IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-01564-MSK

COLORADO WILD PUBLIC LANDS, INC,

Plaintiff,

v.

GREG SHOOP, in his official capacity as Acting Colorado State Director of the U.S. Bureau of Land Management;
RYAN ZINKE, is his official capacity as Secretary of the Interior; and
U.S. BUREAU OF LAND MANAGEMENT,

Defendants.

LESLIE WEXNER and ABIGAIL WEXNER,

Intervenor-Defendants.

PLAINTIFF'S MOTION FOR RECONSIDERATION UNDER RULE 59(e)

Plaintiff Colorado Wild Public Lands respectfully requests that the Court reconsider its March 25, 2021 Opinion and Order (Doc. 44) and Judgment (Doc. 45) under Federal Rule of Civil Procedure 59(e). In this lawsuit, Plaintiff challenge the U.S. Bureau of Land Management's (BLM) Sutey Land Exchange for violations of the National Environmental Policy Act (NEPA), specifically BLM's deficient analysis in its Environmental Assessment and unexplained, unsupported Finding of No Significant Impact (FONSI), and inadequate public comment period, and violations of the Federal Land Management and Policy Act (FLPMA), namely errors associated with its equal-value conclusion and public-interest determination.

Reconsideration is warranted and a new ruling that vacates the Sutey Land Exchange should issue because the Court misapprehended the law, facts, and Plaintiff's position on certain

matters. Plaintiff submits that the standard for reconsideration is met on the following issues: (1) though the Court identifies language in the Sopris Parcels' conservation easement about protecting Conservation Values, BLM did not explain or analyze whether this general prescription would sufficiently protect riparian areas and Harrington's penstemon habitat from livestock grazing and to the same extent as prior BLM grazing permits; (2) in ruling BLM's refusal to analyze Sutey Ranch recreation on wildlife was excusable because the future use of that parcel was too speculative, the Court misapprehended Plaintiff's argument, NEPA, and the facts; (3) the Court misapprehended the law in ruling that BLM could withhold completed property appraisals during the NEPA notice and comment period; (4) upon concluding that BLM did not err in discounting the Sopris Parcel's property value, the Court misapprehended the facts by completely ignoring one the highest and best uses BLM expressly identified for this parcel—assemblage with the Wexners' Two Shoes Ranch; (5) notwithstanding the Court's refusal the second-guess the omission of comparable sales in the Sopris Parcel's appraisal, the Court misapprehended Plaintiff's argument and the relevant standard under the Administrative Procedure Act (APA)—that is, ensuring BLM offered a rational explanation for omitting prior property acquisitions by the Wexners; and (6) the Court misapprehended FLPMA's requirement that the public interest determination is based on solely on the properties being exchanged.

Plaintiffs have conferred with the other parties under Local Rule 7.1(a). Federal Defendants and Intervenor-Defendants said they will oppose this motion.

STANDARD OF REVIEW

Specific grounds for reconsideration under Fed. R. Civ. P. 59(e) are: "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to

correct clear error or prevent manifest injustice." *Servants of Paraclete v. Does,* 204 F.3d 1005, 1012 (10th Cir. 2000) (citing *Brumark v. Samson Res.,* 57 F.3d 941, 948 (10th Cir. 1995)). Under the clear error ground, a Rule 59(e) motion may be granted when the Court has misapprehended the facts, a party's position, or the law. *Id*.; *Hayes Family Trust v. State Farm Fire & Casualty*, 845 F.3d 997, 1005 (10th Cir. 2017) ("certainly a motion under Rule 59(e) allows a party to reargue previously articulated positions to correct clear legal error"); *see also U.S. v. Dieter*, 429 U.S. 6, 8 (1976) (affirming "the wisdom of giving district courts the opportunity promptly to correct their own alleged errors"); Moore's Federal Practice 3d, ¶ 59.30 (Rule 59(e) "was adopted in order to clarify that the district court has the power to rectify its own mistakes in the period immediately following the entry of judgment").

ARGUMENT

I. The Court Misapprehended The Legal Standard For Reviewing BLM's Conclusion That Livestock Grazing Will Have No Significant Impact On Sopris Parcel Natural Resources.

