

James Kaste, WSB No. 6-3244  
Deputy Attorney General  
Travis Jordan, WSB No. 7-5721  
Senior Assistant Attorney General  
Wyoming Attorney General's Office  
109 State Capitol  
Cheyenne, WY 82002  
(307) 777-6946 (phone)  
(307) 777-3542 (fax)  
james.kaste@wyo.gov  
travis.jordan@wyo.gov

*Counsel for Appellant State of Wyoming*

**UNITED STATES DEPARTMENT OF THE INTERIOR  
OFFICE OF HEARINGS AND APPEALS  
BOARD OF LAND APPEALS**

State of Wyoming,

Appellant,

v.

Bureau of Land Management,

Respondent.

IBLA-2022-0218

Appeal of the Decision Record for the  
Marton Ranch LWCF Land  
Acquisition, DOI-BLM-WY-P060-  
2022-0057-EA, Natrona and Carbon  
Counties, Wyoming

---

**STATEMENT OF REASONS**

---

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iv
ATTACHMENT INDEX.....	ix
EXHIBIT INDEX.....	x
INTRODUCTION .....	1
STATEMENT OF STANDING .....	2
LEGAL BACKGROUND .....	3
I.    Land and Water Conservation Fund Act .....	3
II.   Federal Land Policy Management Act .....	4
III.  National Environmental Policy Act.....	4
A.    Direct, Indirect, and Cumulative Effects .....	5
B.    Consultation and Public Involvement.....	6
FACTUAL BACKGROUND.....	6
I.    Marton Ranch Property.....	6
II.   The Decision .....	9
A.    The EA .....	9
B.    The FONSI and Decision Record .....	10
STANDARD OF REVIEW .....	11
ARGUMENT.....	11
I.    The Decision violated the LWCF Act .....	11
II.   The Decision violated NEPA.....	15
A.    The Bureau did not consider the impacts of the Marton Ranch acquisition on the recreational setting of the North Platte River SRMA .....	16

1.	The recreational setting of the North Platte River is a substantial environmental question of material significance .....	16
2.	The Bureau did not consider the direct impact of the Marton Ranch acquisition on the recreational setting of the North Platte River.....	17
B.	The Bureau did not consider any indirect impacts.....	18
1.	The Bureau did not take a hard look at the indirect impact of the Marton Ranch acquisition on the North Platte fishery.....	19
2.	The Bureau did not take a hard look at the indirect impact of the Marton Ranch acquisition on AIS.....	21
C.	The Bureau’s cumulative impact analysis was arbitrary and capricious .....	23
D.	The Bureau violated NEPA when it did not involve the State, local governments, and the public in its decision-making process.....	25
1.	The Bureau did not consult interested State or local governments.....	25
2.	The Bureau violated NEPA by not soliciting public comment .....	28
REMEDY .....		30
CONCLUSION.....		30

**TABLE OF AUTHORITIES**

**Cases**

*Baldwin v. Fish & Game Comm’n of Mont.*,  
436 U.S. 371 (1978) ..... 3

*Bear River Dev. Corp.*,  
157 IBLA 37 (2002)..... 13

*Cascadia Wildlands v. BLM*,  
410 F. Supp. 3d 1146 (D. Or. 2019)..... 17, 18

*Citizens for Better Forestry v. U.S. Dep’t of Agric.*,  
341 F.3d 961 (9th Cir. 2003)..... 25, 26, 27

*Colo. Wild Pub. Lands Inc.*,  
189 IBLA 392 (2017)..... 4, 15

*Confederated Tribes & Bands of Yakama Nation v. Yakima Cnty.*,  
963 F.3d 982 (9th Cir. 2020)..... 12

*Crooks v. Harrelson*,  
282 U.S. 55 (1930) ..... 12

*Decision on Review in Michael Gold*,  
115 IBLA 218 (1991)..... 30

*Devon Energy Prod. Co., L.P. v. Gould*,  
421 F. Supp. 3d 1213 (D. Wyo. 2019)..... 13

*Douglas Cnty. v. Babbitt*,  
48 F.3d 1495 (9th Cir. 1995)..... 3

*Earth Power Res. Inc.*,  
181 IBLA 94 (2011)..... 5, 14, 18

*Enterprise Field Serv., LLC*,  
193 IBLA 313 (2018)..... 13

*Eureka Cnty., Nevada*,  
193 IBLA 193 (2018)..... 26

<i>Forest Guardians v. Babbitt</i> , 174 F.3d 1178 (10th Cir. 1999).....	12
<i>Friends of Nestucca Coast Range Ass’n</i> , 144 IBLA 341 (1998).....	6
<i>Great Basin Res. Watch v. BLM</i> , 844 F.3d 1095 (9th Cir. 2016).....	24
<i>High Country Conservation Advocs. v. U.S. Forest Serv.</i> , 951 F.3d 1217 (10th Cir. 2020).....	5
<i>Idaho ex rel. Kempthorne v. U.S. Forest Serv.</i> , 142 F. Supp. 2d 1248 (D. Idaho 2001) .....	28
<i>James Shaw</i> , 130 IBLA 105 (1994).....	19
<i>John J. Trautner</i> , 197 IBLA 250 (2021).....	12
<i>Klamath-Siskiyou Wildlands Ctr.</i> , 153 IBLA 110 (2000).....	28, 29
<i>Lois J. Armstrong</i> , 130 IBLA 228 (1994).....	13, 14
<i>Lynn Canal Conservation, Inc.</i> , 169 IBLA 1 (2006).....	25, 27, 30
<i>Mark Patrick Heath</i> , 181 IBLA 114 (2011).....	11
<i>Middle Rio Grande Conservancy Dist. v. Norton</i> , 294 F.3d 1220 (10th Cir. 2002).....	14
<i>Mont. Wilderness Ass’n v. Fry</i> , 310 F. Supp. 2d 1127 (D. Mont. 2004) .....	25, 30
<i>Nat’l Parks &amp; Conservation Ass’n v. FAA</i> , 998 F.2d 1523 (10th Cir. 1993).....	17, 23, 24
<i>Nat’l Wildlife Fed.</i> , 129 IBLA 124 (1994).....	2

<i>New Mexico ex rel. Richardson v. BLM,</i> 565 F.3d 683 (10th Cir. 2009).....	25
<i>O'Brien v. Wyoming,</i> 711 P.2d 1144 (Wyo. 1986) .....	3
<i>Or. Nat. Desert Ass'n v. Rose,</i> 921 F.3d 1185 (9th Cir. 2019).....	24
<i>Or. Nat. Res. Council Fund v. Goodman,</i> 505 F.3d 884 (9th Cir. 2007).....	5
<i>Orion Energy LLC,</i> 175 IBLA 81 (2008).....	19, 21, 22
<i>Owyee Cnty., Idaho,</i> 179 IBLA 18 (2010).....	12
<i>Predator Project,</i> 127 IBLA 50 (1993).....	2
<i>Rick Badgley,</i> 186 IBLA 253 (2015).....	13
<i>Robertson v. Methow Valley Citizens Council,</i> 490 U.S. 332 (1989) .....	6, 25
<i>S. Utah Wilderness All.,</i> 122 IBLA 334 (1992).....	28
<i>S. Utah Wilderness All.,</i> 161 IBLA 15 (2004).....	5
<i>S. Utah. Wilderness All.,</i> 194 IBLA 333 (2019).....	30
<i>San Juan Citizens All.,</i> 193 IBLA 51 (2018).....	3
<i>Sierra Club v. Bosworth,</i> 352 F. Supp. 2d 909 (D. Minn. 2005) .....	18
<i>Soda Mountain Wilderness Council v. Norton,</i> 424 F. Supp. 2d 1241 (E.D. Cal. 2006).....	22

