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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

BARTELL RANCH, LLC, a Nevada limited
liability company and **EDWARD BARTELL**,

Plaintiff,

vs.

ESTER M. MCCULLOUGH, Winnemucca
District Manager, Bureau of Land Management,
BUREAU OF LAND MANAGEMENT,

Defendant,

and

LITHIUM NEVADA CORP.,
Defendant-Intervenor.

Case No.: **3:21-cv-00080-MMD-CLB**

FIRST AMENDED COMPLAINT

INTRODUCTION

1
2 1. Plaintiffs Bartell Ranch, LLC and Edward Bartell (collectively, “Bartell
3 Ranch”) challenge the decision by Defendant Ester M. McCullough, District Manager for the
4 Winnemucca District of the Bureau of Land Management (“BLM”), Department of Interior, to
5 approve the Thacker Pass Lithium Mine Project (the “Mine”), a proposal for a massive open
6 pit lithium mine with a disturbance area covering more than 5,000 acres and a total project
7 area covering more than 17,000 acres of federal public land administered by BLM. Bartell
8 Ranch is the holder of a federal grazing permit, private ranch lands, and water rights that are
9 imminently threatened with irreparable harm by the construction and operation of the Mine.
10 The Mine likewise threatens irreparable harm to fish, wildlife, wetlands, and streamflows,
11 including habitat for the Lahontan Cutthroat Trout (“LCT”), which is listed as threatened
12 under the Endangered Species Act (“ESA”).
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15 2. On January 15, 2021, Defendant McCullough signed a Record of Decision
16 (“ROD”) approving the Mine. The ROD selected Alternative A, the Proposed Action, from a
17 December, 2020 Final Environmental Impact Statement (“FEIS”), which was prepared by
18 consultants for the project proponent, Lithium Nevada Corporation (“LNC”), and which
19 presents a one-sided, deeply-flawed, and incomplete analysis and characterization of the
20 proposed project and its likely adverse environmental impacts, and in particular to water
21 resources affecting wetlands, streamflows, LCT and LCT habitat, as well as the water rights
22 and private rangelands held and owned by Bartell Ranch. The project consultants relied upon
23 grossly inaccurate, incomplete, and inadequate data for constructing baselines and models
24 purporting to estimate impacts to water resources caused by the groundwater pumping that
25 would be associated with the Mine. The project consultants did so in a manner that masks, or
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1 will mask, the likely environmental impacts and, in addition, makes the proposed mitigation
2 concepts and strategies meaningless, inadequate and ineffective.

3 3. As described in the FEIS and approved in the ROD, the Mine will be located
4 entirely on public land administered by BLM in Humboldt County, Nevada. The sprawling
5 17,933-acre project area is to be located approximately 17 miles north-northwest of Orovada,
6 Nevada, in a highly-sensitive ecological area that is famously dry, with a commensurately
7 limited and delicate network of water resources. The Mine will require pumping substantial
8 quantities of groundwater for its operations, at 2,600 acre-feet annually during Phase 1, and
9 5,200 acre-feet annually during Phase 2. The groundwater reserves within the “Orovada
10 Subarea,” where this pumping will take place, is already overallocated by approximately 30,271
11 acre-feet a year. Additionally, the approximately 400’ deep open pit will draw down water
12 tables, and the North and South Exploration operations will drop water tables by allowing water
13 to flow from upper aquifers to lower aquifers, as has happened with prior LNC exploration. In
14 addition, the Mine intends to use a mining and processing method that will involve the use of
15 millions of tons of toxic sulfuric acid and the deposit of contaminated tailings containing
16 sulfates, arsenic, antimony, and uranium.