Based on the record, the Court made several significant findings related to livestock grazing. It found that livestock grazing within the Sopris Parcel harms both riparian areas and the Harrington's penstemon. Order at 7-8. It then determined that such impacts required BLM, through its permitting process, to limit livestock numbers, curtail grazing seasons, and impose other restrictions, such as building stock ponds, to protect such resources. *Id*. at 7-8; *id*. at 10 ("BLM determined in 2012 that aggressive limitations on existing grazing would be necessary to negate the adverse impacts that grazing was having on riparian areas and pestemon populations on the Sopris Parcel."). The Court concluded that the Land Exchange would likely "increas[e] the risk to riparian areas and penstemon populations" from grazing, *id*. at 11, and that unrestricted grazing would have significant adverse effects on these resources and had to be mitigated, *id*. at 13-14 (ruling BLM's own analysis "clearly finds that ongoing grazing was

causing substantial environmental harm to riparian area in the Thomas Allotment, to the degree that those areas were no longer meeting Standard 2.") (emphasis in original); *id*. at 15 ("[T]he record as a whole permits only the conclusion that penstemon populations were indeed at risk of harm if the 2012 grazing restrictions were lifted"). The Court acknowledged that a grazing management plan—as contemplated in the Sopris Parcel conservation easement—had not been developed and BLM had not analyzed a future plan's effectiveness in the Environmental Assessment, which means that plan could not support a FONSI. *Id*. at 12.

Despite these findings, the Court concluded that references in the Sopris Parcel's conservation easement to "Conservation Values" were sufficient to support the FONSI regarding impacts from livestock grazing. Order at 15-16. The easement labels all the natural resources on the Sopris Parcel as "Conservation Values" and generally states these resources will be "preserved and protected." *Id*. at 12.

The APA provides the appropriate standard of review of BLM's conclusions in its FONSI. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994) ("[T]he arbitrary and capricious standard requires an agency action to be supported by the facts in the record."); *New Mexico*, 565 F.3d at 704 (judiciary must ask whether agency "did a careful job at fact gathering and otherwise supporting its position"). In the NEPA context, when agencies rely on measures to reduce environmental impacts to insignificance, the agency is obligated to analyze such measures and explain the basis for finding they will be effective. Order at 12-13.[1]

[1] *See also Davis v. Mineta*, 302 F.3d 1104, 1125 (10th Cir. 2002) ("Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal."); *Dine Citizens Against Ruining our Env't v. Klein*, 747 F.Supp.2d 1234, 1259 (D. Colo. 2010) ("The lack of details as to the nature of the mitigation measures in reaching the finding of no significant impacts precludes any meaningful review.").

Accordingly, for BLM to rely on the conservation easement, the preservation and protection of Conservation Values "must be developed to a reasonable degree; a perfunctory description or mere listing of mitigation measures, without supporting analytical data, is not sufficient to support a finding of no significant impact." *San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv.*, 657 F. Supp. 2d 1233, 1245 (D. Colo. 2009). More specifically here, the Court must employ the metric it identified: "Because the record compels the conclusion that there is a risk of damage to riparian areas and penstemon habitat unless the Wexners' use of the property for grazing was restricted to at least the level set forth in the 2012 permit renewals, it was incumbent upon the BLM to identify and evaluate the proposed mitigation measures to ensure they would meet that standard, not simply observe that such measures were possible." Order at 15.

The Court applies none of these standards however. BLM provided no analysis or support for the Court to reach its conclusion about the Conservation Values—not in BLM's Environmental Assessment, its Finding of No Significant Impact, or anywhere else in the agency's administrative record. BLM did not compare, for example, the language of the conservation easement to the particular limits on livestock numbers, the curtailment of the grazing season, or the other protections that BLM found paramount upon issuing a grazing permit to ensure that riparian habitat and the penstemon are sufficiently protected. The Court should not uphold BLM's insignificant conclusion (FONSI) without evidence that the agency considered the adequacy of the Conservation Values and supported its conclusion.[2] When

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[2] The lack of record evidence supporting reliance on the conservation easement is not surprising because, when addressing this issue before the Interior Board of Land Appeals, BLM lawyers said the agency did *not* rely on the conservation easement. AR276, AR519. Only before this Court did Department of Justice lawyers change course to suggest that BLM did rely on the easement.

opining that the conservation easement's "protections…appear to be at least equivalent to (if not broader than) the specific restrictions in the 2012 grazing permits," Order at 16, the Court provides no support or analysis for this summary proposition. Indeed, the conservation easement's vague references to the Conservation Values is no different than its potential "grazing management plan," which the Court properly concluded was undeveloped and not analyzed for its effectiveness. Order at 12. What the Court does here is exactly what the Court said is not permissible—observing mitigation measures are possible without identifying any specific measures or evaluating them to ensure they would meet the standard BLM determined was needed. *See* Order at 15.

