January 28, 2019

Submitted via e-planning

Director (210)
Attention: Protest Coordinator, WO-210
P.O. Box 71383
Washington, D.C. 20024-1383

Re: Protest of Wyoming Greater Sage-Grouse Proposed Resource Management Plan Amendment/Final Environmental Impact Statement

Please accept this timely protest of the Bureau of Land Management's Wyoming Greater Sage-Grouse Proposed Resource Management Plan Amendment (Proposed Amendment) and Final Environmental Impact Statement (FEIS), submitted by The Wilderness Society, National Audubon Society, Wyoming Outdoor Council, National Wildlife Federation, Natural Resources Defense Council, Western Values Project, and the Wyoming Wilderness Association ("Protesting Parties").

INTERESTS OF THE PARTIES

The Wilderness Society has a long-standing interest in the management of Bureau of Land Management lands and engages frequently in the decision-making processes for land use planning and project proposals that could potentially affect wilderness-quality lands, wildlife habitat, and other natural resources managed by the BLM in the West. TWS members and staff enjoy a myriad of recreation opportunities on BLM-managed public lands, including hiking, biking, nature-viewing, photography, and the quiet contemplation in the solitude offered by wild places. Founded in 1935, our mission is to protect wilderness and inspire Americans to care for our wild places.

The National Audubon Society is committed to protecting birds and their habitats throughout the Americas using science, advocacy, education and on-the-ground conservation. Audubon works proactively with all stakeholders, to ensure impacts to important avian habitats are avoided or minimized to the greatest extent possible. A long-standing focus has been on Greater Sage-grouse and the sagebrush ecosystem. Audubon members, including Chapter members, enjoy recreating on federally-managed lands. These lands represent a legacy to pass on to future generations.

Founded in 1967, the Wyoming Outdoor Council is the state's oldest and largest independent conservation organization. With a mission to protect Wyoming's environment and quality of life for present and future generations, the Wyoming Outdoor Council is dedicated to protecting greater sage-grouse and the habitat upon which this sensitive species depends. The Council's members use and enjoy the public lands encompassed by the proposed plan for a range of uses and activities such as hunting, hiking and camping, and would be adversely affected by the roll back of conservation measures contained in the 2015 plan amendments.

Natural Resources Defense Council ("NRDC") is a non-profit environmental membership that uses law, science, and the support of more than three million members and activists throughout the United States to protect wildlife and wild places and to ensure a safe and healthy environmental for

all living things. Many of our members reside in Utah. NRDC members use and enjoy public lands in Utah, including the specific lands at issue, for a variety of purposes, including: recreation, solitude, scientific study, and conservation of natural resources. NRDC has a long established history of working to protect public lands and clean air in Utah and addressing climate change by promoting clean energy and reducing America's reliance on fossil fuels. In particular, NRDC members have been historically invested in federal processes that concern the management and conservation of the Greater Sage-grouse, and the viability of the rangeland habitat that Greater Sage-grouse depend upon.

The National Wildlife Federation (NWF), one of America's largest conservation organizations, has worked across the country to unite Americans from all walks of life in giving wildlife a voice for over eighty years. NWF has 51 state and territorial affiliates and more than 6 million members and supporters, including hunters, anglers, gardeners, birders, hikers, campers, paddlers, and other outdoor enthusiasts. NWF programs work to protect the 600 million acres of public lands owned by all Americans and has a longstanding interest in ensuring these lands are managed properly for fish, wildlife, and communities. NWF and its affiliates care deeply about the conservation of the sage grouse, and ensuring that the sage grouse stays off the endangered species list. NWF is invested in protecting the millions of acres of sagebrush steppe that sustain not only the bird, but many of America's cherished species.

Western Values Project defends America's public lands through research and public education in order to hold policymakers and elected leaders accountable for jeopardizing the West's outdoor heritage. Western Values Project supports the cooperative 2015 11-state sage-grouse management plan that balanced protecting sagebrush habitat with resource development and agriculture. The proposed amendments undermine nearly a decade of hard work and collaboration that will put the future of sage grouse and over 350 other species that depend on healthy and thriving sagebrush habitat, including pronghorn, mule deer, and elk, in jeopardy. These changes will also risk sustainable agriculture and the over $1 billion in outdoor related economic activity that takes place on sagebrush land annually.

The Wyoming Wilderness Association is non-profit organization that protects Wyoming's public wild lands.