<i>State of Alaska,</i> 78 IBLA 390 (1984).....	3
<i>The Wilderness Workshop,</i> 175 IBLA 124 (2008).....	25, 28
<i>United States v. Monsanto,</i> 491 U.S. 600 (1989).....	12
<i>W. Indus. Materials,</i> 182 IBLA 11 (2012).....	4
<i>W. Watersheds Project,</i> 191 IBLA 351 (2017).....	6
<i>Wild Wilderness v. Allen,</i> 12 F. Supp. 3d 1309 (D. Or. 2014).....	18
<i>WildEarth Guardians,</i> 196 IBLA 1 (2020).....	22
<i>Wildlands Def.,</i> 188 IBLA 68 (2016).....	15, 16
<i>Wroncy v. BLM,</i> 777 F. Supp. 1546 (D. Or. 1991).....	25
<i>Yates Petroleum Corp.,</i> 163 IBLA 300 (2004).....	14
<b>Statutes</b>	
5 U.S.C. § 552 (2006).....	14
43 U.S.C. § 1715.....	4, 16
54 U.S.C. § 200306.....	4, 11, 12, 30
John D. Dingell, Jr. Conservation, Management, and Recreation Act, Pub. L. 116-9, § 3001(d), 133 Stat. 580, 755 (2019) .....	4, 11
Land & Water Conservation Fund Act of 1965, Pub. L. 88-578, § 1(b), 78 Stat. 897 (1964) .....	3

Wyo. Stat. Ann. § 36-1-104 ..... 3

**Regulations**

40 C.F.R. § 1501.5 ..... 5, 6, 26

40 C.F.R. § 1501.6 ..... 6, 29, 30

40 C.F.R. § 1506.6 ..... 28

40 C.F.R. § 1508.1 ..... 5, 6, 21

43 C.F.R. § 4.24 ..... 14

43 C.F.R. § 4.410 ..... 2

43 C.F.R. § 4.411 ..... 2

43 C.F.R. § 4.412 ..... 1

43 C.F.R. § 46.155 ..... 26

43 C.F.R. § 46.420 ..... 16

43 C.F.R. Part 2100 [Reserved] ..... 4

**Other Authorities**

Bureau of Land Management Acquisition Handbook H-2100-1 (2002) ..... 4

Wyo. Const. art. 18, §§ 1, 3 ..... 3



**ATTACHMENT INDEX**

Affidavit of Jason Crowder, Wyoming Office of State Lands and Investment (Crowder Aff.)..... 1

Affidavit of Alan Osterland, Wyoming Game and Fish Department (Osterland Aff.) ..... 2

Affidavit of Willing “John” Johnson, on behalf of the Carbon County, Wyoming Board of County Commissioners (Carbon, Cnty. Aff.) ..... 3

Affidavit of Paul Bertoglio, on behalf of the Natrona County, Wyoming Board of Commissioners (Natrona Cnty. Aff.)..... 4

**EXHIBIT INDEX**

Bureau’s Marton Ranch Press Release ..... A

Bureau’s Marton Ranch Public Decision Documents .....B

Wyoming Game and Fish Department 2020 Progress Report (excerpts)/Umbrella  
Memorandum of Understanding .....C

Bureau’s Marton Ranch Undertaking Report submitted to the Wyoming State Historic  
Preservation Office ..... D

Bureau’s Casper Resource Management Plan 2020 Amendment (excerpts) .....E

Bureau’s Rim Rock 2017 Environmental Assessment (excerpts) ..... F

Bureau’s Land and Reality NEPA Documents (excerpts) ..... G

Government Accountability Office (GAO) Land and Water Conservation Fund Report  
(excerpts)..... H

Pursuant to 43 C.F.R. § 4.412, the State of Wyoming files this Statement of Reasons and Statement of Standing regarding the Bureau of Land Management's acquisition of the Marton Ranch in central Wyoming.

## **INTRODUCTION**

The Bureau's purchase of the Marton Ranch was the largest federal land acquisition by the Bureau in Wyoming history. (Ex. A at 1). But the Bureau's Decision was flawed. The Bureau did not consider the statutory criteria for federal land acquisitions that Congress recently adopted in the Land and Water Conservation Fund (LWCF) Act. The Bureau also did not consider the direct, indirect, and cumulative impacts that the Marton Ranch acquisition will have on the recreational setting of the North Platte River and its fishery. In sum, the Bureau violated the National Environmental Policy Act when its environmental analysis stopped at the water's edge.

Although the Bureau claims that it acted in the public interest, it prepared the Decision clandestinely. The decision-making process violated NEPA because it did not consult interested State agencies, local governments, or solicit public comment. Had the Bureau engaged stakeholders in the Decision, it would have received valuable information about the potential impacts that the acquisition will have on the North Platte River.

Wyoming enthusiastically supports and often serves as a partner in the Bureau's efforts to improve access to public lands. But decisions that use public money to acquire federal land for public purposes must involve the public, States, and local governments. For the following reasons, Wyoming respectfully requests that this Board remand the Decision so the Bureau can remedy the deficiencies in its analysis and decision-making process.

## STATEMENT OF STANDING

The Bureau issued the Decision on May 18, 2022. (Ex. B at 1, 33). Wyoming filed a timely appeal on June 17, 2022. *See* 43 C.F.R. § 4.411(a)(2)(i). To maintain an appeal before the Board, an appellant must: (1) be a party to the case; and (2) be adversely affected by the appealed decision. 43 C.F.R. § 4.410(a); *see also Nat'l Wildlife Fed.*, 129 IBLA 124, 125 (1994).

A party to a case “is one who has taken action that is the subject of the decision on appeal, is the object of that decision, or has otherwise participated in the process leading to the decision under appeal[.]” 43 C.F.R. § 4.410(b). The State of Wyoming is a party to this case because it is an object of the decision. (Ex. B at 3, 7, 31-32). For example, the Marton Ranch occupied land within the State of Wyoming, the State manages approximately 8,000 acres of State lands intermingled within the Decision area, and the Marton Ranch contains wildlife and water resources managed by the State. (Ex. B. at 3, 7, 21); (Crowder Aff. at ¶4); (Osterland Aff. at ¶44). Moreover, Wyoming has standing because it should have been consulted and the Bureau did not provide any meaningful opportunity for comment on the proposed action. (*See* Arg. Section II.D); (Ex. B. at 3, 31-32). Under similar circumstances, this Board has found that the appellant was a “party to a case” as described in 43 C.F.R. § 4.10(a). *See Predator Project*, 127 IBLA 50, 53 (1993).

A party to a case is adversely affected when that party has a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest. 43 C.F.R. § 4.410(d). Wyoming has legally cognizable interests that are adversely affected by the Decision. Specifically, the Marton Ranch acquisition adversely impacts Wyoming’s interest in managing wildlife. (Osterland Aff. at ¶¶35-37, 41, 44). The Marton Ranch property includes game fish species and large game animals managed by the Wyoming Game and Fish Department (Department). (Ex. B at 7, 9) (Osterland Aff. at ¶44). Wyoming exercises its sovereign duty to

manage the wildlife resources within the Marton Ranch “for the common benefit of all its people.” *O’Brien v. Wyoming*, 711 P.2d 1144, 1149 (Wyo. 1986).

The Decision also directly impacts Wyoming’s property interests within the Decision area. *See, e.g., State of Alaska*, 78 IBLA 390, 393 (1984) (finding the State of Alaska’s property interest in the Bureau’s decision was sufficient to establish standing). Specifically, Wyoming has a constitutional and statutory duty to manage its State Lands as a trust asset to support public schools and other designated beneficiaries. *See* Wyo. Const. art. 18, §§ 1, 3; Wyo. Stat. Ann. § 36-1-104; (Crowder Aff. at ¶3). The Decision provides access to several sections of State Land that previously did not exist which will require additional enforcement. (*See* Crowder Aff. at ¶8).

This Board may look to Federal court cases for guidance in interpreting its regulations, including its regulation on standing. *San Juan Citizens All.*, 193 IBLA 51, 56 (2018). Federal courts recognize that interests in wildlife management and State lands are legally cognizable interests sufficient to establish Wyoming’s standing to challenge the Decision. *See Douglas Cnty. v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995) (presence of State lands are “concrete interests”); *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 390 (1978) (a state’s regulatory interest over wildlife living within its borders is a legally protected interest). In particular, the Bureau’s failure to consider impacts to the fishery adjoining the Marton Ranch will impair Wyoming’s ability to meet its management goals and preserve recreational opportunities for the public. (Osterland Aff. at ¶¶37-38, 41)

## LEGAL BACKGROUND

### I. Land and Water Conservation Fund Act

Congress enacted the LWCF Act in 1964 to help preserve, develop, and ensure access to outdoor recreation resources. *See* Land & Water Conservation Fund Act of 1965, Pub. L. 88-578,

§ 1(b), 78 Stat. 897 (1964). The LWCF Act provided funds for federal land acquisition to promote hunting, fishing, recreational shooting, and other recreational purposes. 54 U.S.C. § 200306(c).