17 4. The Mine and the associated pumping will pose significant adverse harm to
18 several sensitive and protected species—including LCT and Greater Sage Grouse—through
19 direct, indirect, and cumulative impacts. It is well-established within the academy of
20 hydrological science, as well as within Ninth Circuit case law, that excessive groundwater
21 pumping in an already-overallocated basin is inextricably linked to reductions in streamflows
22 within the hydrological nexus. In addition, in signing the ROD, BLM has wholesale ignored the
23 inconsistency of the Mine with BLM’s Sage Grouse plans and associated regulations.
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1 5. Immediately north of the proposed Mine site are several perennial streams
2 known to be inhabited by LCT, and the presence of which is well-understood and
3 comprehensively documented throughout decades of catalogued research and reports completed
4 by the Nevada Department of Wildlife (“NDOW”) in conjunction with the U.S. Fish and
5 Wildlife Service (“FWS”). Two of the streams immediately to the north of the proposed Mine
6 location where LCT are known to inhabit are Pole Creek and Crowley Creek. Indeed, in
7 NDOW’s 2012 LCT Study for the Western Region, one of the specific objectives of the study
8 was identifying genetically-pure LCT in Crowley Creek via electroshocking, and then
9 transporting them in aerated tanks to various reaches of Pole Creek where they were then
10 released to supplement the Pole Creek population. This effort was described as one “to salvage
11 and protect the last pure LCT within the Crowley Creek drainage,” which was undertaken
12 through “extensive genetic sampling and mapping, salvaging pure LCT and reintroducing them
13 into the Pole Creek tributary of Crowley Creek[,]” and confirms the existence and importance
14 of the Pole Creek LCT population to the continued existence and recovery of the species.
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18 6. In approving the FEIS and ROD for this project, BLM acknowledges that the
19 Mine’s proposed pumping volume has “the potential for mine related groundwater aquifer
20 drawdown,” and that “[w]ater produced and used by the mine from the proposed production
21 wells could also affect surface water stream flows in nearby perennial and intermittent streams
22 or springs.” In the FWS 1995 Recovery Plan for the Lahontan Cutthroat Trout, “[r]eduction and
23 alteration of stream discharge” is listed as the very first of the “[m]ajor impacts to LCT habitat
24 and abundance[.]”
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26 7. Instead of adhering to the statutory duties imposed upon the agency with respect
27 to the protection of sensitive species such as the LCT, BLM relied entirely upon flawed and
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1 error-laden findings made by a third-party contractor that compiled data for the EIS at the
2 direction of, and in return for payment from, the project applicant LNC. The FEIS made the
3 arbitrary and capricious finding that the proposed Mine and its associated pumping would not
4 pose any threat to ESA-listed LCT, noting in the FEIS that “[a]ccording to Piteau Associates,
5 simulated flow losses to [Lahontan Cutthroat Trout] occupied reaches of Crowley and Pole
6 Creek due to water use requirements from the proposed Project would not be expected.”
7 Although BLM consulted informally with the U.S. Fish and Wildlife Service (“FWS”) on
8 impacts to LCT, and FWS concurred with BLM’s assessment that there would be no adverse
9 effects to LCT, the BLM’s biological assessment for consultation with the FWS was based
10 entirely on the flawed and incomplete data and modeling performed by LNC’s consultant,
11 predicting no impacts to streamflows in Pole Creek or Crowley Creek. BLM did not disclose
12 that it was consulting with the FWS the DEIS or FEIS, nor did BLM disclose to the public the
13 existence of BLM’s biological assessment, which prevented Plaintiffs and the public from
14 having informed participation and from providing comments to the FWS on its reliance upon
15 LNC’s consultant’s data and modeling for its letter of concurrence.¹ ² In doing so, BLM acted
16 in a manner that is arbitrary, capricious, an abuse of discretion, and contrary to law under the
17 National Environmental Policy Act (“NEPA”) 42 U.S.C. §§ 4321–61, Federal Land Policy and
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24 ¹ Indeed, despite their thorough and exhaustive participation throughout the NEPA process, including making
25 numerous requests for data, reports, and information from BLM, Plaintiffs did not become aware that BLM ever
26 consulted with FWS on effects to LCT until well after the ROD was issued. This prevented Plaintiffs from
27 apprising the FWS of Plaintiffs’ opposing viewpoints on the data and modeling relied on by BLM and provided by
28 LNC’s consultants.

² Indeed, despite their thorough and exhaustive participation throughout the NEPA process, including making
numerous requests for data, reports, and information from BLM, Plaintiffs did not become aware that BLM ever
consulted with FWS on effects to LCT until well after the ROD was issued. This prevented Plaintiffs from
apprising the FWS of Plaintiffs’ opposing viewpoints on the data and modeling relied on by BLM and provided by
LNC’s consultants.

1 Management Act (“FLPMA”), 43 U.S.C. §§ 1701–1787, and Administrative Procedure Act
2 (“APA”), 5 U.S.C. § 701 *et seq.*, requiring vacatur of the ROD by this Court.

3 8. For example, but without limitation, BLM approved the ROD based on the
4 FEIS’s inadequate, incomplete, and, in several cases, misrepresented analysis and collection of
5 the baseline streamflow data and, thereby, failed to consider the likely impacts of the Mine on
6 the LCT population in Pole Creek. In the FEIS, BLM relied upon reports that make the
7 conclusory and objectively inaccurate determination that “Pole Creek is an ephemeral stream.”
8 The existence of a residential LCT population necessarily precludes the characterization of this
9 stream as anything other than a perennial stream. As a result of the objectively inaccurate
10 characterization of the *perennial* flows on Pole Creek, the FEIS’s data on pre-mining calibration
11 flux targets and all other modeling based upon this incorrect data and characterization as an
12 “ephemeral creek” are fundamentally flawed.

13 9. By approving the ROD based on the FEIS’s inadequate, incomplete, and in some
14 cases objectively flawed collection of baseline data, the ROD was approved based on the FEIS’s
15 inadequate and incomplete analysis of likely impacts of the Mine on streamflows, groundwater
16 levels, LCT and LCT habitat, and other wildlife species. Even though the FEIS acknowledged
17 that the Mine-associated pumping will have an impact on the groundwater levels and surface
18 flows (and that the test-pumping conducted during the analysis impacted groundwater tables),
19 the FEIS failed to adequately address the likely direct, indirect, and cumulative impacts of the
20 Mine on LCT and their habitats—and failed to inform the public of BLM’s assessments of such
21 impacts—in violation of NEPA.