In sum, the Court's reliance on the conservation easement does not comport with its factual findings and the relevant legal standard it articulated. BLM's FONSI should be vacated and remanded on the issue of livestock grazing's impacts on Sopris Parcel natural resources.

II. BLM Did Not Take A Hard Look At Recreation's Impact on Sutey Ranch Wildlife—The Court Confuses Two Distinct Arguments And Consequently Misstates The Facts.

Plaintiff made two distinct NEPA arguments pertaining to recreation's impact on Sutey Ranch wildlife. Plaintiff challenged both BLM's inadequate analysis in the Environmental Assessment and unsupported conclusion in the FONSI. Doc. 38 (Pls.' Opening at 23) ("In addition to its failure to analyze impacts from Sutey Ranch recreation on wildlife, BLM's insignificance conclusion as it pertains to this issue lacks support."); *Id*. (Pls.' Opening at 24) ("BLM's *analysis* of recreation activities on Sutey Ranch resources does not comport with NEPA's 'hard look' requirement and its insignificant-impact *conclusion* is without factual support in the record.") (emphasis added); Doc. 43 (Pls.' Reply at 8) ("Both BLM's analysis and conclusion concerning recreation impacts on Sutey Ranch wildlife violated NEPA.").

The Court's ruling confuses these two arguments. The Court states BLM's failure to analyze impacts from recreation was justified because "the future use of the Sutey Ranch Parcel remains a distant, largely speculative endeavor." Doc. 44 at 17 (stating evaluating such impact "would be premature at this stage").

The Court misapprehends the facts. The record plainly reveals that gaining recreational lands on Sutey Ranch was the goal of the Land Exchange. AR 2993 (touting Sutey Ranch's "high dispersed recreational values."); AR 2969-70 (BLM explaining it "expects the exchange to enhance recreational opportunities for the public with improved access to public lands"). Most notably, the Court's ruling itself acknowledges this undisputed use. In discussing FLPMA's "public interest" requirement for land exchanges, 43 U.S.C. § 1716(a), the Order states: "the BLM's Record of Decision appears to place considerable emphasis on the acquisition of the Sutey Ranch parcel for its <u>recreational</u> characteristics." Doc. 44 at 27 (emphasis in original) (citing AR 2969-70). Using this property for recreation was not "concept[ual]" or "the mere contemplation of certain action." *See* Order at 17. The Court's statement that the "future use of the Sutey Ranch remains a distant, largely speculative endeavor," Order at 17, is simply wrong. Accordingly, BLM was required to analyze recreation's impact as part of the Land Exchange's "indirect effects"—those that "are caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable," 40 C.F.R. § 1508.8(b); *New Mexico v. Bureau of Land Management*, 565 F.3d 683, 718 (10th Cir. 2009) (ruling "assessment of all reasonably foreseeable impacts must occur at earliest practicable point"). BLM did not.

The Court's confusion may stem from Plaintiff's argument that a FONSI for recreation's impact on wildlife could not be based on an undeveloped management plan. Doc. 38 (Pls.' Opening at 23-24); Doc. 43 (Pls.' Reply at 11-12). Colorado Parks and Wildlife warned BLM

that recreation will have significant impacts on Sutey Ranch deer and elk populations. AR604, AR2310. Though BLM indicated its intention to developed a plan to address conflicts between recreation and wildlife, none had been developed at the time of the Land Exchange and, as Plaintiff argued, that future and speculative plan could not support a FONSI. Doc. 38 (Pls.' Opening Br. at 24) ("The forthcoming Sutey Ranch management plan…cannot support BLM's FONSI. That Sutey Ranch plan does not exist. *See Klein*, 747 F.Supp.2d at 1259 (finding FONSI unsupported where "there were no detailed mitigation plans upon which OSM could have relied")). But the lack of a plan had nothing to do with whether BLM violated its duty to evaluate recreation's impact on wildlife. Nor does it mean that recreation was a speculative use of the property.

In sum, the Court misapprehends Plaintiff's two distinct NEPA arguments—one about a missing analysis and one about BLM's FONSI. The Court should reconsider its ruling and conclude that BLM's complete failure to evaluate and disclose the impacts to wildlife from Sutey Ranch recreation violated NEPA and was arbitrary and capricious.

III. <u>The Court Misapprehended NEPA And FLPMA In Permitting BLM To Not Provide For Public Comment On The Appraisals</u>.