In 2019, Congress amended the LWCF Act and enacted common criteria that federal agencies must take into account when considering which lands to acquire. 54 U.S.C. § 200306(d); John D. Dingell, Jr. Conservation, Management, and Recreation Act, Pub. L. 116-9, § 3001(d), 133 Stat. 580, 755 (2019). When considering land for acquisition under LWCF, the Secretaries of Interior and Agriculture shall take into account: “(1) the significance of the acquisition; (2) the urgency of the acquisition; (3) management efficiencies; (4) management cost savings; (5) geographic distribution; (6) threats to the integrity of the land; and (7) the recreational value of the land.” 54 U.S.C. § 200306(d).

## **II. Federal Land Policy Management Act**

Notwithstanding any other provision of law, the Federal Land Policy Management Act (FLPMA) of 1976, authorizes the Secretary of Interior to acquire public lands. 43 U.S.C. § 1715(a). Any land acquisition under FLPMA “shall be consistent with the mission of the department involved and with applicable departmental land-use plans.” *Id.* at § 1715(b). The Secretary of Interior has not promulgated regulations regarding the acquisition of federal land under FLPMA. *See* 43 C.F.R. Part 2100 [Reserved]. Instead, the Secretary of Interior relies on land acquisition guidance in the Bureau handbook. *See, e.g., W. Indus. Materials*, 182 IBLA 11, 13 n.5 (2012); *Colo. Wild Pub. Lands Inc.*, 189 IBLA 392, 408 (2017); *see also* Bureau of Land Management Acquisition Handbook H-2100-1 (2002).

## **III. National Environmental Policy Act**

“NEPA creates a set of action-forcing procedures that require that agencies take a hard look at environmental consequences, and that provide for broad dissemination of relevant

environmental information.” *High Country Conservation Advocs. v. U.S. Forest Serv.*, 951 F.3d 1217, 1223 (10th Cir. 2020) (citation and internal quotation marks omitted). Agencies shall prepare an environmental assessment (EA) for a proposed action that is not likely to have significant effects on the environment. 40 C.F.R. § 1501.5(a). The EA shall “provide sufficient evidence and analysis” and briefly discuss “the environmental impacts of the proposed action.” *Id.* at § 1501.5(c)(1)-(2).

**A. Direct, Indirect, and Cumulative Effects**

In an EA, the environmental impacts include the direct, indirect, and cumulative effects of the federal action. *See* 40 C.F.R. § 1508.1(g)(1)-(4). The “direct effects” of a federal action “are caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.1(g)(1). An agency’s “general references” to an impact in an EA do not constitute “reasoned, well-supported analysis.” *Earth Power Res. Inc.*, 181 IBLA 94, 110 (2011); *see also Or. Nat. Res. Council Fund v. Goodman*, 505 F.3d 884, 893 (9th Cir. 2007) (finding “generalized, conclusory assertions from agency experts are not sufficient” to address the impact of a project). NEPA is satisfied when an EA contains a “reasonably thorough discussion of ... significant aspects of the probable environmental consequences[.]” *S. Utah Wilderness All.*, 161 IBLA 15, 19 (2004) (citation omitted).

Indirect effects “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.1(g)(2). Indirect effects “may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems[.]” *Id.* An indirect effect is “reasonably foreseeable” if it is “sufficiently likely to occur such that a person of ordinary prudence would take into account in reaching a decision.” 40 C.F.R. § 1508.1(aa).

Cumulative impacts “are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non–Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.1(g)(3). This Board recognizes that “to ‘consider’ cumulative effects, some quantified or detailed information is required.” *Friends of Nestucca Coast Range Ass’n*, 144 IBLA 341, 358 (1998) (citation omitted). In reviewing the adequacy of the cumulative impact analysis in an EA, “an appellant must show a deficiency in [the Bureau’s] cumulative effects analysis[.]” *W. Watersheds Project*, 191 IBLA 351, 366-67 (2017).

## **B. Consultation and Public Involvement**

NEPA “prohibits uninformed—rather than unwise—agency action.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). Thus, agencies “shall involve the public, State, Tribal, and local governments, relevant agencies, and any applicants, to the extent practicable in preparing environmental assessments.” 40 C.F.R. § 1501.5(e). Agencies shall also “include a listing of agencies and persons consulted” in the EA. 40 C.F.R. § 1501.5(c)(2). If the agency determines that a proposed action in an EA will not have a significant effect on the environment, the agency shall issue a finding of no significant impact (FONSI). 40 C.F.R. § 1501.6(a). When the nature of the proposed action is one without precedent, the agency shall make the FONSI available for public review thirty days before the agency action occurs. 40 C.F.R. § 1501.6(a)(2)(ii).

## **FACTUAL BACKGROUND**

### **I. Marton Ranch Property**

The Marton Ranch was a 35,669.52 acre private ranch located in central Wyoming. (*See* Ex. B at 3). It included 33,470.93 acres of private land in Natrona County, Wyoming and 2,198.59



acres of private land in Carbon County, Wyoming. (*Id.*) The area was historically used for grazing cattle and sheep, ranching, hunting, oil and gas development, and recreation subject to landowner permission. (*Id.* at 10). The Marton Ranch property included eight miles of North Platte River frontage. (*Id.* at 3).

The Bureau concluded that the Marton Ranch was not under consideration for residential development, but the land across from it on the North Platte River has experienced substantial developments of tourist housing for those recreating on the North Platte River. (*Id.* at 10.) The North Platte River is the only floatable waterway in central Wyoming. (*Id.* at 7). The Bureau recognizes that the Marton Ranch was within the Bureau's North Platte River Special Recreation Management Area (SRMA). (*Id.* at 10). The Bureau has objective criteria in the Casper Resource Management Plan (RMP) for managing the recreational setting of the North Platte River SRMA including prescribed social contacts and group sizes. (Ex. E at 7-8, 11). In addition to fishing opportunities, the Marton Ranch property provided habitat for sage-grouse, various migratory birds, mule deer, pronghorn, and elk. (Ex. B at 7-9).

The Department rates the North Platte River adjoining the Marton Ranch as a blue-ribbon fishery and the North Platte River provides opportunities for anglers to pursue rainbow, brown, and cutthroat trout. (*Id.* at 7). The Marton Ranch adjoined and provided access to the 13.1-mile Gray Reef fishery between Gray Reef and Government Bridge. (Osterland Aff. at ¶4); (Ex. C at 14). The Gray Reef fishery is one of the nation's premier trout fisheries. (Osterland Aff. at ¶4). The Gray Reef fishery attracts anglers from across the country. (*See id.* at ¶¶17-18). Over the past decade, the Department has documented growing angler pressure and watercraft use on this section of the North Platte River. (*Id.* at ¶¶12, 14, 16); (Ex. C at 24-26). The Department expects that significant angling pressure on the Gray Reef fishery will continue for the foreseeable future

because it is a destination fishery and remains economically viable for commercial guiding. (Osterland Aff. at ¶18); (Ex. C at 19).

The Department regularly surveys fish populations and has documented that trout populations remain below the Department's management objectives. (Osterland Aff. at ¶¶7, 10). The Department is particularly concerned with the persistence of elderly fish in the population and lack of natural rejuvenation of the fishery. (*Id.* at ¶8); (Ex. C at 8). It has also observed and received reports of increased hooking injuries in Gray Reef fish resulting from multiple catches which studies show can depress fish growth, reproduction, and recruitment. (Osterland Aff. at ¶¶11-12); (Ex. C at 14).

The Bureau recognizes that the Decision could increase public use of the North Platte River. (Ex. B at 11). Previously, the Marton Ranch portion of the Gray Reef fishery provided relative relief for trout from angling pressure because access was limited to those with landowner permission. (Osterland Aff. at ¶¶30-33). The Decision will provide anglers with access to nearly the entire eastern and southern portion of the Gray Reef fishery and provide fewer areas for trout to find relief from angling pressure. (*Id.* at ¶34). The Department is concerned that increased public use and angling pressure from both sides of the Gray Reef fishery will have added impacts on the trout population, aging fish demographics, and presence of hooking injuries. (*Id.* at ¶36); (Ex. C at 13-14).