22 10. If the proposed Mine project is allowed to commence—permanently altering the
23 water table and streamflows that an ESA-protected species rely on—it will cause irreparable
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1 harm to water resources and LCT and their habitat in Pole Creek, which flows immediately
2 north of the project area. Construction of the Mine is imminent, with Phase 1 of the project
3 commencing as early as 2021, with mining and ore-processing estimated to commence as early
4 as 2022. Accordingly, Plaintiffs seek immediate relief, including preliminary injunctive relief,
5 from this Court to set aside and remand BLM's ROD and FEIS, order BLM to prepare a new,
6 lawful FEIS, enjoin the project and preserve the environmental status quo during the interim
7 period, and protect the ecological integrity of Pole Creek and the residential LCT therein, as
8 well as the host of other environmental impacts that were ignored by BLM in the FEIS and in
9 approving the ROD.
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11 **JURISDICTION AND VENUE**

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13 11. Jurisdiction is proper in this Court under 28 U.S.C. 1331 (federal question)
14 because this action arises under the laws of the United States, including NEPA, 42 U.S.C. §§
15 4321–4370(h), the APA, 5 U.S.C. § 701 *et seq.*, the Declaratory Judgment Act, 28 U.S.C. §
16 2201 *et seq.*, and the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.* An actual, justiciable
17 controversy exists between the parties, and the requested relief is therefore proper under 28
18 U.S.C. §§ 2201–2202 and 5 U.S.C. § 701–06.
19

20 12. Venue is proper in this Court under 28 U.S.C. § 1391 because all or a substantial
21 part of the events or omissions giving rise to the claims herein occurred within this judicial
22 district, Defendants reside in this district, and the public lands and resources and agency records
23 in question are located in this district.
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25 13. The federal government has waived sovereign immunity in this action pursuant
26 to 5 U.S.C. § 702.
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PARTIES

14. Plaintiff Edward Bartell is an individual American citizen who resides in Humboldt County, Nevada, and owns and operates an active ranching operation (through Plaintiff Bartell Ranch, LLC) on both private and leased public lands within the immediate vicinity of the proposed Mine and the LCT-inhabited streams at issue in this action. Mr. Bartell is a co-owner in Bartell Ranch, LLC. As a BLM grazing permit holder for the area at issue and a passionate steward of the lands within and adjacent to the proposed Mine, Bartell Ranch has gone to great lengths to protect LCT and LCT habitat in the area of the proposed Mine, and has a real, genuine interests in the species' conservation and protection as a threatened and protected species. These actions include moving cattle herds away from LCT habitat, as well as extensive construction of fencing to protect surface waters with residential LCT populations in Pole Creek. Many of these efforts were undertaken after or during communications with BLM in connection with administration of the Bartell Ranch federal grazing permit.

15. Defendants' violations of federal laws and regulations, as alleged herein, directly harm the interests of Plaintiffs in recovery of LCT and protection of LCT habitat, which have been and will continue to be injured and harmed by Defendants' actions as complained of herein. Unless the relief prayed for is granted, Plaintiffs will suffer ongoing and irreparable harm and injury to their interests.

16. In addition to Bartell Ranch's interests in LCT, Bartell Ranch are the owners of private ranch lands and water rights that will, like LCT habitat, be negatively impacted by the Mine. The FEIS and ROD ignored, severely discounted, or simply misrepresented the likely negative impacts to Bartell Ranch's water rights and the productivity of their private ranch lands as result of flawed, incomplete, error-laden, and misrepresented data collection and modeling

1 work done by the project consultants and blindly incorporated and relied upon by BLM in the
2 FEIS and ROD.

3 17. Defendant Ester M. McCullough is the District Manager of the Winnemucca
4 District of the BLM, and has the statutory authority and responsibility to comply with all federal
5 laws and regulations in the management of federal public lands at issue here, including NEPA,
6 the ESA, and APA. She is sued in her official capacity.
7

8 18. Defendant BLM is an agency or instrumentality of the United States, within the
9 Department of Interior, and is charged with managing the public lands and resources of the area
10 at issue in accordance and compliance with federal laws and regulations. BLM was the lead
11 agency that officially released the FEIS and subsequent ROD at issue in this action.
12

13 **LEGAL BACKGROUND**

14 19. NEPA, 42 U.S.C. § 4321 *et seq.*, is our “basic national charter for protection of
15 the environment.” 40 C.F.R. § 1500.1(a). It serves two purposes: (1) “it ensures that the agency,
16 in reaching its decision, will have available, and will carefully consider, detailed information
17 concerning significant environmental impacts,” and (2) it “guarantees that the relevant
18 information will be made available to the larger audience that may also play a role in both the
19 decision-making process and the implementation of that decision.” *Robertson v. Methow Valley*
20 *Citizens Council*, 490 U.S. 332, 349 (1989).
21

22 20. NEPA requires agencies to prepare an environmental impact statement (EIS) for
23 “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C.
24 § 4332(2)(C). The EIS must “provide full and fair discussion of significant environmental
25 impacts.” 40 C.F.R. § 1502.1. Agencies must consider every significant aspect of the
26 environmental impact of a proposed action. This includes studying the direct, indirect, and
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1 cumulative impacts of the action. *See* 40 C.F.R. §§ 1508.7, 1508.8.

2 21. Cumulative impacts are impacts that “result [] from the incremental impact of
3 the action when added to other past, present, and reasonably foreseeable future actions
4 regardless of what agency . . . undertakes such other actions.” 40 C.F.R. § 1508.7. Cumulative
5 impacts “can result from individually minor but collectively significant actions taking place
6 over a period of time.” *Id.*

7
8 22. In analyzing the cumulative effects of a proposed action, an agency must do
9 more than just catalogue “relevant past projects in the area”: it must also include a “useful
10 analysis of the cumulative impacts of past, present and future projects.” *City of Carmel-by-the-*
11 *Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1160 (9th Cir. 1997). Agencies must provide “some
12 quantified or detailed information” about cumulative impacts – “[g]eneral statements about
13 possible effects and some risks do not constitute a hard look absent a justification regarding
14 why more definitive information could not be provided.” *Klamath-Siskiyou Wildlands Ctr. v.*
15 *BLM*, 387 F.3d 989, 993 (9th Cir. 2004). When an EIS does not “sufficiently identify or discuss
16 the incremental impacts” expected from successive projects, or “how those individual impacts
17 might combine or synergistically interact with each other to affect the [] environment,” it does
18 not satisfy NEPA. *Id.*