The Protesting Parties have and will continue to participate in this planning process, including through scoping comments submitted December 1, 2017, which are incorporated herein by reference, overarching comments on this process submitted on July 24, 2018, and comments on the Draft RMP Amendment and EIS submitted August 2, 2018, all of which are incorporated herein by reference, along with their respective exhibits and attachments. The Protesting Parties care deeply about the survival of the greater sage-grouse and the sagebrush ecosystem, and have been integrally involved in the multi-year efforts that resulted in the 2015 amendments and revisions to Bureau of Land Management (BLM) resource management plans ("2015 Sage-grouse Plans). The significant changes proposed to the 2015 Sage-grouse Plans risk the habitat upon which the sage-grouse and more than 350 other species depend for their survival and which the U.S. Fish and Wildlife Service based its 2015 finding that the greater sage-grouse no longer warranted listing under the Endangered Species Act.
This protest is filed in accordance with 43 C.F.R. § 1610.5-2 and addresses the following issues:

I. BLM Has Failed To Prepare An Analysis Of The Management Situation In Violation Of The Federal Land Policy And Management Act.
II. BLM Has Failed To Comply With The National Environmental Policy Act.
    A. BLM's purpose and need action violates NEPA.
    B. BLM has failed to take a hard look at potential impacts.
    C. BLM has not adequately analyzed cumulative impacts.
    D. BLM has improperly relied on incorporation by reference to avoid adequate analysis.
    E. BLM has failed to consider a reasonable range of alternatives.
    F. Supplemental NEPA is required due to major changes in the policies and circumstances underlying the plans.
    G. The new plans are incomprehensible based on their revised mitigation approach.
    H. The Proposed RMP Amendments and Final EISs fail to address information gaps regarding current use of waivers, exceptions, and modifications, and post-2015 oil and gas leasing in sage-grouse habitat.
    I. BLM failed to respond to substantive comments.
    J. BLM has not relied on the best available science.
III. BLM Improperly Removed Federally Enforceable Compensatory Mitigation From The Plan.
IV. BLM Has Eliminated All Meaningful Requirements to Prioritize Oil And Gas Leasing and Development Outside Sage-Grouse Habitat.
V. Endangered Species Act Consultation Is Required.
VI. BLM's Plan Fails to Protect Greater Sage-Grouse from Noise Impacts.
VII. Proposed Changes to Appendix C Weaken Protection for Greater Sage-Grouse.

Our discussion of each of these issues concisely states why we believe the State Director's decisions are wrong and the corresponding portions of the Proposed Amendment at issue, which includes but is not limited to the Executive Summary, Chapters 1, 2, 3, 4 and 5, the Appendices, and the Errata Sheet of the Proposed Amendment, as well as our requested remedy for each issue addressed. Because the 2015 Sage-grouse Plans were prepared to address conservation of greater sage-grouse habitat at a landscape scale, the Proposed Amendments have an overarching effect on the purpose and need of the original plans. Accordingly, this protest notes the manner in which the decisions in this Proposed Amendment and all of the Proposed Amendments are flawed.

POINTS OF PROTEST

I. BLM Has Failed To Prepare An Analysis Of The Management Situation In Violation Of The Federal Land Policy And Management Act.

In its rush to overturn the Obama-era 2015 greater sage-grouse plan amendments, the BLM violated key provisions of its planning regulations, including the requirement to prepare an analysis of the management situation, or AMS. This analysis, required by 43 CFR 1610.4-4, is an essential first step in the land use planning process. *See, e.g.,* Analysis of the Management Situation, Eastern Washington and San Juan Resource Management Plan, March 2011 ("The Federal Land Policy and Management Act (FLPMA) of 1976 directs the BLM to develop and periodically update RMPs that guide land management on public lands. The first step in the process to prepare a new RMP is to conduct an AMS. The purpose of the AMS is to summarize the

existing management situation, explain the need for change, propose a range of management opportunities, and describe any management limitations.")
https://www.blm.gov/or/districts/spokane/plans/ewsjrmp/files/Spokane_RMP_AMS.pdf

Motivated by a desire to expedite the modification, if not repeal, of the 2015 Sage-grouse Plans, the BLM chose to ignore this critical first step in the planning process. Protesters identified the BLM's failure to prepare an AMS in their comments on the Draft Plan Amendments. In response, the BLM claims that:

> The BLM analyzed the management situation in full compliance with its regulations and policies. The BLM evaluated inventory and other data and information, partnering with USGS and coordinating extensively with States, to help provide a basis for formulating reasonable alternatives. The BLM described this process in its Report to the Secretary in response to SO 3353 (Aug. 4, 2017). Among other things, the Report describes how the BLM coordinated "with each State to gather information related to the [Secretary's] Order, including State-specific issues and potential options for actions with respect to the 2015 GRSG Plans and IMs to identify opportunities to promote consistency with State plans." (Report to the Secretary at 3.) This process overlapped to some degree with the BLM's scoping process, which also assisted the BLM in identifying the scope of issues to be addressed and significant issues, and with coordination with the States occurring after the Report. In addition, as described in DEIS Chapter 3, the BLM determined that the current management situation is similar in condition to that assessed in 2015.

See "Response to Substantive Comments on the Draft EIS," Wyoming Proposed Amendment, Appendix E, at E-13.

Quite to the contrary, the "process" described by BLM in its response to public comments clearly does not satisfy—nor can it serve as a lawful surrogate for— the AMS required by 43 CFR 1610.4-4 and the BLM's Land Use Planning Handbook, H-1601-1.

