (Connelly et al. 2000)." *Id.*

23 Prescribed fire is also subject to timing and treatment design  
24 restrictions pursuant to the EA. See AR 7512, 7522. Fire will not  
25 be used to treat sagebrush in less than 12-inch precipitation  
26 zones. AR 7512. Additionally, prescribed fire timing and severity

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27  
28 <sup>6</sup> This restriction comports with the guidelines listed in the BLM  
memoranda concerning the protection of sage grouse. AR 7874.

1 will be limited to minimize impact to certain types of vegetation.  
2 AR 7522. These mitigation measures were designed to reduce the  
3 threats of increased soil and water erosion due to a lack of  
4 understory immediately post-fire, and reduce the risk of cheatgrass  
5 and other non-native grasses proliferating in the burned areas. AR  
6 7592; *see also* 7522 ("Given the presence of a healthy and diverse  
7 understory of native perennial species and a lack of non-native  
8 invasive plant species, it is less likely that invasive plants  
9 would establish in these areas.").

10 The EA contains timing and treatment design restrictions on  
11 the use of Tebuthiuron. Tebuthiuron will be administered in pellet  
12 form to avoid impact to air quality. AR 7591. Additionally,  
13 Tebuthiuron will be administered during calm weather conditions to  
14 prevent herbicide drift. AR 7757. Impact to riparian areas will be  
15 avoided by the creation of a buffer zone of non-treatment near  
16 those riparian areas. AR 7594. Use of Tebuthiuron will also be  
17 limited to areas "with desirable understory," and where "pinyon  
18 pine and juniper have established on sagebrush ecological sites,"  
19 while avoiding areas that "have surface water or an elevated  
20 groundwater level" and "stands of mountain mahogany." AR 7522; *see*  
21 *also* AR 6482.

22 Plaintiff contends the EA provides no analysis of the  
23 effectiveness of these mitigation measures, and, further, that BLM  
24 does not intend to adhere to the very mitigation measures it  
25 mentions in the EA. #45-2 at 22-31. Plaintiff's first contention is  
26 refuted by the analysis and citations in the record. The Ely FEIS  
27 and Vegetation PEIS are replete with citations to independent  
28 studies and analysis on the use of prescribed fire and herbicides

1 in habitats such as the Cave and Lake Valley watersheds. See, e.g.,  
2 AR 2433, 75 Fed. Reg. at 13,940 ("Mechanical treatments, if  
3 carefully designed and executed, can be beneficial to sage-grouse by  
4 improving herbaceous cover, forb production, and sagebrush  
5 resprouting (Braun 1998, p. 147)). The Fish and Wildlife Service  
6 has stated that while the long-term efficacy of these treatments on  
7 sage-grouse productivity has not been scientifically demonstrated,  
8 some action is necessary because current treatments "are not likely  
9 keeping pace with the current rate of pinyon-juniper encroachment,  
10 at least in parts of the range." 75 Fed. Reg. at 13,938.

11 Additionally, the BLM memoranda used by BLM to create design and  
12 treatment restrictions tailored to protect sage grouse is also  
13 supported by independent analysis. AR 7874.

14 Plaintiff's assertion that BLM does not intend to abide by the  
15 mitigation measures outlined in the EA is similarly contradicted by  
16 the administrative record and the pleadings before the court. In  
17 the EA, its motions before this court, and the hearing before the  
18 court, the BLM has represented that the restrictions and mitigation  
19 measures outlined in the EA will be followed in order to ensure the  
20 health of the region and to control the impact of the treatment.

21 Plaintiff relies on maps within the EA to support its  
22 assertion that BLM intends to violate its own mitigating measures.  
23 BLM contends those maps are general maps "showing where the project  
24 will be and [are] not small enough scale to show" the areas to be  
25 excluded pursuant to the restrictions. #54-1 at 25:6-7.  
26 Additionally, where the EA indicates treatment will take place in  
27 contravention of the restrictions, "BLM will follow its treatment  
28 restrictions for prescribed fire and avoid such areas" when



1 planning individual treatments. *Id.* At 27:5-7. The court finds that  
2 with the mitigation measures in place, the EA provides a  
3 comprehensive and calculated analysis adequately addressing  
4 plaintiff's contentions.