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21 23. In addition, an agency must disclose and discuss any “responsible opposing view
22 which was not adequately discussed in the draft statement and shall indicate the agency’s
23 response to the issues raised.” 40 C.F.R. §1502.9(b). “This disclosure requirement obligates the
24 agency to make available to the public high-quality information, including accurate scientific
25 analysis, expert agency comments and public scrutiny, before decisions are made and actions
26 are
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1 taken.” *Ctr. for Biol. Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003).
2 Likewise, NEPA requires that “the public receive the underlying environmental data from
3 which a [an agency] expert derived her opinion.” *See Idaho Sporting Cong. v. Thomas*, 137
4 F.3d 1146, 1150 (9th Cir. 1998). When the agency fails to disclose important information
5 related to potential environmental impacts of the proposed action, the public is denied the
6 opportunity to meaningfully participate and comment during the NEPA process.
7

8 24. BLM has breached its statutory duties and abused its discretion under NEPA by
9 relying upon a one-sided, inadequate, in in many cases misrepresented data, modeling, and
10 analysis in the FEIS to approve the ROD for the Mine and associated groundwater pumping
11 while downplaying or ignoring a host of significant environmental impacts, failing to
12 adequately inform the public of critical data and information, and not responding to responsible
13 opposing viewpoints.
14

15 **STATEMENT OF FACTS**

16 25. The area of the proposed Mine, situated deep in northern Nevada’s high desert,
17 is a spectacular area with a rich geological and ecological diversity, wildlife habitat, and
18 recreation opportunities.
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20 26. Despite being in the high desert, several perennial, but sensitive and delicate,
21 spring-fed streams flow through the area at issue in this action. At least two of these
22 streams—Pole Creek and Crowley Creek—are inhabited by residential populations of LCT,
23 which were listed under the ESA as “endangered” in 1970, and then as “threatened” in 1975.
24 Pole Creek and Crowley Creek are immediately north of the proposed footprint for the mining
25 operation subject to this action.
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1 27. The lands subject to this action also benefit from water tables that are
2 abnormally high; so high that vegetation can access wetted soil. As water levels drop in this
3 area, the lands are quickly converted from productive grasslands to barren desert. Big game
4 species and Greater Sage Grouse depend on the numerous springs in this area for drinking
5 water, and migratory waterfowl are dependent upon the down-system wetlands that exist due
6 to the abnormally high-water tables. This area is home to one of the largest Greater Sage
7 Grouse populations in northern Nevada. Mr. Bartell enjoys seeing and photographing Sage
8 Grouse which is an important part of his enjoyment of the public lands at issue in this case.
9 Sage Grouse population declines in this area may result in an ESA listing that would
10 adversely affect Plaintiffs in numerous ways, including with respect to Plaintiffs' use and an
11 enjoyment of public lands potential restrictions on Plaintiffs' public land grazing.
12 Additionally, this is one of the few areas with streams that host residential populations of
13 native LCT outside of the Truckee Basin.
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16 28. As holders of several vested, certificated, and permitted water rights for
17 irrigation and stock watering in the area subject to this action, Plaintiffs are intimately familiar
18 with the sensitivity of the hydrology. These water rights include groundwater rights with wells
19 in the area, enabling Plaintiffs to measure groundwater levels. Accordingly, Plaintiffs have
20 been and continue to be uniquely situated so as to both assess the efficacy of the test pumping
21 data compiled by LNC's contractor (and subsequently adopted into the FEIS), and to suffer
22 significant injury caused by initiation of this mining operation.
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25 29. Through the data and reports compiled by LNC and its consultants—
26 subsequently adopted by BLM wholesale and incorporated into the FEIS—it can be seen that
27 even after a short period of test pumping, LNC's proposed production well has already shown
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1 harmful impacts to water levels in one of Plaintiffs' stock water wells. Thus, the substantial
2 groundwater pumping planned by LNC in conjunction with its mining-related operations
3 poses an imminent threat not only to Plaintiffs' existing water rights, but also to streamflows,
4 the sensitive terrestrial and riparian species that depend on them for survival, and the entire
5 ecosystem as a whole.
6

7 30. Plaintiffs hold the approximately 50,000-acre Crowley Creek grazing lease,
8 which is immediately to the north and west of the proposed open pit and within the proposed
9 project area for the Mine. Within the boundaries of that lease, Plaintiffs own a 320-acre parcel
10 of land through which Crowley Creek flows. This parcel of Plaintiff's private land is
11 approximately 1.5 miles from the proposed "North Exploration Area" within the FEIS. The
12 confluence of Crowley and Pole Creeks is within the Mine's "North Exploration Area," as
13 well as most of Lower Pole Creek. Even more disturbing is the fact that a considerable reach
14 of Pole Creek (which is home to a resident population of ESA-listed LCT) flows directly
15 through the Mine's area of operations, inside the "Disturbance within the Proposed Project
16 Area" boundary, upstream of the confluence with Crowley Creek (which is also known to be
17 inhabited by LCT).
18