The Court agreed that BLM should have allowed for public notice and comment on the appraisals. Order at 21. The Court concluded, however, that BLM can withhold the appraisals—the documents underlying BLM's equal-value determination under FLPMA—because they are economic documents and not environmental ones. *Id*. at 18-19.

Here, the Court misapprehends the law. BLM cannot lawfully trade away public lands in a land exchange absent satisfying FLPMA's equal-value requirement. BLM achieves this FLPMA requirement by developing appraisals for the properties involved. Disposing public lands through an authorized land exchange impacts the human environment and consequently, as

for the Sutey Land Exchange, triggers the NEPA process. Public lands managed by BLM host a multitude of natural resources and values, including those lands proposed in for exchanges. *See* Pub. L. No. 100-409, Section 2(a)(1 (Congress authorized land exchanges "to secure important objectives including the protection of fish and wildlife habitat and aesthetic values..."). On the Sopris Parcel, such resources include a population of a native wildflower known as the Harrington's penstemon, a unique bighorn sheep herd, valuable riparian vegetation along two creeks, and recreational access to Mount Sopris. Because land exchanges impact the human environment and appraisals are a necessary underlying component of a land exchange approval, they are part of the NEPA process that must be made available for the public to review and comment. 40 C.F.R. § 1506.6(f) (requiring agencies to "make…underlying documents available to the public."); *Ctr. for Biological Diversity v. Walsh*, 2021 WL 1193190, at *4 (D. Colo. Mar. 30, 2021) ("The agency must give the public notice of the EA and FONSI (*and underlying documentation*) and solicit information and comment from the public on the documents and proposed action before proceeding to finalize its decision.") (emphasis added).[3] The appraisals,

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[3] In general, economic documents and information are not beyond the scope of NEPA. A NEPA evaluation looks at impacts to the "human environment," 42 U.S.C. § 4332(c), which is defined to include "economic or social effects" that are interrelated with environmental effects, 40 C.F.R. § 1508.14. The regulations also define "effects" to include "economic" effects. *Id.* § § 1508.8. Further, NEPA ensures that agencies "attain the widest range of beneficial uses of the environment without …other undesirable and unintended consequences," 42 U.S.C. § 4331(b)(3), which may be economic consequences. The Supreme Court in *Robertson v. Methow Valley Citizens Council* reviewed a proposed ski resort in a national forest involving an EIS that reviewed the "economic market for skiing and other summer and winter recreational activities in the valley." *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 339 (1989) (further noting EIS looked at "socio-economic" conditions); *id*. at 342 (identifying economic benefits of not permitting ski resort). The Tenth Circuit highlighted economic data contained within an EIS from a report entitled "2008 Energy Outlook," which detailed information about coal production and economic growth. *WildEarth Guardians v. BLM*, 870 F.3d 1222, 1235 (10th Cir. 2017). Thus, economic information related to the NEPA must be disclosed and subjected to public notice and comment.

therefore, do relate to and "implicate environmental concerns that NEPA addresses." *See* Order at 18.

Notably, BLM's NEPA process for the Land Exchange including the appraisals and equal-value requirement. The Environmental Assessment discusses the appraisals and states: "The land included in the exchange proposal have been appraised in accordance with federal regulations and federal appraisal standards." AR 2992. The Environmental Assessment contains a heading called the "Valuation Process for BLM Land Exchanges," in which the agency describes the appraisals, the concepts employed, rules followed, and techniques used. AR 2996-2998. BLM's NEPA document then states that "FLPMA requires the value of exchanged federal and non-federal lands be equal." AR 2996 ("Federal regulations require that the exchange parcels be appraised to determine their fair market value.").[4] BLM's press releases announcing the availability of the draft Environmental Assessment for public comment states "[t]he preliminary EA includes a detailed analysis of the environmental *and economic aspects* of this proposal." AR1943 (emphasis added). The Court misapprehends the facts, as BLM did not exclude issues related the appraisals from its NEPA process. Accordingly, as documents underlying and expressly referenced in the Environmental Assessment, the appraisals should have been made available for public comment.