The BLM's planning handbook identifies the preparation and documentation of AMS as a "required step" in the planning process. *See* BLM Land Use Planning Handbook H-1601-1 Figure 1—*EIS-level planning efforts: Required steps for new plans, revisions, and amendments.* The Handbook directs the BLM to document the results of the analysis of the management situation in an AMS. *Id.* Among other things, the AMS must describe the:

- Present characteristics and condition of the public land;
- Status of physical and biological processes that affect ecosystem function;
- Condition of individual components such as soil, water, vegetation, and wildlife habitat;
- Relative value and scarcity of resources; and
- Social and economic conditions.

Planning Handbook at 20. These and other required elements of an AMS were not analyzed or documented in the Department of the Interior's *Report in Response to Secretarial Order 3353*, August 4, 2017. Rather, SO 3353 directed the DOI's sage-grouse review team (created by the Order) to conduct:

> (i) a review of the plans and programs that States already have in place to ensure that the 2015 Sage-Grouse Plans adequately complement state efforts to conserve the species;
>
> (ii) a further examination … of issues associated with preventing and fighting the proliferation of invasive grasses and wildland fire …;
>
> (iii) an examination of the impact on individual States disproportionally affected by the large percentage of Federal lands within their borders, recognizing that those lands are important to resource use and development, and to the conservation of the Sage-Grouse;
>
> (iv) a review of the 2015 Sage-Grouse Plans and associated policies, including seven BLM Instruction Memorandum (IM) issued in September 2016. The review will include (1) identification of provisions that may require modification or rescission, as appropriate, in order to give appropriate weight to the value of energy and other development of public lands within BLM's overall multiple-use mission and to be consistent with the policy set forth in Secretary's Order 3349, "American Energy Independence," implementing the Executive Order signed by the President on March 28, 2017, "Promoting Energy Independence and Economic Growth"; and (2) opportunities to conserve the Sage-Grouse and its habitat without inhibiting job creation and local economic growth;
>
> (v) as appropriate, the Team should provide recommendations with regard to (1) captive breeding; (2) opportunities to enhance State involvement; (3) efficacy of target populations on a State-by-State basis; and (4) additional steps that can be taken in the near term to maintain or improve the current population levels and habitat conditions.

While interesting, nothing in the Review Team's review or recommendations comes close to addressing the required elements of an AMS.[1] *See* 43 C.F.R. §§ 1610.4-4(a)-(i) (outlining the eight non-exclusive required factors that must be considered in an AMS). The report explains that the Review Team "identified issues, options to address those issues, and next steps to implement the Order." *See* SO 3353, Executive Summary at 1. The report does not claim, or even suggest, that it takes the place of a proper AMS. Moreover, the DOI report addresses plans and policies at a broad

[1] As directed in Section 5, the Review Team "provide[d] a report to the Secretary summarizing the review set forth in section 4b of this Order and provide[d] recommendations regarding additional steps the Department should take to address any issues identified as a result of that review."

scale, and therefore lacks the detail and level of analysis that is required to support amendments to BLM Wyoming's resource management plans.[2] Indeed, the Report acknowledges this fact:

> The DOI Team and the SGTF affirm that the issues and options identified in this report do not apply to each State, are not consensus opinions from all States, and are not "one size fits all." Pertinent issues and associated solutions should be tailored to each State's needs while ensuring conservation of the species. Whenever possible, the options identified by the DOI Team provide near-term opportunities to resolve concerns and issues and achieve the purpose of the Order, including development of policies, clarification, memoranda of understanding (MOUs), and training, many of which can be completed within 6 months (see Section IV and Appendix A). The DOI Team also identified longer term options, including potential plan amendments, which would be completed in accordance with applicable laws and policies (see Section IV and Appendix A).

Report at 1.

With respect to the aforementioned "longer term options" the Report explains that:

> The review also identified longer term options to consider some issues through a potential plan amendment process. This report recommends further investigation of potential plan amendments, including considering what combination of potential plan amendments would best balance continuing to conserve the GRSG and its habitat and supporting economic development, and whether to consider State-by-State or range-wide amendments. Potential plan amendments could be considered in some States to remove or modify sagebrush focal area (SFA) designations; address adjustments to habitat management boundaries; adjust responses to reaching adaptive management triggers; evaluate the compensatory mitigation standard; and provide additional flexibility in resource development.

See Report at 2.

In recommending an "investigation of potential plan amendments" it is clear that the DOI Team regarded the prospect of future plan amendments as an issue worthy of further consideration. But the team stopped short of recommending specific plan amendments, and certainly did not intend or envision that its report would be used to supplant a proper AMS. To the contrary, the DOI Team explicitly acknowledged that "longer term options, including potential plan amendments, would be completed in accordance with applicable laws and policies." Report at 13.