The North Platte River is a destination fishery that attracts anglers from multiple states. (Ex. B at 7); (Osterland Aff. at ¶¶17, 40). The Department regulates watercraft entering Wyoming to avoid the introduction of aquatic invasive species (AIS) including the zebra and quagga mussels. (Osterland Aff. at ¶¶20-22). AIS can have a devastating impact on both water quality and a fishery. (*Id.* at ¶¶20, 27-28). Infested watercraft and even personal fishing equipment (such as waders) can

introduce AIS into a waterway. (*Id.* at ¶21). Zebra and quagga mussels are not currently found in the North Platte River, but the expected increased public use associated with the Decision will increase the threat that AIS are introduced into the Gray Reef fishery. (*Id.* at ¶¶26, 40).

## **II. The Decision**

The Decision to acquire the Marton Ranch property consisted of an EA, FONSI, and Decision Record. (*See* Ex. B at 1-33). The Bureau released its FONSI and Decision Record on May, 23, 2022, but did not release its EA until June 6, 2022. The Bureau publically announced of the Marton Ranch acquisition on June 2, 2022. (Ex. A at 1-2).

### **A. The EA**

The Bureau’s purpose for acquiring the Marton Ranch was “to enhance and facilitate public recreation opportunities.” (Ex. B at 3). The Bureau’s proposed action was to acquire the Marton Ranch in partnership with The Conservation Fund to provide access to eight miles of North Platte River frontage. (*Id.* at 4). The thirteen-page EA explained that the Bureau would acquire the private land using LWCF funding for the benefit of the public. (*Id.*).

The Bureau performed an internal scoping process and conducted a field visit to the project area in September 2021. (*Id.* at 3). It identified the land use planning objectives in the Casper RMP and Rawlins RMP that it believed supported the Decision. (*Id.* at 4-5). The Bureau did not list its Casper RMP objective for preserving the recreational setting of the North Platte River SRMA. (*See id.*).

The Bureau briefly considered the impact of the Decision on recreation, special status species, and terrestrial wildlife. (*See id.* at 10-14). The single-paragraph analysis on the direct impacts of the Decision on recreation focused on the eight miles of North Platte River access that came with the acquisition. (*Id.* at 11). The Bureau concluded in a single sentence that the “direct

impacts could be an increase of public usage of the area for recreation along the river.” (*Id.*). The Bureau did not consider any impacts on the recreational setting of the North Platte River. (*Id.*). It also did not consider any indirect recreational impacts in the EA. (*Id.*). The three-sentence cumulative impact analysis concluded that the Decision could “spread out” recreational use and “relieve all forms of recreation pressures in and around the SRMA[.]” (*Id.*). The Bureau did not cite any data in the EA to support its cumulative impact analysis. (*See id.*).

In the EA, the Bureau focused on big game populations and sensitive species, but did not include any consideration of the North Platte River fishery. (*See* Ex. B at 9). It concluded that the Decision’s impact to wildlife “are expected to be negligible.” (*Id.* at 13). The Bureau did not propose the adoption of any mitigation measures. (*See id.* at 11-14).

The Bureau did not consider any impacts to livestock grazing, socio-economic impacts, surface water, or invasive/non-native species because the Bureau concluded that the “resources are either not present or not impacted by the project[.]” (Ex. B at 6). The only agencies, organizations, or individuals contacted during the process was the Wyoming State Historic Preservation Officer (SHPO). (*Id.* at 14); (*See also* Ex. D. at 1-4).

## **B. The FONSI and Decision Record**

In the FONSI, the Bureau adopted the proposed action to acquire the Marton Ranch and concluded that the Decision “will not have significant environmental impacts” beyond those already addressed in applicable land use plans. (Ex. B at 27). In the three-page Decision Record, the Bureau explained that the acquisition was consistent with the “decisions, goals, and objectives” of the Casper and Rawlins RMPs. (*Id.* at 31). No public comment was solicited on the Decision. (*Id.* at 31-32). The Bureau reiterated that it consulted with SHPO but that “[n]o other agencies, groups, or individuals were contacted in the development of this project.” (*Id.*).

## STANDARD OF REVIEW

“The burden is upon an appellant to demonstrate, by a preponderance of the evidence, that the Bureau committed a material error in its factual analysis or that the decision generally is not supported by a record showing that [the Bureau] gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made.” *Mark Patrick Heath*, 181 IBLA 114, 125 (2011).

## ARGUMENT

### I. The Decision violated the LWCF Act.

The Decision violated the LWCF Act because it did not explain how the Marton Ranch purchase met the statutory criteria that the Bureau was required to consider when making a land acquisition. In 2019, Congress amended the LWCF Act with the following language:

(d) Acquisition considerations. In determining whether to acquire land (or an interest in land) under this section, the Secretary [of Interior] and the Secretary of Agriculture **shall take into account**—

- (1) the significance of the acquisition;
- (2) the urgency of the acquisition;
- (3) management efficiencies;
- (4) management cost savings;
- (5) geographic distribution;
- (6) threats to the integrity of the land; **and**
- (7) the recreational value of the land.

54 U.S.C. § 200306(d) (emphasis added); *see also* Pub. L. 116-9, § 3001(d), 133 Stat. 580, 755 (2019).

Section 200306(d) unambiguously requires the Bureau to consider certain factors when acquiring land with LWCF funding. When interpreting a statute, this Board begins “with the plain language” of the statute and asks whether the language “‘provides a clear answer’ to the question at hand.” *John J. Trautner*, 197 IBLA 250, 256 (2021) (citations omitted). Here, the plain language

of Section 200306(d) makes clear that the Bureau must consider each of the seven statutory factors in its land acquisition process.

In the pertinent statutory language, Congress used the words “shall take into account.” 54 U.S.C. § 200306(d). When Congress uses “shall” it imposes a mandatory duty on the subject of the command. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) (citing *United States v. Monsanto*, 491 U.S. 600, 607 (1989)) (“The Supreme Court and [the Tenth Circuit] have made clear that when a statute uses the word ‘shall,’ Congress has imposed a mandatory duty upon the subject of the command.”). Without question, the Bureau had a mandatory obligation to take into account the acquisition considerations in Section 200306(d).

Congress also used the word “and” to connect the seven factors considered when determining whether to acquire land. *See* 54 U.S.C. § 200306(d). When Congress uses “and” to connect concepts, the statute is interpreted as requiring consideration of each concept. *See, e.g., Crooks v. Harrelson*, 282 U.S. 55, 59 (1930). In other words, the use of the word “and” in a list is interpreted conjunctively expressing the idea that the concepts are taken together. *Id.*; *see also Confederated Tribes & Bands of Yakama Nation v. Yakima Cnty.*, 963 F.3d 982, 990 (9th Cir. 2020) (“The most common meaning of the word ‘and’ is as a conjunction expressing the idea that the two concepts are to be taken ‘together.’”) (citation omitted). Thus, the Bureau was required to consider each of the seven factors listed in Section 200306(d) when it made the Decision.

This Board recognizes that noncompliance with a statutory mandate violates the law. *See Owyee Cnty., Idaho*, 179 IBLA 18, 27 (2010) (“[N]oncompliance with a [statutory] mandate ‘is fatal to any proceeding to execute the statute[.]’”) (citation omitted). Although the Bureau may have broad statutory authority to acquire lands, this Board will not affirm a decision when the

Bureau's record does not "reasonably anal[alyze] all pertinent factors, with due regard for the public interest." *Bear River Dev. Corp.*, 157 IBLA 37, 73 (2002).

Here, the Decision did not consider five of the required statutory criteria in Section 200306(d): the significance, urgency, management efficiency, and management cost savings of the Marton Ranch acquisition, and threats to the integrity of the land associated with the acquisition. (*See Ex. B at 1-33*). The Bureau only made fleeting references in the Decision to the geographic distribution and recreational value of the land acquired. (*See Ex. B at 12*) (discussing "blocking up" land); (*See Ex. B at 7*) (discussing benefits associated with providing additional North Platte River access). The Bureau violated the statutory mandate in Section 200306(d) when it did not consider five statutory criteria for acquiring land.