The Court's conclusion perpetuates an ongoing problem for the public when it comes to land exchanges. As the Court recognized, BLM's "concealing appraisals of the value of lands

[4] Other economic information was also included in BLM's NEPA process for the Land Exchange. For instance, in the section entitled Social and Economic Resources, the Environmental Assessment discusses tax revenues, the economy and revenue sources, and population size and projections. AR 3060-3066. And the idea that only natural resources are part of the human environmental is belied by the Environmental Assessment, which discusses issues such as realty authorizations, transportation, recreation, social and economic resources, Native American religious concerns and environmental justice, AR2985-86.

subject to a proposed exchange…smacks of secrecy" and "contributed to the bringing of this litigation." Order at 20. BLM and the U.S. Forest Service continue to withhold appraisals from the public and avoid public comment on the appraisals for proposed land exchanges, including most recently the Blue Valley Ranch Land Exchange, Valle Seco Land Exchange, and Buffalo Horn Land Exchange. Declaration of Anne W. Rickenbaugh, ¶¶ 5-7. "Because the appraisals are vital to ensuring land exchanges are lawful and fair, it is really important that they be available for public scrutiny." *Id*. ¶ 8. "And since land exchanges are agency decisions about trading away public lands to private parties to use as private lands, it is critical that the public have a voice in such decisions." *Id*. NEPA provides a public check on agencies proposing to trade away public lands available to all Americans. The Court's ruling, however, allows BLM to continue with a tactic that undermines the public's faith in good government.

Because land exchanges have environmental impacts and appraisals are requisite components of approving a land exchange, and since the appraisals for this Land Exchange were included BLM's NEPA process, the Court should hold BLM violated NEPA and require the agency to undertake a notice and comment process for the appraisals.

IV. To Affirm BLM Undervaluing the Sopris Parcel In Its Appraisal, The Court Misstated The Property's Highest and Best Use As Identified By BLM.

The Court's decision recognized that the Sopris Parcel's appraised value depends on the property's "highest and best use"—the FLPMA legal standard, 43 C.F.R. § 2200.0-5(k), that is defined as "the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future." Order at 21 (citing, *Nat'l Parks & Conservation Ass'n v. Bureau of Land Management*, 606 F.3d 10958, 1067 (9th Cir. 2010) and Uniform Appraisal Standards for Federal Land Acquisitions at 22, 102.). The Court found that

BLM determined that the Sopris Parcel's highest and best uses are for "agriculture and grazing land." Order at 23.

Here, the facts were misapprehended. The Court inexplicably omits the third use BLM identified for the Sopris Parcel—"assemblage with adjacent land (Two Shoes Ranch)." AR2717; AR2698 ("agriculture and/or recreation, as well as possible assemblage with adjacent private lands (Two Shoes Ranch is the only logical buyer)"). BLM plainly articulated this use throughout the decisiomaking process and in its administrative record. The appraisal explains why "assemblage" with the Two Shoes Ranch is one of the best future uses. AR2717 ("assemblage of the subject property with the surrounding private land is a viable option" because it "creates a 'land bridge' between the Upper and Lower Two Shoes Ranch," and Wexners "hold exclusive and renewable federal grazing permits on this tract of BLM land" and "control vehicle access to each of the Pitkin BLM Parcels (the Sopris Parcel)."); AR2718 (explaining Wexners are "the most logical buyer" so they "could maintain control over the entire holding in order to enhance [their] privacy and prohibit any development"). The Court erred in stating "the parcel is tagged as supporting *only agricultural use*." Order at 23 (emphasis added). The omission of assemblage with the Two Shoes Ranch is significant—it means the Sopris Parcel is accessible and the basis for devaluing the property's value was arbitrary.

Plaintiff is not arguing now, or in its prior briefing, that BLM should have identified this use, but did not. Nor is Plaintiff merely disagreeing with the uses BLM selected. The Court's reasoning on page 22 of the Opinion, therefore, misses the mark. BLM—not the Plaintiff—determined that the highest and best use of the Sopris Parcel included the unique value it held for the Wexners. To the extent this "assemblage" use restricts potential buyers, that is because BLM selected "assemblage with adjacent private lands (Two Shoes Ranch is the only logical buyer)"

as one of the highest and best uses of the parcel. Consequently, assessing the Sopris Parcel's value based on the perspective of "any hypothetical purchaser," Order at 22, who is buying agriculture and grazing land would contradict BLM's highest and best use determination.

The Court's conclusion misapprehends the facts. It inexplicably ignores the "assemblage" use that BLM decided was a reasonably probable future use. *See Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1184 (9th Cir. 2000) ("The use of the land as a landfill was not only reasonable, it was the specific intent of the exchange that it be used for that purpose."). And because assemblage with the Wexners' ranch includes vehicle access, BLM could not discount the value of the Sopris Parcel based on a purported lack of vehicle access.