For BLM to suggest now that the DOI report satisfies BLM's planning requirements is nothing more than a futile effort to correct what cannot be corrected, the absence of an AMS. There is no

[2] The AMS must be tailored to the planning area. 43 CFR 1610.4-4. Here, the planning area "includes all the BLM Field Offices within Wyoming, encompassing approximately 18 million surface acres and 40 million acres of Federal mineral estate administered by the BLM. *See* "Dear Reader" letter from Wyoming BLM State Director Mary Jo Rugwell, published in the Wyoming Greater Sage-Grouse Proposed RMP Amendment and Final EIS, November 2018.

doubt that preparation of an AMS is a mandatory obligation. *See* 43 C.F.R. § 1610.4-4 (stating "The analysis of the management situation shall provide . . . the basis for formulating reasonable alternatives, including the types of resources for development or protection."). The Director should not sanction or approve such unlawful behavior.

The Report goes on to recommend that DOI:

- Further evaluate whether clarification and policy actions sufficiently address the issues identified by the States and other partners or if additional actions should be considered. For longer term options that include potential plan amendments, further refine the issues and potential solutions, including evaluating State-specific solutions and assessing potential additive effects of the proposed changes and the continued ability to achieve conservation of GRSG. This work is recommended to follow the public outreach phase.

See Report Section V. Next Steps, at 13.

The Report is clear that the DOI team regarded plan amendments as a *possible, longer term option* that would require further refinement of issues (i.e., scoping), evaluation and analysis. Although identifying plan amendments as potential longer-term option, the DOI Team did not write its report to fulfill the AMS requirement, but rather to "address the elements of the order (SO 3353) and produce a report." *See* Report at 1. BLM's current transparent attempt at *post hoc* rationalization fails to correct the underlying failure by BLM to prepare the required AMS.

Lastly, to the extent the BLM attempts to rely on the AMS prepared in 2011 for the 2015 Sage-grouse Plans, that reliance is severely misplaced. The AMSs prepared by the BLM in 2011 provided the basis for a vastly different set of alternatives for consideration in the Draft Plan Amendments, driven by a completely different purpose and need statement. The BLM's assertion in its response to comments that "the current management situation is similar in condition to that assessed in 2015" is manifestly false. Since 2015, the 2015 Sage-grouse Plans were in place such that density and disturbance stipulations, compensatory mitigation, net conservation gain, required design features (RFDs), sagebrush focal areas (SFAs) etc. were in effect. It is impossible for the public to understand the effects of those management efforts because the management situation has not been evaluated since their implementation. Furthermore, the national "energy dominance" policy that has increased the scale of oil and gas leasing on public lands in the West, and specifically dramatically increased leasing in sage-grouse habitat, was not in effect when the management situation was "assessed" in 2011. The management situation has been dramatically altered by this policy and must be reevaluated. Finally, the public has no means by which to measure the success of the 2015 Sage-grouse Plans without a new AMS.

Therefore, it is clear that BLM cannot proceed with the 2018 Amendments without developing a current AMS. As the basis for this planning process, BLM's failure to prepare an updated AMS also sets the stage for the multiple violations of the National Environmental Policy Act discussed in detail below.

Requested Remedy: BLM must prepare an updated AMS.

II. BLM Has Failed To Comply With The National Environmental Policy Act.

The complete transformation of the focus of the planning effort between the 2015 Sage-grouse Plans and these Proposed RMP Amendments required BLM to conduct a thorough analysis under the National Environmental Policy Act (NEPA), defining a valid purpose and need, taking a hard look at environmental consequences, evaluating a reasonable range of alternatives and relying on high quality science. However, despite making changes to the fundamental aspects of the 2015 Sage-grouse Plans, BLM has failed to conduct the necessary analysis, instead attempting to conduct a superficial analysis through these RMP Amendments.

The 2015 Sage-grouse Plans were focused on avoiding the need to list the Greater Sage-grouse under the Endangered Species Act (ESA) through a landscape level approach, based on the best available science, prescribing the highest level of protection in the most important habitat and addressing threats identified by the U.S. Fish and Wildlife Service (FWS) in its initial finding that listing was warranted. As summarized in the Records of Decision for the 2015 Sage-grouse Plans:

> In response to a 2010 determination by the US Fish and Wildlife Service (FWS) that the listing of the GRSG under the Endangered Species Act was "warranted, but precluded" by other priorities, the BLM, in coordination with the US Department of Agriculture Forest Service, developed a landscape-level management strategy, based on the best available science, that was targeted, multi-tiered, coordinated, and collaborative. This strategy offers the highest level of protection for GRSG in the most important habitat areas. It addresses the specific threats identified in the 2010 FWS "warranted, but precluded" decision and the FWS 2013 Conservation Objectives Team (COT) Report.

See, e.g., Record of Decision for the Rocky Mountain Region, p. S-1. The COT Report identified conservation objectives and measures for each of the key habitat threats identified across sage-grouse habitat, providing an important tool for measuring efficacy across the range. The stated goal of the plans was focused on measures to "conserve, enhance, and restore [greater sage-grouse] habitat by avoiding, minimizing, or compensating for unavoidable impacts."