The Bureau's lack of an explanation for how the Marton Ranch acquisition met the criteria in Section 200306(d) was also arbitrary and capricious. *See Lois J. Armstrong*, 130 IBLA 228, 233 (1994) (finding agency decision was arbitrary and capricious because it failed to consider relevant legal factors). The Bureau "must provide a reasonable explanation for its conclusions that is supported by record evidence." *Enterprise Field Serv., LLC*, 193 IBLA 313, 328 (2018); *see also Rick Badgley*, 186 IBLA 253, 256 (2015) (finding a Bureau decision to acquire private lands "must be supported by a rational and defensible basis which is set forth in the decision, or it will be found to be arbitrary and capricious.") (citations omitted). When an agency does not state any reasons to support a decision, its decision is arbitrary and capricious for failure to "articulate a satisfactory explanation[.]" *Devon Energy Prod. Co., L.P. v. Gould*, 421 F. Supp. 3d 1213, 1221 (D. Wyo. 2019) (citation omitted).

In the Decision, the Bureau makes no reference to the urgency of the Marton Ranch acquisition. (*See Ex. B at 1-33*). Similarly, the Bureau does not explain how management

efficiencies or cost savings were considered in the acquisition process. (*Id.*). The Bureau also does not explain how the Marton Ranch acquisition was necessary to address threats to the integrity of the land. (*Id.*). The statutory factors in the LWCF Act directly invoke Wyoming’s interests because State agencies and local governments will assist in the management of the resources on the Marton Ranch and will provide essential public services including law enforcement. (Osterland Aff. at ¶44); (Carbon, Cnty. Aff. at ¶¶7, 23).

The only legal authority that the Bureau cited in the Decision was FLPMA. (Ex. B at 31) (“Statutory authorities for this decision are contained in the Federal Land Policy and Management Act, as amended, and supplemented.”). The Bureau did not acknowledge the mandatory criteria in the 2019 LWCF Act amendments and, therefore, failed to consider a relevant legal factor. (*See id.*); *see also Lois J. Armstrong*, 130 IBLA at 233 (remanding agency decision for not considering a relevant legal factor). If the Bureau, in fact, considered the LWCF Act factors in the Decision, it should have published its explanation. The administrative record that forms the basis of a decision by this Board consists of public records that are open to inspection by the public. *See Earth Power Res. Inc.*, 181 IBLA at 101 (citing 5 U.S.C. § 552 (2006)); *see also* 43 C.F.R. § 4.24(a)(4) (stating no decision on appeal shall be based upon any record that is not open to inspection by the parties). In this case, the Bureau did not discuss five of the Section 200306(d) criteria in its EA, FONSI, or Decision Record. (*See* Ex. B at 2-33).

This Board remands decisions that are unsupported by the record. *Yates Petroleum Corp.*, 163 IBLA 300, 309 (2004); *see also Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1226 (10th Cir. 2002) (“If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, ... the proper course, *except in rare circumstances*, is to remand to the agency for additional investigation or explanation.”) (citation



omitted). Accordingly, this Board should remand the Decision and order the Bureau to perform further analysis consistent with Section 200306(d).

## **II. The Decision violated NEPA.**

In the EA, the Bureau concluded that a direct impact of the proposed action “could be an increase in public usage of the area for recreation along the river.” (Ex. B at 11). It also concluded that the acquisition “would also allow for expanded recreation and usage in the up lands including once landlocked public lands that will now be accessible to the public.” (*Id.*). But the Bureau did not analyze any potential direct or indirect impacts associated with an increase of public use on the North Platte River associated with the Marton Ranch acquisition.

This Board assesses the adequacy of an EA by applying a “rule of reason.” *Colo. Wild Pub. Lands Inc.*, 189 IBLA at 410. A party challenging a Bureau decision analyzed in an EA has the burden of demonstrating, by a preponderance of the evidence and with objective proof, that the decision “(1) is based on a clear error of law or demonstrable error of fact, (2) failed to consider a substantial environmental question of material significance to the proposed action, or (3) otherwise failed to comply with Section 102(2)(C) of NEPA or its regulations.” *Wildlands Def.*, 188 IBLA 68, 70-71 (2016). “The Board will uphold a [Bureau] decision to proceed with a proposed action, absent preparation of an EIS...where the record demonstrates that [the Bureau] has considered all relevant matters of environmental concern, taken a ‘hard look;’ at potential environmental impacts, and made a convincing case that no significant impact will result therefrom or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures.” *Id.* at 71.

**A. The Bureau did not consider the impacts of the Marton Ranch acquisition on the recreational setting of the North Platte River SRMA.**

The EA identified that a direct impact of acquiring the Marton Ranch “could be an increase in public usage of the area for recreation along the river.” (Ex. B at 11). But the EA is devoid of any analysis on the potential recreational impacts to the North Platte River directly caused by increased public use. (*See id.*). The Bureau touted that the Decision created eight miles of new riverfront access, but it violated NEPA when it failed to consider how the Decision will impact recreation on the North Platte River.

**1. The recreational setting of the North Platte River is a substantial environmental question of material significance.**

When reviewing the adequacy of an EA, this Board considers whether the Bureau failed to consider “a substantial environmental question of material significance to the proposed action[.]” *Wildlands Def.*, 188 IBLA at 70. In this case, the impact of the Decision on the recreational setting of the North Platte River is a substantial environmental question of material significance for three reasons.

First, the Bureau prioritized recreational user experience when it adopted Recreation Management Matrices in the Casper RMP. (Ex. E at 7-8, 11). The Bureau’s Recreation Management Matrices in the Casper RMP are of material significance because federal land acquisitions “shall be consistent ... with the applicable departmental land use plans.” *See* 43 U.S.C. § 1715(b). Second, maintaining the recreational character of the North Platte River relates directly to the Bureau’s purpose for the EA. The Bureau explained that its purpose for the EA was “to enhance and facilitate public recreation opportunities.” (Ex. B at 3). The impacts that the Marton Ranch acquisition has on recreational user experience speak directly to the Bureau’s stated goals in the EA. *See* 43 C.F.R. § 46.420(a)(1) (the purpose “refer[s] to the goal or objective that the

bureau is trying to achieve”). Finally, recreational user experiences are environmental impacts appropriately considered under NEPA. *See, e.g., Nat’l Parks & Conservation Ass’n v. FAA*, 998 F.2d 1523, 1533 (10th Cir. 1993); *Cascadia Wildlands v. BLM*, 410 F. Supp. 3d 1146, 1159-60 (D. Or. 2019).

Accordingly, this Board should consider whether the Bureau considered the impacts that the Marton Ranch acquisition will have on the recreational setting of the North Platte River.

**2. The Bureau did not consider the direct impact of the Marton Ranch acquisition on the recreational setting of the North Platte River.**

The Bureau concluded that the Decision will impact recreation on the North Platte River. (Ex. B at 18) (“The proposed action will impact recreation.”). The Bureau also concluded that the Decision could increase recreational use on the North Platte River. (Ex. B at 11). But the EA did not include any analysis that considered the impact that the Decision will have on recreational user experiences. (*See id.*).

The Bureau determined in the Casper RMP that it will manage the North Platte River between Pathfinder Dam and the Natrona/Converse County line (which includes the Marton Ranch) as a SRMA. (*See* Ex. B at 10); (Ex. E at 8). Specifically, management Decision No. 6089 and Decision No. 6037 in the Casper RMP explain that the Bureau will manage the North Platte River SRMA in accordance with its Recreation Management Matrices. (Ex. E at 8) (Decision No. 6089: “Manage [ ] SRMAs as described in Appendix O”); (Ex. E at 7) (Decision No. 6037: “[t]hose areas selected as SRMAs are managed as described in Appendix O, Recreation Management Matrices.”). The Recreation Management Matrices state that the Bureau will maintain the prescribed setting character of the North Platte River SRMA, including managing social contacts to 7-14 “middle country” encounters and 30 “front country” encounters. (Ex. E at 11). In the EA, the Bureau did not consider Decision No. 6089, Decision No. 6037, or the Recreational

Management Matrices from the Casper RMP. (*See* Ex. B at 4-5). The Bureau also failed to provide any analysis on how the Decision will impact the prescribed recreational setting for the North Platte SRMA. (*See* Ex. B at 7).