19 31. The NDOW and FWS have put great effort and energy into studying and
20 protecting the residential populations of LCT in Pole and Crowley Creeks, immediately north
21 of the proposed Mine site. After introductions of non-native trout species into these systems,
22 LCT began to hybridize with the non-native fish in Pole Creek. In an effort to mitigate the
23 genetic dilution of the protected species, Pole Creek was chemically treated to eliminate non-
24 native fish and genetically-pure LCT were collected in Crowley Creek (for which Pole Creek
25 is a tributary) and then transported and reintroduced into Pole Creek by the NDOW in 2012.
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1 Over the years, Plaintiffs have undertaken great efforts to protect Pole Creek in order to
2 enhance conditions for LCT. Plaintiffs are active participants in the conservation efforts of
3 LCT in this water-sensitive area, and are substantially invested and interested in the
4 conservation and protection of this ESA-listed species.
5

6 32. The harm caused by over-pumping the groundwater in this area to the sensitive
7 hydrological conditions not only means harm to forage availability for grazing purposes, but it
8 means harm to Greater Sage Grouse and LCT and LCT habitat. Through their endeavors to be
9 good stewards of this land and the ecosystems therein, Plaintiffs know that fluctuations to the
10 water table, which will be caused by the monumental volume of groundwater pumping
11 proposed by this project, create an immediate and significant threat to the sensitive balance
12 that exists on this unique landscape. There exists a delicate balance to the biological status
13 quo of this landscape that is maintained in large part through Plaintiffs' disciplined rotational
14 grazing practices, mindful water use, and being proactive and flexible land stewards and
15 managers.
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18 33. Over the course of the efforts related to protecting the LCT habitat, Plaintiffs
19 have met with BLM staff several times to discuss LCT-issues on Pole Creek, and BLM has
20 prepared NEPA documentation related to the fencing efforts to protect Pole Creek and its
21 resident LCT populations. Plaintiffs' rotational grazing operation and extensive fencing efforts
22 were designed to minimize impacts to LCT habitat and protect this vulnerable species and its
23 riparian habitat. Prior to LNC even beginning its work on the application for this Mine, BLM
24 has been well aware that Pole Creek is both a perennial stream and that it contains a
25 residential population of the ESA-listed and protected LCT.
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1 34. Over the course of the last several years, “studies” on the water features of this
2 area have been paid-for and carried out on behalf of LNC in conjunction with the application
3 process to develop this Mine. Within these studies are numerous erroneous figures that
4 purport to show that Pole Creek is an ephemeral stream that lacks any standard annualized
5 flow. On numerous occasions—through correspondence with BLM, LNC, and LNC’s
6 contractors, as well as comments submitted throughout the scoping process—Plaintiffs have
7 informed BLM that perennial reaches (those with year-round flow) of Pole Creek were being
8 erroneously labeled as ephemeral (flows that only exist briefly after rainfall or snowmelt).
9 Hence, both LNC’s contractors, LNC itself, and the BLM have been aware of these
10 inaccuracies in the data since before the EIS process even began.

13 35. BLM accepted reports submitted by LNC and completed on its behalf that
14 form the basis of the FEIS that mischaracterize Pole Creek as “an ephemeral stream” with
15 sections that “*may*” flow perennially, “but are not continuous year-round.” Not only is this
16 characterization of Pole Creek (as an ephemeral stream, but one with non-continuous
17 perennial reaches) a completely nonsensical and contradictory statement in and of itself, but it
18 is well-established in studies and reports completed by NDOW that Pole Creek is considered a
19 perennial stream that has resident LCT. This “ephemeral” distinction for the entirety of Pole
20 Creek in the FEIS is at odds with the fact that NDOW and FWS recognize Pole Creek as a
21 perennial stream.

24 36. Despite awareness of these inaccuracies in the baseline data, BLM accepted the
25 objectively flawed Hydrologic Data Collection Report (“Report,” compiled by the applicant
26 LNC’s contractors) into its baseline data for the FEIS. This Report purports that the entirety of
27 Pole Creek is an ephemeral stream. These inaccuracies were then used to calibrate
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1 groundwater modeling which comprise the central basis of BLM's decision-making in the
2 draft EIS. The groundwater-modeling was calibrated using calibration flux targets of zero
3 flow for all reaches of Pole Creek.

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5 37. In the FEIS, in response to objections from Plaintiffs regarding the flaws and
6 omissions in the data relied upon within the draft EIS, BLM (and, thereby, LNC) advanced
7 the position that even though LNC's contractors calibrated the groundwater model with zero
8 flow for all reaches of Pole Creek, the model still somehow arrived at the correct baseflow.
9 Supporting this reasoning, BLM incorporated new data provided by LNC into the FEIS,
10 which the public had never seen before. As Plaintiffs noted in their comments to the FEIS,
11 which was supported by an expert hydrologist, these new data are highly erroneous and
12 controversial due to site bias and failure to consider evapotranspiration, and even then, they
13 still do not match the modeled data. In addition, it also does not appear that BLM ever
14 disclosed to the FWS the errors in the modeling associated with the DEIS, including model
15 calibration inputs of "zero flow" in Pole Creek, when BLM provided the FWS its biological
16 assessment, which assessment was founded entirely on the contention that there would be no
17 impact to streamflows on Pole Creek itself.