The 2018 RMP Amendments are the product of a review directed by Secretarial Order (S.O.) 3353, which focused on not only state plans and programs but also consistency with executive and secretarial orders on prioritizing energy development on public lands. Similarly, the purpose of the amendment processes were summarized as aligning with state plans and "with DOI and BLM policy." Conserving the greater sage-grouse is no longer an explicit focus of this effort and the central aspects of the 2015 Plans summarized above are weakened or removed, including:

- Sagebrush Focal Areas (SFAs), the most protective habitat designation are no longer included in Wyoming, Utah, Idaho and Nevada, removing protections from destructive activities such as energy development.
- The net conservation gain standard, which ensured that any habitat loss that could not be avoided or minimized would be compensated for with a multiplication factor (to address the uncertainty associated with reclamation and restoration activities), no longer applies in Idaho, Utah and Wyoming.

- BLM will no longer require compensatory mitigation, a tool that BLM has historically used to require off-site restoration, reclamation or acquisition of habitat where there is residual loss of habitat; although a project proponent can volunteer to use this tool or BLM can voluntarily choose to honor state requirements (to the extent a state can articulate such a program).
- BLM will no longer prioritize oil and gas leasing and development outside sage-grouse habitat, through a combination of formal changes to this commitment in Utah and Wyoming and new guidance issued in 2017 that states: "In effect, the BLM does not need to lease and develop outside of GRSG habitat management areas before considering any leasing and development within GRSG habitat." Instruction Memorandum (IM) 2018-026.
- General Habitat Management Area (GHMA) is no longer used as a designation in Utah, meaning that more than 448,000 acres of habitat, nearly 20% of the surface acres of grouse managed by BLM in Utah, will no longer be managed for protection.

The changes to management of waivers, exceptions and modifications for managing no surface occupancy stipulations in oil and gas leases is a useful example for highlighting the impact of the changes between the two planning processes. In the 2015 Sage-grouse Plans, these stipulations permitted oil and gas development to continue in sage-grouse habitat without destruction of habitat. Waivers (permanent exemption that applies to the entire leasehold), exceptions (one-time exemption for a particular site within the leasehold) and modifications (change to the lease stipulation, either temporarily or for the term of the lease, can apply to the entire leasehold or certain areas) all permit an operator to avoid compliance with the requirements of a stipulation. Where these loopholes are permitted and used, the protections that the stipulations are supposed to provide can be undermined.

There was uniformity and a reason to rely on the effectiveness of these stipulations to function as conservation measures across the landscape in the 2015 Plans because:

- In SFAs, there were no waiver, exceptions or modification permitted.
- In Priority Habitat Management Areas (PHMA), only exceptions were available and then only with unanimous agreement among BLM, FWS and the state wildlife agency, which was a limited situation.
- The commitment to prioritization of leasing and development outside habitat meant leasing itself would be limited.
- Finally, the net conservation gain standard and BLM's requirement of a commitment to compensatory mitigation before permitting leasing activities meant that any habitat destruction that occurred would be compensated for, including a multiplication factor to address the uncertainty and yet-to-be-established skills in restoration and reclamation of sagebrush.
- Overall, while leasing and development would continue to occur, because of the provisions in the 2015 Sage-grouse Plans, we knew there would be a reduced impact across the range, which is especially important because FWS identified oil and gas development as a primary threat in the Rocky Mountain Region.

In comparison, in the Proposed 2018 RMP Amendment, there is neither uniformity nor an expectation of effectiveness because:

- SFAs have only been retained in Oregon and Montana, covering 1.8 million acres instead of more than 11 million acres.
- In PHMA (other than in Oregon and Montana), these stipulations are now subject to waivers, exceptions and modifications, with no FWS involvement and a broader set of criteria. It's difficult to aggregate the likely impacts of those changes rangewide except that there are certainly many more opportunities for the stipulations not to apply because modifications and waivers have broader impacts than one-time exceptions and there are many more bases on which to grant them, which differ from state to state.
- The commitment to prioritize leasing and development outside habitat has been removed altogether in Utah and from General Habitat Management Areas in Wyoming but effectively removed through IM 2018-026, as shown by the nearly 1.5 million acres in grouse habitat put up for lease since 2017 and the more than 2 million acres currently proposed for leasing in February and March 2019 lease sales, meaning that leasing is not only subject to less protections but more likely to occur in grouse habitat.
- Net conservation gain has been supplanted by a still-to-be-defined "no net loss" standard in Idaho, Utah and Wyoming. BLM has also declared itself unable to enforce compensatory mitigation, the tool that would be relied on to both compensate for habitat destruction and achieve net conservation and/or a meaningful no net loss standard.
- Overall, there is no longer a consistent application of these stipulations across the range, a likelihood of more leasing and more harm to grouse habitat with less assurance that such harm will be avoided, minimized or mitigated.