Federal courts occasionally uphold general statements about the impact a federal action has to recreational experiences where an agency has “no objective basis in the record for prioritizing these recreational values[.]” *Cascadia Wildlands*, 410 F. Supp. 3d at 1159; *see also Wild Wilderness v. Allen*, 12 F. Supp. 3d 1309, 1324 (D. Or. 2014) (plaintiffs’ subjective perceptions about recreational experiences did not warrant additional NEPA review). But this case is different. The Bureau adopted objective criteria in the Casper RMP for evaluating impacts to the recreational setting of the North Platte River SRMA including managing the number of social contacts and promoting specific social experiences. (Ex. E at 11). The Bureau’s conclusory determination that the Marton Ranch acquisition will impact recreation was not “reasoned, well-supported analysis.” *See Earth Power Res. Inc.*, 181 IBLA at 110. At the very least, the Bureau was required to consider how the Decision impacted the prescribed recreational setting for the North Platte River SRMA.

Wyoming was involved in the Bureau’s determination to manage the North Platte River as a SRMA because it supports maintaining this “world-class” fishery. (Ex. E at 14, 18). The Bureau’s failure to substantiate its conclusions in the Decision and consider the direct impact of the Marton Ranch acquisition on recreational use violated NEPA. *See Sierra Club v. Bosworth*, 352 F. Supp. 2d 909, 925 (D. Minn. 2005) (finding the agency’s failure to support its conclusion that recreational use would be impacted violated NEPA).

**B. The Bureau did not consider any indirect impacts.**

The EA did not evaluate any indirect impacts of the Decision. (*See* Ex. B at 11). Specifically, the EA did not consider the reasonably foreseeable indirect effects that the Marton

Ranch acquisition will have on the North Platte River fishery or introduction of AIS. This Board will remand the decision when it lacks substantive information or analysis of reasonably foreseeable environmental impacts. *See Orion Energy LLC*, 175 IBLA 81, 92-94 (2008).

**1. The Bureau did not take a hard look at the indirect impact of the Marton Ranch acquisition on the North Platte fishery.**

The Bureau explains that the Marton Ranch acquisition will provide recreational access to eight new miles of the North Platte River, including access to the fishery. (*See Ex. B at 3*). However, the Bureau's EA does not consider any of the indirect impacts that the Decision will have on the North Platte River fishery.

This Board has held that “[the Bureau] must address indirect effects, including reasonably foreseeable changes in land use or population density, provided those effects are caused by its action.” *James Shaw*, 130 IBLA 105, 113 (1994). Impacts to the North Platte River fishery are reasonably foreseeable because the Bureau concluded that the Decision could result in “an increase in public usage of the area” and provide for “expanded recreation” including access to the North Platte River fishery. (*See Ex. B at 3, 11*). Additionally, indirect impacts to the fishery are reasonably foreseeable because the Bureau's management objective for the North Platte River SRMA states that it will place emphasis on “enhancing recreational benefits **and wildlife/fisheries habitats[.]**” (*Ex. B at 5*) (emphasis added).

The Gray Reef fishery occupies the 13.1-mile section of the North Platte River between Gray Reef and Government Bridge and includes the Marton Ranch. (*Osterland Aff. at ¶4*). The Gray Reef fishery is considered a blue-ribbon fishery. (*Ex B. at 7*). The Department manages the Gray Reef fishery with specific management objects and regularly surveys the fish population. (*Osterland Aff. at ¶¶5, 6*). A population survey in 2020 indicated a 67.5 percent decrease in catches from the eight-year average despite excellent environmental conditions for sampling. (*Id. at ¶7*);

(Ex. C at 7). The 2020 population estimates for the Gray Reef fishery also remain below the Department's management objective to maintain the Gray Reef fishery's reach of 3,600 trout and 4,100 pounds per square mile. (Osterland Aff. at ¶10); (Ex. C at 8).

The Department's studies have also found that the trout population in the Gray Reef fishery has aged significantly over the past decade and the Department is concerned that the lack of natural recruitment and disproportionate demographic imbalance will harm the population and require additional stocking. (Osterland Aff. at ¶¶8-9, 37); (Ex. C at 8). The population estimates and demographic studies for the Gray Reef fishery coincide with documented high angling pressure and initial Department observations on hooking injuries. (Osterland Aff. at ¶12). The Department's preliminary hooking data shows that some trout are caught multiple-times in a season which has known deleterious effects on trout populations such as depressing fish growth, reproduction, and recruitment. (*Id.* at ¶¶11-12); (Ex. C at 13-14).

Even if the Bureau correctly concluded that the Marton Ranch acquisition will "spread out" anglers, the Bureau did not consider the potential impact on the Gray Reef fishery now that more anglers can readily access more sections of the North Platte River. Before the Decision, only anglers with landowner permission could fish on the banks or anchor boats on most eastern portions of the Gray Reef fishery. (*See* Ex. B at 7) ("The acquisition lands are currently under private ownership and permission to access said lands for recreational purposes must be obtained from the current landowner.") (Osterland Aff. at ¶31). Accordingly, angling impacts before the Decision were concentrated and the Marton Ranch portion of the Gray Reef fishery provided trout with areas of relative relief from fishing pressure. (*Id.* at ¶34). Angling pressure is a factor that can impair fish populations. (*Id.* at ¶36); (Ex. C at 13-14). The increased public use and shifting angling

pressure associated with the Decision may have adverse impacts on the Gray Reef fishery. (Osterland Aff. at ¶¶36-37).

The Bureau was required to consider indirect effects including “induced changes in the pattern of land use” and “related effects on air and water and other natural systems[.]” *See* 40 C.F.R. § 1508.1(g)(2). Here, the Decision fundamentally changed the Gray Reef fishery by shifting angling pressure on the North Platte River. The EA lacks any substantive analysis about how changing the land use status along an eight-mile stretch of the river will impact the North Platte River fishery and, thus, the Bureau did not consider a reasonably foreseeable environmental impact of the Decision. *See Orion Energy LLC*, 175 IBLA at 92-93 (finding the Bureau’s land use decision failed to consider indirect impacts to adjoining lands).

**2. The Bureau did not take a hard look at the indirect impact of the Marton Ranch acquisition on AIS.**

In the EA, the Bureau also did not consider the indirect impact that the Decision will have on the introduction of invasive species to the North Platte River. (Ex. B at 6). It merely concluded that there was no impact associated with invasive species because “[the Bureau] would manage the property in the same way as the surrounding [Bureau] administered public lands[.]” (*Id.* at 17).

However, the threat of AIS is a reasonably foreseeable indirect impact of the Marton Ranch acquisition because the Bureau recognized that the North Platte River is a destination fishery within a multi-state area. (Ex. B at 7). Moreover, the Bureau concluded that the Decision could increase public use of the North Platte River. (Ex B at 11). Because the Marton Ranch acquisition will draw more users to the North Platte River from surrounding states, the Bureau had an obligation to consider the impacts associated with AIS.

The introduction of AIS to the North Platte River will have significant consequences on the quality of the fishery and result in costs to adjoining water infrastructure. (Osterland Aff. at

¶¶20, 27-28). Boats with outboard motors, non-motorized watercraft, and even personal fishing equipment from infested waters pose a risk to spread AIS such as zebra and quagga mussels. (*Id.* at ¶21). Zebra and quagga mussels are not currently present in the North Platte River. (*Id.* at ¶26). But increased recreational use of the North Platte River will increase the risk of introducing AIS into the fishery. (*Id.* at ¶40). The Department operates watercraft check stations and roving crews to intercept infested watercraft but the Marton Ranch acquisition will provide new access points to the North Platte River and require adjustments to Department AIS enforcement practices. (*Id.* at ¶41).

NEPA requires “a reasonably close causal relationship” between the environmental effect and the alleged cause. *See WildEarth Guardians*, 196 IBLA 1, 22-23 (2020) (citation omitted). The Bureau was aware that the Decision impacted a “destination fishery” that attracts non-resident anglers. (Ex. B at 7). Thus, the Bureau’s Decision has a reasonably close causal relationship to the risk of introducing AIS to the North Platte River because a person of ordinary prudence would consider that the increased use of a fishery can result in a greater risk for AIS infestation. *See WildEarth Guardians*, 196 IBLA 1, 23 (2020).