5 Viewing the record in its entirety, the court concludes the EA  
6 reflects that the BLM has taken the adequate hard look at the  
7 environmental consequences of the proposed action. The EA has been  
8 through an extensive vetting process, resulting in a number of  
9 revisions to create a plan that addresses the current problems  
10 facing the Cave and Lake Valley Watersheds.<sup>7</sup>

#### 11 **Rangeland Improvements**

12 Plaintiff asserts BLM additionally violated NEPA in approving  
13 a series of range projects without taking the requisite "hard look"  
14 at potential ecological consequences. The court finds BLM has  
15 sufficiently analyzed the impacts of the rangeland improvements in  
16 the EA.

17 The rangeland improvements are designed to repair aging  
18 infrastructure and will occur primarily in areas where structures  
19 already exist. See AR 7501. The existing structures were  
20 constructed in the 1950's and 1960's and need to be updated to  
21 serve the purpose of improving livestock and wildlife distribution  
22 across the watersheds to support overall rangeland health. *Id.*

23 BLM has integrated restrictions to mitigate the impact of the  
24 rangeland improvements. Indeed, Section 2.3.1.7 employs grazing  
25 restrictions to block livestock usage of seeded areas. AR 7515.

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26  
27 <sup>7</sup> The court notes plaintiff did not submit comments on the Preliminary  
28 EA after it was released, attend either of two public meetings, or  
attend the site visit conducted in April 2012. AR 6723; AR 7000-01; AR  
8195.

1 Section 2.3.6.1 provides that fences will be required to comply  
2 with BLM wildlife specifications, including marking or moving  
3 fences in sage grouse habitat to minimize mortality from predation  
4 and collisions. AR 7531. Section 2.3.6.3 states big game animal  
5 jumps will be installed in existing and newly constructed fences,  
6 where needed. AR 7535. The rangeland improvements thus support the  
7 comprehensive mitigation set forth in the EA.

### 8 **The FLPMA Claim**

9 Plaintiff's complaint contained a claim alleging BLM's  
10 approval of the Restoration Plan violated the Federal Land Policy  
11 and Management Act. See Compl. ¶¶124-28. Under the APA, the claim  
12 should be resolved on cross-motions for summary judgment based on a  
13 review of the administrative record. See *Nw. Motorcycle Ass'n.*, 18  
14 F.3d at 1472. Plaintiff did not brief the FLPMA claim in its motion  
15 for summary judgment, nor did it address the absence of the claim  
16 in its respective response and reply, despite BLM's recognition of  
17 the claim, its note concerning plaintiff's failure to brief the  
18 issue, and argument in favor of summary judgment on this issue in  
19 its own motion for summary judgment. Consequently, the claim is  
20 deemed abandoned and BLM is entitled to summary judgment on this  
21 claim.

### 22 **Conclusion**

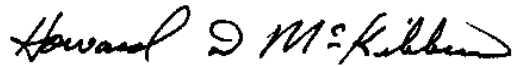
23 Therefore on the basis of the foregoing, the court concludes  
24 that the action of the BLM in adopting the Cave Valley and Lake  
25 Valley Watershed Restoration Plan Environmental Assessment was not  
26 arbitrary and capricious or an abuse of discretion. Further, the  
27 court concludes that the action of the BLM complied with NEPA and  
28 FLPMA. Accordingly, and based on the foregoing, defendant U.S.

1 Bureau of Land Management's motion for summary judgment (#54) is  
2 **GRANTED**. Plaintiff Western Watershed Project's motion for summary  
3 judgment (#45) is **DENIED**. Judgment shall be entered in favor of the  
4 defendants and against the plaintiff.

5 IT IS SO ORDERED.

6 DATED: This 13th day of August, 2015.

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UNITED STATES DISTRICT JUDGE