In essence these Proposed RMP Amendments have changed the central tenets of the 2015 Sage-grouse Plans. As a result, BLM cannot rely on the analysis and alternatives that were developed to support the landscape level, conservation-focused 2015 Sage-grouse Plans to support the case-by-case, development-focused 2018 RMP Amendments. Further, BLM cannot merely assert that there are no impacts from these changes when they have undermined the consistency, reliability and measurability that supported not only the FWS's "not warranted" finding but also the BLM's conclusions regarding conservation of the greater sage-grouse. The conclusions of both FWS and BLM regarding the likely success of conservation measures and impacts of measures in the 2015 Sage-grouse Plans were based on best available science and the COT Report, but neither of these are consistent with the 2018 Proposed RMP Amendments, as has been repeatedly brought to BLM's attention by leading sage-grouse scientists. *See, e.g.,* June 2018 Sage-grouse scientists letter.

In order to support the Proposed RMP Amendments, the Final EIS must evaluate the impact of the changes being made to the 2015 Sage-grouse Plans but it does not incorporate a rangewide assessment, address the scientific basis for its conclusions, account for removing BLM's role in requiring compensatory mitigation, define no net loss, or develop a range of alternatives. In sum, the Final EIS does not comply with NEPA.

Requested Remedy: BLM must address the NEPA violations discussed in detail below by developing a compliant purpose and need, reasonable range of alternatives and compliant analysis of environmental consequences, as well as responding to substantive comments. BLM must, therefore, conduct a supplemental NEPA analysis through a supplemental EIS.

A. BLM's purpose and need violates NEPA.

BLM employed an unlawful "purpose and need" for the Proposed Amendments. While BLM has some discretion over a project's "purpose and need," that discretion is not unlimited. BLM may not, for example, define the "purpose and need" so narrowly that it forecloses consideration of a reasonable range of alternatives. *Westlands Water Dist. v. U.S. DOI*, 376 F.3d 853, 867 (9th Cir. 2004); *see also City of Carmel-By-The-Sea v. U.S. Dep't of Transp.,* 123 F.3d 1142, 1155 (9th Cir. 1997) (". . . an agency cannot define its objectives in unreasonably narrow terms."). Nor may BLM simply adopt the "purpose and need" advanced by a project proponent. *National Parks Conservation Ass'n v. BLM* [NPCA], 606 F.3d 1058, 1070-72 (9th Cir. 2010).

Yet, that is exactly what BLM has done here. It has developed an unreasonably narrow "purpose and need" for the FEISs that forecloses consideration of any alternative that does not align with state plans and recent DOI and BLM policies that "prioritize energy independence. . . ." *See, e.g.,* Wyoming Proposed Plan/FEIS at 1-3; NW Colo. Proposed RMPA/FEIS at ES-2; Utah Proposed RMPA/FEIS at ES-2. Further, it is self-evident that this "purpose and need" was defined not by BLM, as required by NEPA, but by certain states (i.e., project proponents). Thus, BLM's "purpose and need" is fundamentally flawed and undermines the range of alternatives, along with other aspects of the FEISs.

1. <u>BLM's "Purpose and Need" for the Proposed Amendments is unreasonably narrow and forecloses consideration of alternatives that do not align with insufficient state plans or promote "energy independence."</u>

In violation of NEPA, BLM used an unreasonably narrow "purpose and need" for the Proposed Amendments. According to the Wyoming Proposed Plan/FEIS:

> the purpose and need for this resource management plan amendment (RMPA)/EIS is to modify the approach to Greater Sage-Grouse management in existing land use plans through (1) enhancing cooperation and coordination with the State of Wyoming, (2) align with DOI and BLM policy directives that have been issued since 2015, and (3) incorporate appropriate management flexibility and clarifications to better align with Wyoming's conservation plan.

See, e.g., Wyoming Proposed Plan/FEIS at ES-2 and 1-3. The "policy directives" referenced in the "purpose and need" statement "direct the Department of the Interior to prioritize energy independence and greater cooperation with the states specific to the management of Greater Sage-Grouse." *Id*. Such an objective departs dramatically from the original purpose for BLM's sage-grouse conservation plans, which was based entirely on the need to develop "adequate regulatory mechanisms" that would avoid the need to list the species under the ESA. *See, e.g.,* Wyoming GRSG Proposed LUPA/Final EIS May 2015 at ES-6 ("This LUPA with associated EIS is needed to respond to the USFWS' March 2010 "warranted, but precluded" ESA listing petition decision (75 Federal Register 13910, March 23, 2010).

When evaluating the reasonableness of an agency's "purpose and need" statement, courts consider the views of Congress . . . in the agency's statutory authorization to act, as well as in other

congressional directives." *Citizens Against Burlington v. BUSEY IV*, 938 F.2d 190, 196 (D.C. Cir. 1991). Here, "Congress intended endangered species to be afforded the highest of priorities." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978). Accordingly, the ESA requires BLM to administer programs that "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. . . ." 16 U.S.C. § 1531(b); *see also id*. § 1536(a)(1) ("The Secretary shall . . . utilize such programs in furtherance of the purposes of [the ESA]."). Further, FLPMA specifically prohibits efforts to enshrine a single use, such as energy development, as the "dominant" or pervasive use of public lands. *See* 43 U.S.C. § 1701(a)(7) (specifying that "management [of public lands] be on the basis of multiple use and sustained yield"); *id*. § 1712(e)(2) (requiring congressional oversight for actions that "exclude" principal uses for two or more years).