The Bureau’s conclusion that the Decision was “just land acquisition” is unpersuasive because the action provides access to lands previously closed to the general public. (*See* Ex. B at 19); *see also Soda Mountain Wilderness Council v. Norton*, 424 F. Supp. 2d 1241, 1267 (E.D. Cal. 2006) (rejecting Bureau’s argument that land acquisition was only an “administrative boundary change” that “has no effects on the environment”). The fact that the Bureau did not consider any indirect impacts of the Decision warrants remand. *See Orion Energy LLC*, 175 IBLA at 99 (to satisfy NEPA, the Bureau must identify and explain why indirect impacts were not considered).



**C. The Bureau’s cumulative impact analysis was arbitrary and capricious.**

The Bureau’s cumulative impact analysis concluded that the Marton Ranch acquisition “could see a lessening of impacts” because “[t]he impacts could be spread out across this larger area along the river[.]” (Ex. B at 11). This three-sentence cumulative impact analysis was deficient for two reasons. First, the Bureau did not consider the expected increase in recreational use associated with the Marton Ranch acquisition. Second, the Bureau did not consider existing trends that show an increased use of the North Platte River. Thus, the Bureau’s cumulative impact analysis failed to consider a substantial environmental question of material significance because it provided no data, methodology, or evidence to support its conclusion that recreational impacts “could be lessened” by the Decision. (*See* Ex. B at 11).

In the EA, the Bureau determined that the Marton Ranch acquisition could increase public use of the North Platte River. (Ex. B at 11). It also explained that its cumulative impact analysis includes “the project boundary plus the North Platte River SRMA.” (Ex. B. at 10). Therefore, there is no dispute that increased recreational use of the North Platte River was a “reasonably foreseeable” impact of the Decision.

The Bureau’s cumulative impact analysis was deficient because it did not substantiate its conclusion that the Marton Ranch acquisition could “relieve all forms of recreational pressures in and around the SRMA[.]” (*See* Ex. B at 11). Instead, the Bureau ignored its conclusion that the Decision could increase public use and subjectively concluded that there would be a “lessening of impacts” without the support of any data or empirical evidence. (*See id.*).

An agency’s cumulative impact analysis evaluating recreational user experience is arbitrary and capricious when the agency provides no empirical evidence to support its claims. *See Nat’l Parks & Conservation Ass’n*, 998 F.2d at 1533. The Tenth Circuit also found that an agency’s

conclusions are not reasonable when its cumulative impact analysis contradicts its other findings. *Id.* Here, the Bureau offered no data, methodology, or evidence to support its claim that the Marton Ranch acquisition would “spread out” impacts across a larger area. (*See Ex. B. at 11*). The Bureau’s conclusion that the Marton Ranch acquisition would disperse impacts across a larger area was also inconsistent with its conclusion that the acquisition could increase public use of the area. (*See id.*).

The Bureau’s cumulative impact analysis also did not adequately consider existing baseline recreational trends on the North Platte River. *See Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1101 (9th Cir. 2016) (“Establishing appropriate baseline conditions is critical to any NEPA analysis.”). The Bureau only provided a list of the existing recreational uses of the area and acknowledged that adjacent recreational areas “are heavily used” based on data from a single year. (*Ex. B at 7*). But generic statements in an EA about existing conditions are not sufficient under NEPA. *Or. Nat. Desert Ass’n v. Rose*, 921 F.3d 1185, 1191-92 (9th Cir. 2019) (explaining that the Bureau must use some method or estimate to establish baseline conditions). The Department has documented a significant upward trend in angler use and watercraft traffic on the Gray Reef fishery over the past decade. (*Osterland Aff. at ¶35*); (*See Ex. C at 14-21*). The Bureau’s cumulative impact analysis does not take into account the impact of growing recreational use on the North Platte River combined with the foreseeable growth caused by the Marton Ranch acquisition.

The Bureau’s cumulative impact analysis was deficient because it failed to support its conclusion, address inconsistencies in its own analysis, and evaluate existing recreational trends. Therefore, this Board should find that the Bureau’s cumulative impact analysis was deficient and remand it for further analysis. *See Nat’l Parks & Conservation Ass’n*, 998 F.2d at 1533.

**D. The Bureau violated NEPA when it did not involve the State, local governments, and the public in its decision-making process.**

The Bureau did not solicit public comment on the EA and it did not make the FONSI available for public review prior to making the Decision. (*See* Ex B at 3-4). The Bureau also did not consult State agencies or local governments with a direct interest in the Decision. (*See* Ex. B at 14). Its process for acquiring the Marton Ranch was contrary to NEPA and inadequate because the Bureau did not seek input from the very agencies and individuals with information relevant to the Decision. *See Robertson*, 490 U.S. at 351 (explaining that NEPA prohibits uninformed agency action).

NEPA “imposes procedural requirements intended to improve environmental impact information available to agencies and the public.” *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 704 (10th Cir. 2009) (emphasis omitted). “[W]here [the Bureau] has engaged in some type of public process and an appellant alleges that public notice and comment procedures were inadequate, this Board will scrutinize that process on a case-by-case basis to determine its adequacy. *The Wilderness Workshop*, 175 IBLA 124, 133 (2008). However, this Board also recognizes that a complete failure to involve the public in developing an EA and FONSI constitutes a violation of the NEPA regulations. *Lynn Canal Conservation, Inc.*, 169 IBLA 1, 5 (2006) (citing *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961, 970 (9th Cir. 2003); *Mont. Wilderness Ass’n v. Fry*, 310 F. Supp. 2d 1127, 1147-48 (D. Mont. 2004); *Wroncy v. BLM*, 777 F. Supp. 1546, 1549 (D. Or. 1991)). In this instance, the Bureau failed to provide any public process for its Marton Ranch acquisition in violation of NEPA.

**1. The Bureau did not consult interested State or local governments.**

The Bureau did not engage interested State agencies and local governments when it prepared the Decision. Although the Bureau submitted a report on the Decision to the Wyoming

State Historic Preservation Officer, the Bureau did not seek comment from Wyoming. (*See* Ex. D at 1-4) (*See* Ex. B 31-32). And, the Bureau concedes “[n]o other agencies, groups or individuals were contacted in the development of this project.” (Ex. B at 31-32).

The implementing regulations for NEPA provide that “[a]gencies shall involve the public, State, Tribal, and local governments, relevant agencies, and any applicants to the extent practicable in preparing environmental assessments.” 40 C.F.R. § 1501.5(e). The Bureau must “whenever possible consult, coordinate, and cooperate with relevant State, local, and tribal governments and other bureaus and Federal agencies concerning the environmental effects of any Federal action within the jurisdictions or related to the interests of these entities. 43 C.F.R. § 46.155. “[A] complete failure to involve or even inform the public about an agency’s preparation of an EA and a FONSI ... violates [NEPA] regulations.” *Citizens for Better Forestry*, 341 F.3d at 970.

This appeal is wholly unlike situations in which the Bureau provided state and local governments with some opportunity to participate in the decision-making process. *See Eureka Cnty., Nevada*, 193 IBLA 193, 204 (2018) (finding the Bureau did not violate its consultation obligations under NEPA when it received and responded to local government comments). Instead, this appeal results from the Bureau’s failure to provide any meaningful opportunity for interested State agencies and local governments to participate in the Decision. In the EA, the Bureau acknowledged that the affected environment included the presence of wildlife species within the Marton Ranch. (Ex. B at 9). But it did not consult the Department about any potential impacts to wildlife or the North Platte River fishery. (Osterland Aff. at ¶45). Approximately 8,000 acres of State land lies within the Marton Ranch acquisition boundary. (Crowder Aff. at ¶4). But the Bureau did not consult the Wyoming Office of State Lands and Investment. (*Id.* at ¶7). The Marton Ranch

property included land in both Natrona and Carbon County, Wyoming. (Ex. B at 3). But the Bureau did not consult either local government. (Natrona Cnty. Aff. at ¶3); (Carbon, Cnty. Aff. at ¶27).

By contrast, the Bureau consulted State agencies in past land acquisitions in Wyoming. For example, the Bureau consulted the Department in 2017 when it completed the **645.50 acre** Rim Rock acquisition on the North Platte River just fifteen miles downstream from the Marton Ranch. (Ex. F at 3-4). Yet, the Bureau did not consult the Department when it acquired the **35,669.52 acre** Marton Ranch in the same area. (*See* Ex. B at 14).