18
19 38. BLM also failed to require LNC to establish long-term gauging stations on any
20 portion of Pole Creek, or to correct any of the clearly erroneous calibration flux targets for
21 Pole Creek. Instead, BLM accepted this after-the-fact flow data with little-to-no explanation
22 in the FEIS in order to backfill clear errors in the Report. Amazingly, in the Report, LNC's
23 contractors only documented two (2) side channel springs that feed Upper Pole Creek and
24 Middle Pole Creek, while ignoring the flow in the main channel of the Creek itself, and
25 numerous other springs along Upper/Middle Pole Creek. Furthermore, photographs that
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1 accompany the Report purport to represent a particular Spring that was allegedly measured
2 (SP-036) were taken a substantial distance *downstream* from the actual spring itself. Likewise,
3 BLM refused to consider NDOW data presented in Plaintiffs' comments on the perennial
4 flows of Pole Creek from 2020, 2009, 2003, 1998, and 1987, and instead, unbelievably, opted
5 to base its "ephemeral" characterization of this entire stream solely on the LNC contractors'
6 improperly-collected data from two (2) solitary side channels that feed Pole Creek, instead of
7 any actual data from the mainstem of Pole Creek itself. There are countless other omissions
8 and errors in the baseline data upon which LNC's contractors' Report is based that were
9 addressed in detail within the numerous comments submitted by Plaintiffs following the
10 publication of the draft EIS and the FEIS.
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13 39. LNC's own Report—paid for and submitted in support of its application—also
14 shows that LNC mining operation is significantly altering the area's hydrology by as much as
15 90-feet in certain areas where exploratory wells were dug by LNC, in addition to falsifying
16 key pump-result data graphing to arbitrarily move elevations of separate test wells so as to
17 argue that water elevation levels are lower in the area at issue and thereby erroneously
18 minimize the potential impacts of long-term pumping.
19

20 40. Despite being aware of the errors in the baseline data, the FEIS makes the
21 following two contradictory conclusions: (1) "[w]ater produced and used by the mine from the
22 proposed production wells could also affect surface water stream flows in nearby perennial
23 and intermittent streams or springs[;]" and (2) "[a]ccording to Piteau Associates [LNC],
24 simulated flow losses to LNC occupied reaches of Crowley and Pole Creek due to water use
25 requirements from the proposed Project would not be expected." These statements are
26 irreconcilable and highlight the gross material errors in the FEIS, which states, falsely, that the
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1 Mine will have no impact on LCT or LCT habitat, despite acknowledging more generally
2 elsewhere in the FEIS that water used by the Mine could, indeed, effect surface water stream
3 flows—i.e., LCT habitat. In addition, in seeking the FWS’s concurrence for BLM’s
4 biological assessment of impacts to LCT, BLM did not make FWS aware of the substantial
5 errors and substantial controversy regarding the accuracy of the modeling of impacts to
6 streamflows. On top of that, BLM never informed the public about its consultation with FWS
7 in the first place, preventing the public from informing FWS and challenging BLM’s rationale
8 for finding that there would be no impact to LCT.
9

10
11 41. Despite this Mine’s potential to reduce streamflow on nearby perennial and
12 ephemeral streams, BLM opted for its proposed Alternative A, which extends the 10-foot
13 threshold drawdown area only a mere 1.4 miles from the project area. The modeled 10-foot
14 drawdowns are compromised by erroneous model inputs. Moreover, the 10-foot drawdowns
15 are the alleged extent of confidence in model accuracy, not the extent of impacts. Any
16 drawdown underneath springs supplying springs to Pole Creek will impact flows, and by
17 extension LCT habitat.
18

19 42. LNC’s contractors doctored and/or misreported the data that BLM
20 unquestioningly incorporated into the FEIS, which had the effect of materially altering the
21 baseline, associated modeling, and the public disclosure of environmental impacts and, if not
22 corrected, will aid LNC in avoiding the triggering of the proposed mitigation measures.
23

24 43. BLM did more than simply incorporate the data submitted by LNC contractors
25 into the FEIS; the erroneous data constitutes the vast majority of the baseline hydrological
26 data utilized and relied upon in the FEIS.
27
28

1 44. With respect to BLM's statutory consultation duties associated with approving
2 a project with known ESA-listed species' habitat immediately adjacent to and even *within* the
3 project area boundaries, BLM responded to comments expressing concern about LCT by
4 tersely responding: "[e]ffects on LCT are not anticipated to occur from the project, therefore,
5 no formal Section 7 consultation was required." BLM utterly failed to disclose to the public
6 that it had informally consulted with the FWS and prepared a biological assessment
7 throughout the NEPA process, including the FEIS. This single sentence is the entirety of
8 BLM's disclosure to the public of its assessment of potential impacts to LCT.
9

10 45. This failure to disclose to the public BLM's assessment of effects on the ESA-
11 listed LCT, and to disclose to the FWS the substantial errors and disagreement with the data
12 and modeling utilized in the BLM's biological assessment, is conspicuously arbitrary given
13 the following:
14

15 a. A stream (Pole Creek) with well-studied residential LCT population flows
16 *within* the proposed area of surface disturbance for this project;
17

18 b. BLM's own identification of mine-related environmental issues in the FEIS
19 includes "modifications to existing water rights, the potential for mine related groundwater
20 aquifer drawdown, contamination of ground or surface water from unintended materials
21 releases (spills) and the potential for adverse effects to groundwater resulting from surface
22 water infiltration into the open pit or through above ground mine facilities. Water produced
23 and used by the mine from the proposed production wells could also affect surface water
24 stream flows in nearby perennial and intermittent streams or springs [;]" and
25

26 c. BLM's own conclusion in the FEIS that "[i]f the flow from the perennial
27 spring or stream is controlled by discharge from the aquifer affected by mine-induced
28

1 drawdown, a reduction of groundwater levels would likely result in a reduction of the
2 groundwater discharge perennial springs or streams with a corresponding reduction in spring
3 flows, lengths of perennial stream reaches, and their riparian/wetland areas.”