In 2015, BLM honored the wishes of Congress as expressed in the ESA, as well as FLPMA, by adopting the need to develop "adequate regulatory mechanisms" that would address the long-term "conservation needs of the species" as the overarching purpose for the sage-grouse plans. *See, e.g.*, Wyoming GRSG Proposed LUPA/Final EIS May 2015 at ES-6. This purpose drove the development of alternatives for the plans and dictated the final decision on the plans: "The RMPAs are designed to directly address the specific threats to the species identified by the FWS in its 2010 listing determination. . . ." ROD and RMPAs for the Great Basin GRSG Sub-Regions at 1-35. The Fish and Wildlife Service (FWS) subsequently recognized BLM's conservation plans as the "foundation" of its "not-warranted" decision for Greater sage-grouse. 80 Fed. Reg. 59,858, 59,887 (Oct. 2, 2015). Notably, this decision found that only conservation plans adopted by BLM (and the U.S. Forest Service) and the states of Montana, Oregon, and Wyoming contained "adequate regulatory mechanisms." *Id.* at 59,936. Plans developed by other states, including Colorado, Idaho, Nevada, and Utah – the very plans that BLM now seeks to "align" with – were deemed "non-regulatory," due to their limited scope and reliance on voluntary measures. *Id*. at 59,931-933.

However, in spite of Congress's clear instruction to make the conservation of endangered and threatened species the "highest priority," and even though BLM did so in the 2015 plans, BLM has abandoned this purpose. Instead, in the FEISs, BLM has chosen to focus on other, administrative priorities – i.e., "aligning" its sage-grouse plans with those of the states and with recent DOI/BLM policies on prioritizing "energy independence." *See, e.g.* Sec. Order 3358 (Oct. 25, 2017) (recognizing "energy dominance" as a "top priority for this Administration."); Report in Response to Sec. Order 3353 5-6 (Aug. 4, 2017) (recommending several changes that DOI/BLM could make to the sage-grouse plans in order to promote energy development). By pursuing these objectives, which have nothing to do with securing the long-term conservation of sage-grouse or avoiding a future ESA listing, BLM is flouting the will of Congress.

Moreover, the Proposed RMPAs will likely move the species closer to a listing, because, in 2015, BLM and FWS both rejected the very approach – aligning federal sage-grouse plans closely with plans developed by individual states – that BLM is now embracing:

- **BLM: "**Alternative E is the alternative based on information provided by the State or Governor's offices for inclusion and analysis in the EISs. . . . <u>The BLM believes Alternative E did not incorporate adequate regulatory mechanisms</u> into the existing plan to

meet its purpose and need to conserve, enhance, and restore GRSG and its habitat; therefore, the BLM did not select Alternative E as the RMPA." ROD and RMPAs for the Great Basin GRSG Sub-Regions at 3-3 to -4 (emphasis added); and

- **FWS: "**While 10 of the 11 States in the range of the sage-grouse updated their State plans to conserve the species by incorporating new information, which is a testimony to their concern and commitment to protect the grouse and its habitats, not all of these plans have been implemented or are regulatory in scope. We will specifically highlight the regulatory conservation actions mandated by the State plans in Wyoming, Montana, and Oregon because they provide the greatest degree of regulatory certainty in addressing potential threats on State and private lands not under the jurisdiction of Federal plans. We appreciate the work that each State has completed, but not all planning efforts met a level of certainty for implementation and effectiveness." 80 Fed. Reg. at 59,873 (emphasis added).

Finally, by focusing so narrowly on bending the federal plans to the will of the states, as well as on promoting "energy independence," BLM foreclosed consideration of alternatives that actually respond to new information concerning the species and strengthen the regulatory certainty provided by the 2015 plans. For example, BLM refused to evaluate several alternatives proposed by the public, including developing additional measures to limit and control development activities. *See, e.g.*, NW Colo. Proposed RMPA/FEIS at 2-1–2.; Utah Proposed RMPA/FEIS at App.-2-15. BLM explained that these alternatives simply did comport with the "purpose and need" for the plan amendments. *See, e.g.,* Wyoming Proposed Plan/FEIS at 1-8; Utah Proposed RMPA/FEIS at App.-2-37. In sum, BLM's "purpose and need" statement is unreasonably narrow and fails to recognize the broader conservation objectives of the 2015 plans.