V. The Court Misapprehended APA Standards When Upholding BLM's Rejection of Comparable Properties.

Under the APA, if two lawful options are available to an agency, it has the freedom to choose one and that choice should not be second-guessed by a court, even if the court would have chosen a different one. However, judicial deference is appropriate provided the court first finds that the agency's choice was not arbitrary and capricious under the APA. *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983) (courts sustain agency action if it has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.").

The Court misapplied the arbitrary and capricious standard when adjudicating the Sopris Parcel appraisal and its omission of certain comparable sales. Had BLM explained and supported its reasons for finding that the Wexners' acquisition of related parcels—each with a significantly higher per acre sale price—were not comparable, judicial deference could have followed. But the Court jumped to deference, noting "this Court is reluctant to second-guess the appraiser's decisions or substitute the Court's opinion for the BLM's expertise in this area."

Order at 25. Plaintiff never asked that the Court second guess the agency, but instead inquire, as the APA mandates, whether BLM explained and supported with evidence its refusal to include the Wexners' acquisition of the Two Shoes Ranch (two separate purchases), Sutey Ranch (two separate acquisitions), and the West Crown parcel as comparable sales in the Sopris Parcel appraisal.[5] Each was purchased by the Wexners for the same goal—to create a sprawling private ranch on the slopes of Mount Sopris.

The Court misapprehended the APA by not assessing whether BLM explained its reasons for omitting these Wexners' purchases. Presumably, that is because BLM and the appraisal were silent as to why these related properties were omitted. In this scenario, it is not the Court's role to offer possible reasons that the agency failed to consider these properties. *See* Order at 25.[6] BLM's failure to explain and support the exclusion of these acquisitions from the Sopris Parcel appraisal was arbitrary and capricious.

VI. <u>The Court Misapprehended the Plain Text in 43 U.S.C. § 1716(a)</u>.

FLPMA explicitly requires BLM to evaluate whether the Land Exchange is in the public interest. As the Court notes, "43 U.S.C. § 1716(a) authorizes federal agencies to swap tracts of federal land for those is private hands if 'the public interest will be well served by making that exchange.'" Order at 26. The plain language of this statutory provision limits the public interest evaluation to the lands involved in the land exchange. 43 U.S.C. § 1716(a). This provision

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[5] The Court appears to have understood Plaintiff's position—"Colorado Wild argues that the administrative record offers no meaningful explanation as to why these sale prices [from the Wexners' acquisitions] were not factored into the appraisal of the Sopris Parcel." Order at 24. It also finds the Wexners' five purchasers were not included in the appraisal for the Sopris Parcel and the appraiser chose six other transactions as comparable sales. Order at 24.

[6] As a possible reason for why the other Wexner acquisitions were ignored, the Court offered that the Sopris Parcel lacked access. Order at 25. But that is not the reason BLM identified; it articulated no reasons. Furthermore, the access excuse assumes falsely, as discussed above, that assemblage with the Two Shoes Ranch was not a highest and best use.

requires BLM to compare "the values of the non-Federal lands" to "values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership." *Id*. Nothing in the text suggests that other lands or other benefits can be considered in a public interest determination. Although the Court rationalizes that limiting the public interest determination to the swapped lands "is unnecessary" and "would be foolish," Order at 28, 29, the plain language of section 1716(a) does not support going beyond the exchanged lands.

As the Court notes, BLM must comply with two distinct FLPMA obligations before approving a land exchange. Order at 29. If the Wexners had to donate part of Sutey Ranch to satisfy FLPMA's equal-value requirement, then that change to Sutey Ranch's configuration is what 43 U.S.C. § 1716(a) requires to be analyzed for the purpose of the public interest determination. Conversely, if the whole of Sutey Ranch is needed to comply with FLPMA's public interest requirement, then BLM would have to reject the Land Exchange due to noncompliance with the equal-value mandate. In short, these duties require BLM to evaluate the same land exchange—not one crafted to satisfy one obligation and another land exchange to meet a separate FLPMA mandate. BLM cannot manipulate the properties involved to achieve its desired outcome—that is not what the law allows. The Court misapprehended the legal requirements of FLPMA.

Respectfully submitted, dated April 22, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2021 I electronically transmitted Plaintiff's Motion for Reconsideration under Rule 59(e) to the Clerk's Office using the CM/ECF System for filing and service on all registered counsel.

/s/ Neil Levine
Neil Levine