4
5 d. In the Nevada Department of Wildlife (NDOW) comments on the FEIS,
6 NDOW summarized its serious concerns by stating: “We continue to find that the Preferred
7 Alternative will likely result in adverse *impacts to wildlife, ground and surface waters*, and
8 riparian vegetation within and outside the project area. These impacts include effects to an
9 array of species and will likely have *permanent ramifications* on the area’s wildlife and
10 habitat resources.” (emphasis added). NDOW further explained: “*Groundwater dependent*
11 *habitats* in the Montana Mountains north of the Project area boundary *are critical to greater*
12 *sage-grouse, Lahontan cutthroat trout*, mule deer, pronghorn, and many other wildlife
13 species. Given the arid nature of this region, water sources, riparian vegetation, and wet-
14 meadow habitats are essential to wildlife and the *loss or degradation of these areas will have*
15 *significant negative impacts on wildlife populations*.” (emphasis added).

16
17
18 46. Despite these factors, BLM gave short-shrift to impacts to LCT, failing to take
19 a the “hard look” required by NEPA. In the section dedicated to LCT within the FEIS, BLM
20 concisely showcases both the arbitrary and capricious nature of its mischaracterization of Pole
21 Creek as “an ephemeral stream” as well as the potential for irreparable harm posed by this
22 project in a single sentence: “[c]onnectivity into the reaches within the project boundaries in
23 high water years is a possibility with spring flows (January through April) being the most
24 likely time for LCT to move down into the ephemeral reaches. During high water years, care
25 must be taken not to disturb Pole and Crowley Creek until after the water naturally recedes
26 out of the ephemeral portion.”
27
28

1 47. Accordingly, not only does this reference to isolated and identifiable
2 “ephemeral reaches” along Pole Creek undermine the description of the *entirety* of Pole Creek
3 BLM incorporates into the FEIS in Appendix P (*i.e.*, “Pole Creek is an ephemeral stream
4 which originates in the Montana Range”), but it is an express admission that ESA-listed fish
5 will be *within* the Mine’s project boundaries during high water events. Furthermore, despite
6 the vague statement that “care must be taken not to disturb” Pole Creek during high water
7 events, there are no limits whatsoever on LNC’s ability to continue pumping a volume of
8 2,600-5,200 acre-feet per year in either LNC’s water right permits or the FEIS, rendering this
9 cautionary statement meaningless.
10

11 48. In sum, throughout the NEPA process, BLM failed to adequately inform the
12 public of the BLM’s assessment of potential impacts to LCT. Likewise, as a result of this
13 error, neither the DEIS nor the FEIS demonstrate that BLM took a “hard look” at potential
14 impacts to LCT.
15

16 49. Plaintiffs have exhausted all necessary administrative remedies. Although
17 BLM provided the public the opportunity to file an appeal of the ROD with the Interior Board
18 of Land Appeals (“IBLA”), an IBLA appeal is not necessary because the ROD was made
19 effective upon execution and would remain in effect during the pendency of the administrative
20 appeal unless stayed by the IBLA. The ROD is final agency action subject to judicial review
21 under the APA and threatens irreparable harm to Plaintiffs. Plaintiffs intend to seek
22 preliminary injunctive relief against the ROD from this Court.
23

24 50. Plaintiffs have also exhausted and preserved all issues it presents in this
25 Complaint, by raising its concerns with BLM during the NEPA process for the draft EIS and
26 FEIS, as well as through its additional correspondence with both the BLM and LNC. On
27
28

1 information and belief, BLM now intends to implement the final decisions approving the
2 ROD. Implementation of the ROD will adversely and irreparably impact the water levels,
3 ecology, fish and wildlife habitat, and other values on these public lands, as well as the water
4 rights and property rights held and owned by Bartell Ranch.
5

6 **FIRST CLAIM FOR RELIEF**

7 51. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

8 52. This First Claim for Relief challenges BLM's violations of the National
9 Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and NEPA's implementing regulations in
10 approving the ROD based on the faulty, incomplete, and inadequate FEIS. Plaintiffs bring this
11 claim pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706.
12

13 53. Defendants violated NEPA and implementing regulations in multiple respects
14 through issuance of the challenged ROD based on the FEIS, including but not limited to:

15 a. Failing to take the requisite "hard look" at all of the significant and potential
16 direct, indirect, and cumulative impacts of the proposed Mine and associated groundwater
17 pumping on the environmental baseline, including impacts to: (1) LCT and LCT habitat; (2)
18 Sage-Grouse and Sage-Grouse habitat; (3) wetlands and streamflows; (4) Bartell Ranch's
19 water rights and productivity of their private ranch lands; (5) air quality and other pollution
20 impacts due to doubling the amount of sulfur proposed to be used between the draft EIS and
21 FEIS; (6) visual resources based on BLM's Visual Resource Management ("VRM")
22 classifications and associated regulations; and (7) water quality by virtue of groundwater
23 contamination associated with the deposit and storage of waste rock laden with toxins such as
24 arsenic, antimony, and uranium—and all without adequate baseline data and based on
25 fundamentally flawed modeling and analysis;
26
27
28

1 b. Failing to ensure scientific integrity and failing to discuss and address
2 responsible opposing views in the FEIS, in a supplemental FEIS, and/or in the ROD,
3 including opposing viewpoints expressed by Plaintiffs and Plaintiffs' expert consultant that
4 BLM failed entirely to address in the FEIS;