The Bureau's failure to consult the Department during the Marton Ranch acquisition was also contrary to its cooperative agreement with the Department which provides that the Bureau agrees to coordinate in advance of a "change in use designation or classification of any public lands" and "consult with the Department on Bureau projects, programs, policies, and activities which may have an impact on wildlife." (Ex. C at 44-45). The Department could have provided the Bureau with data about big game winter habitat within the Marton Ranch property and analysis of the potential impacts of the acquisition on the North Platte River fishery. (Osterland Aff. at ¶46). Similarly, if the Bureau had consulted the Wyoming Office of State Lands and Investment and local governments on the Decision, those government entities would have informed the Bureau about the potential impacts of the acquisition on grazing, recreation, law enforcement, and the property tax base. (Crowder Aff. at ¶8); (Carbon, Cnty. Aff. at ¶29).

Because the Bureau did not provide any process for interested state and local governments to participate in the decision-making process, this Board should find that the Bureau's action was an obvious violation of NEPA. *See Lynn Canal Conservation, Inc.*, 169 IBLA at 5; *see also Citizens for Better Forestry*, 341 F.3d at 970. Even so, under a case-by-case analysis, this Board can also find that the Bureau violated NEPA because the record demonstrates that it ignored local

interests, past practices involving land acquisitions, and existing cooperative agreements that provide for coordination between the Bureau and State agencies. *See, e.g., The Wilderness Workshop*, 175 IBLA at 134 (considering whether the record demonstrates the Bureau met its obligation to provide meaningful participation in the environmental review process).

## **2. The Bureau violated NEPA by not soliciting public comment.**

When it acquired the Marton Ranch property, the Bureau did not invite public comment. (Ex. B at 31-32). The Bureau's exclusion of public input violated NEPA on two separate grounds — it did not provide a compelling reason for not providing any public input and it did not make the FONSI available for public comment.

First, the implementing regulations for NEPA explain that “[a]gencies shall []make diligent efforts to involve the public in preparing and implementing their NEPA procedures.” 40 C.F.R. § 1506.6(a). Section 102(2)(C) of NEPA generally requires the Bureau to encourage and facilitate public involvement in its processes. *Klamath-Siskiyou Wildlands Ctr.*, 153 IBLA 110, 121 (2000). Therefore, the Bureau “should demonstrate ‘a compelling reason for not providing any public comment period during the EA process.’” *Id.* (quoting *S. Utah Wilderness All.*, 122 IBLA 334, 342 (1992)).

The Decision does not explain why it did not provide an opportunity for public comment. (*See* Ex. B at 3, 31-32). Instead, the Bureau conducted an “internal” scoping process and simply created a webpage for the project that did not adequately describe the proposed acquisition or invite public participation. (*See* Ex. B at 1, 3); *see also Idaho ex rel. Kempthorne v. U.S. Forest Serv.*, 142 F. Supp. 2d 1248, 1260-62 (D. Idaho 2001) (discussing how inadequate information about the project deprived meaningful public participation). The acquisition of the Marton Ranch was not a typical agency action. The Bureau even recognized that the Decision was a major

commitment of federal resources without precedent in Wyoming. (Ex. A at 1). Regardless, the Bureau relied on a truncated decision-making process typically used for incidental agency actions such as constructing a snowmobile parking lot, securing a 0.2 acre right-of-way for snow fences, and constructing a 0.2 acre cell phone tower site. (Ex. G at 5, 7-8, 10-11). The Bureau, however, at least explained in those truncated processes why external scoping was not necessary. (*See id.* at 5, 8, 11). In this case, the Bureau provided no explanation for why it did not conduct public scoping for its Marton Ranch acquisition. (*See Ex. B* at 3-4, 31-32).

The public has a significant interest in the Marton Ranch acquisition because the Decision used public funding to make **35,669.52 acres** of land available for public use. (*See Ex. B* at 3). Given the significance of the Decision, the Bureau should have solicited public comment as it has with other LWCF acquisitions. For example, the Bureau held a public scoping process on February 4, 2022, for the planned McDonald's Ferry LWCF land acquisition of **4,100 acres** in Oregon. (Ex. G at 2-3). The Marton Ranch acquisition also warranted a meaningful public process and the Bureau violated NEPA when it did not provide a "compelling reason for not providing any public comment during the EA process." *Klamath-Siskiyou Wildlands Ctr.*, 153 IBLA at 121.

Second, the Decision was without precedent in Wyoming and the implementing regulations for NEPA required the Bureau to make the FONSI available for public comment. Agencies must provide the public with a thirty-day review of a FONSI when "[t]he nature of the proposed action is one without precedent." 40 C.F.R. § 1501.6(a)(2)(ii). The Bureau recognized that the Marton Ranch acquisition "is the largest land purchase [the Bureau] has undertaken in Wyoming." (Ex. A at 1). Similarly, the acquisition was the largest LWCF acquisition by the Bureau in recent years. (*See Ex. H* at 2-3). Given the size of the acquisition, potential environmental impacts, and public interest in the Marton Ranch property, the Bureau was required to make the FONSI available for

comment and the Bureau provided no reasonable explanation for its failure to abide by the applicable regulations. *See* 40 C.F.R. § 1501.6(a)(2)(ii).

The Bureau's failure to solicit public comment and explain why comment was not warranted violated the NEPA regulations. *See Mont. Wilderness Ass'n*, 310 F. Supp. 2d at 1147-48 (granting plaintiffs' motion for summary judgment where the Bureau "provided no evidence that it complied in any way with [the NEPA] regulation" regarding the solicitation of public comment for an EA). Accordingly, this Board should remand the Marton Ranch EA for further analysis and order the Bureau to provide meaningful opportunities for the State, local governments, and the public to participate in a new decision-making process. *See, e.g. Lynn Canal Conservation, Inc.*, 169 IBLA at 11 (remanding the decision for further action).

### **REMEDY**

This Board typically remands inadequate agency decisions. *See, e.g., Decision on Review in Michael Gold*, 115 IBLA 218 at \*2 (1991) (discussing the Board's "usual practice" of remanding inadequate EAs for supplementation). The proper remedy in this appeal is for the Board to remand the Decision "for additional appropriate action[.]" *S. Utah. Wilderness All.*, 194 IBLA 333, 337 (2019) (citation omitted). Wyoming respectfully requests that the Board remand the Decision so the Bureau can adequately consider the mandatory statutory criteria in 54 U.S.C. § 200306(d) and remedy the NEPA deficiencies in the EA. Wyoming also respectfully requests that this Board order the Bureau to engage State agencies, local governments, and the public, as required by NEPA, in any corrective action.

### **CONCLUSION**

For the foregoing reasons, this Board should remand the Decision to acquire the Marton Ranch.



DATED: July 15, 2022

*/s/ Travis Jordan*

---

James Kaste, WSB No. 6-3244  
Deputy Attorney General  
Travis Jordan, WSB No. 7-5721  
Senior Assistant Attorney General  
Wyoming Attorney General's Office  
109 State Capitol  
Cheyenne, WY 82002  
(307) 777-7895 (phone)  
(307) 777-3542 (fax)  
james.kaste@wyo.gov  
travis.jordan@wyo.gov

*Counsel for Appellant State of Wyoming*

## CERTIFICATE OF SERVICE

I hereby certify that pursuant to this Board's October 5, 2021 *Order Permitting Filing by Email* that I filed this Statement of Reasons, Attachments, and Exhibits via [ibla@oha.doi.gov](mailto:ibla@oha.doi.gov) on July 15, 2022. I also certify that I mailed a true and correct copy of the foregoing Statement of Reasons, Attachments, and Exhibits to the persons named below by overnight express mail, in accordance with 43 C.F.R. §§ 4.412(a) and 4.401(c), 4.413, as of the date of this signature.

### INTERIOR BOARD OF LAND APPEALS

Office of Hearings and Appeals  
U.S. Department of Interior  
801 N. Quincy Street, Suite 300  
Arlington, VA 22203

### REGIONAL SOLICITOR

Rocky Mountain Region  
U.S. Department of the Interior  
755 Parfet Street, Suite 151  
Lakewood, CO 80215

### WILLIAM BECK

Casper Field Manager  
Bureau of Land Management  
2987 Prospector Drive  
Casper Wyoming, 82604

### ANDREW ARCHULETA

Wyoming State Director  
Bureau of Land Management  
5353 Yellowstone Road  
Cheyenne, Wyoming 82009

DATED: July 15, 2022

/s/ Travis Jordan  
Counsel for Appellant State of Wyoming