5
6 c. Failing to make material and necessary data and information relied upon in the
7 draft EIS, FEIS and/or the ROD available to the public and Plaintiffs in a timely or
8 meaningful manner, including BLM's informal consultation with FWS and biological
9 assessment, as well as data and assumptions used by LNC's consultants in its modeling of
10 surface and ground water impacts;

11
12 d. Reliance on mitigation concepts and strategies that are based on inadequate or
13 false baseline data and inadequate or fundamentally flawed models and monitoring schemes
14 and not reasonably likely to occur or otherwise provide effective or meaningful mitigation for
15 the likely impacts of the Mine; and

16
17 e. Failing to consider an adequate range of alternatives, including alternative
18 mining, extraction, or processing methods or techniques that would reduce or eliminate the
19 amount of sulfuric acid utilized and groundwater pumping.

20 f. Failing to consider or address Plaintiffs' comments related to invalid mining
21 claims improperly filed outside of the mineralization. BLM applied improper legal standards,
22 as it relates to the impacts to Sage Grouse, LCT, and VRM, by improperly assuming that all
23 mining claims are valuable mineral deposits. Plaintiffs provided well-reasoned comments on
24 this subject which were not addressed at all.

25
26 g. Failing to provide necessary information to the public, in a timely manner, such
27 that the public could knowingly comment, and participate in the EIS.
28

1 54. BLM’s FEIS and ROD constitute final agency actions judicially reviewable by
2 this Court pursuant to 5 U.S.C. § 706.

3 55. Based on their violations of NEPA and implementing regulations, BLM’s
4 approval of the challenged FEIS and ROD is arbitrary, capricious, an abuse of discretion, and
5 not in accordance with law, and will allow serious ecological degradation as well as harm to
6 the public and Plaintiffs’ interests, unless vacated by this Court. Accordingly, the FEIS and
7 ROD must be vacated and set aside pursuant to the APA, 5 U.S.C. § 706.

8
9 **SECOND CLAIM FOR RELIEF**

10 56. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

11 57. This Second Claim for Relief challenges BLM’s violations of FLMPA,
12 including the requirement that the agency “take any action required to prevent unnecessary or
13 undue degradation of the lands and their resources or to afford environmental protection[,]”
14 43 U.S.C. § 1782(c); to “manage the public lands under principles of multiple use and
15 sustained yield, in accordance with the land use plans[,]” 43 U.S.C. § 1732(a); and to
16 minimize impacts on soils, vegetation, wildlife, air, water, and cultural resources, 43 C.F.R. §
17 8342.1(a)– (c). Plaintiffs bring this claim pursuant to the judicial review provisions of the
18 APA, 5 U.S.C. § 706.

19 58. Defendants have violated FLPMA in multiple respects through issuance of the
20 challenged ROD based on the FEIS, including but not limited to:

21 a. Allowing a processing method that involves the importation, burning, and
22 disposal of millions of tons of sulfur on public lands when less environmentally harmful
23 methods and techniques exist;
24
25
26
27
28

1 b. Allowing storage and ultimately in-pit disposal of waste rock in a manner that
2 risks contaminating public lands and groundwater with toxins such as arsenic, antimony, and
3 uranium;

4
5 c. Failing to adequately protect and conserve Sage-Grouse and Sage-Grouse
6 habitat, in violation of the BLM's Winnemucca District Resource Management Plan ("RMP")
7 and, thus, FLPMA; and

8 d. Failing to comply with the Visual Resource Management designations, in violation
9 of the RMP and, thus, FLPMA; the FEIS explicitly says "Alternative A would not meet the
10 current VRM Class II objectives, and would not conform with the existing ROD/RMP".

11
12 e. Erroneously assuming or concluding that all or some of FLMPA's
13 requirements, including violations of the RMP, do not apply based on the proposition that
14 LNC possesses "valid existing rights" without adequate evidence demonstrating that such
15 rights exist as to all or portions of the project area.

16
17 59. Based on their violations of FLPMA and implementing regulations, BLM's
18 approval of the challenged FEIS and ROD is arbitrary, capricious, an abuse of discretion, and
19 not in accordance with law, and will allow serious ecological degradation as well as harm to
20 the public and Plaintiffs' interests, unless vacated by this Court. Accordingly, the FEIS and
21 ROD must be vacated and set aside pursuant to the APA, 5 U.S.C. § 706.

22
23 **PRAYER FOR RELIEF**

24 WHEREFORE, plaintiffs pray for a judgment granting the following relief;

25 A. Order, adjudge, and declare that the FEIS and ROD violate NEPA and FLPMA,
26 in violation of the APA, 5 U.S.C. § 706;

27 B. Reverse, set aside, vacate, and remand the FEIS and ROD;
28

1 C. Enter temporary, preliminary, or permanent injunctive relief as hereinafter
2 prayed for by Plaintiffs, including by enjoining Defendants from allowing construction to
3 commence on the LNC Mine through ground-clearing, site preparation, or other such actions
4 until such time as Defendants have fully complied with law;
5

6 D. Award Plaintiffs their reasonable costs, litigation expenses, and attorney's fees
7 associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. §§ 2412 *et*
8 *seq.*, and/or all other applicable authorities; and/or

9 E. Grant such further relief as Plaintiffs may pray for hereafter or as the Court
10 deems necessary or appropriate to redress Defendants' legal violations and protect the public
11 lands and resources of the sensitive area in question from further degradation.
12

13 Respectfully submitted this 11th day of May, 2021.

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