2. BLM has impermissibly defined the "purpose and need" based on project proponent objectives.

Also in violation of NEPA, BLM has improperly defined the "purpose and need" to reflect the narrow wishes of certain states and not broader objectives set forth in the ESA and other federal laws. NEPA prohibits BLM from "mandating" that the interests of project proponents "define the scope of the proposed project." *NPCA*, 606 F.3d at 1070. Instead, BLM must reference and incorporate broader, national objectives as enumerated in statutes and other congressional directives. *Id.*

BLM failed to do so here, and instead developed the "purpose and need" to carry out the wishes of specific states. BLM has openly acknowledged doing so, stating that the decision to move forward with the plan amendments, as well as the range of issues and alternatives to be considered, came directly from certain states. *See, e.g.,* Utah Proposed RMPA/FEIS at App.-2-15 ("The agency's purpose and need for considering these amendments was carefully drawn to promote alignment with the State's plans and policies. . . ."); Notice of Availability of the Wyoming Draft Resource Management Plan Amendment and Draft Environmental Impact Statement for Greater Sage-Grouse Conservation, 83 Fed. Reg. 19,801 (May 4, 2018) ("After carefully considering the Governor's input . . . the BLM proposes amending the Wyoming Greater Sage-Grouse land use plans that address GRSG management."); BLM, Press Release – BLM Listens to Idaho State

Partners (May 2, 2018) ("The BLM developed the proposed changes in collaboration with the Idaho Governor, state wildlife managers and other stakeholders to align federal and state plans.").

Yet, BLM is not permitted to blindly accept a project proponent's objectives in this manner. As the *NPCA* court explained, "[o]ur holdings . . . forbid the BLM to define its objectives in unreasonably narrow terms. The BLM may not circumvent this proscription by adopting private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives . . . ." 606 F.3d at 1072. While it may have been permissible for BLM to develop a "purpose and need" that sought to better accommodate the wishes of the states, provided that any changes did not weaken the range-wide effectiveness of the plans or undermine the FWS's 2015 not-warranted determination, it did not do so. Consequently, by focusing so narrowly on what specific states want, and ignoring the conservation needs of greater sage-grouse and objectives of the ESA, BLM's "purpose and need" for the Proposed Amendments violates NEPA.

B. BLM has failed to take the requisite "hard look" at potential environmental impacts.

BLM has not taken the required "hard look" at potential environmental impacts. Under NEPA, the BLM must take a "hard look" at the environmental consequences or a proposed action, and the requisite environmental analysis "must be appropriate to the action in question." *Metcalf v. Daley,* 214 F.3d 1135, 1151 (9th Circ. 2000); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989).

The complete transformation in the focus of the planning effort between the 2015 Sage-grouse Plans and the proposed amendments combined with an overall weakening of protections on sage grouse habitat, obligates the BLM to conduct a thorough analysis of potential environmental impacts. Conclusory statements throughout the FEISs that changes to the 2015 plans would result in minimal impacts cannot be deemed reasonable, and certainly do not meet the "hard look" standard required by NEPA. *See, e.g.,* Wyoming Proposed Plan/FEIS at 4-17 ("The Management Alignment Alternative's effects are effectively within the range of effects analyzed by the 2015 and 2016 EISs. … Conditions on public land have changed little since the 2015 Final EISs, and to the extent that there have been new actions or developments, the impacts associated with those actions or developments are in line with the projections in the 2015 Final EISs regarding reasonably foreseeable actions and effects.") *See also e.g.* Idaho FEIS Table 4-2.

As part of its hard look analysis, BLM must sufficiently analyze the environmental consequences of eliminating designated Sagebrush Focal Areas (SFAs). Containing large blocks of Federal lands in important sage grouse habitats that have high levels of population connectivity and density of breeding birds, SFAs were identified by BLM and FWS to contain the most important sage-grouse habitats. Under the Proposed Plan Amendments, BLM would eliminate approximately 8.7 million acres of SFAs in Idaho, Utah, Wyoming and Nevada. According to the BLM, its earlier decision to not pursue mineral withdraws in SFAs eliminates the need for further environmental analysis; in support, the BLM points to applicable analysis from the 2015 FEISs and 2017 DEISs. *See e.g.,* Wyoming Proposed Plan/FEIS at 4-9, -10; Utah FEIS at 4-13. However, mineral withdrawal, while important, was certainly not the only protection afforded by SFAs. BLM must sufficiently analyze the impact of removing these protections.

The protections offered by SFAs were recognized by the Fish and Wildlife Service in its 2015 not warranted decision, and thus are a key component of the land use plans that must be maintained if the not warranted decision is to be sustained. "Based on our recommendation to further protect sage-grouse population centers that have been identified in the scientific literature as critically important for the species and areas identified through our analysis as important for conservation, BLM and USFS designated areas as Sagebrush Focal Areas (SFA) and added protections that would further limit new, human-caused surface disturbance in SFAs." 80 Fed. Reg. 59858, 59875 (Oct. 2, 2015). SFAs "are the areas that the Federal Plans manage as the highest priority lands in PHMAs for sage-grouse conservation (Figure 5)." *Id.* at 59878. They are "strongholds" for sage-grouse conservation and as mentioned above contain important connectivity habitat and high densities of breeding birds. *Id.* FWS recognized that in addition to PHMA protections, the protections mentioned above would also apply in SFAs, including NSO stipulations for fluid minerals with no waivers, exceptions, or modifications, and prioritizing management and conservation actions. *Id.* This was because SFAs need "the most conservative strategies to protect sage-grouse and habitat." *Id.* Grazing permit review is also prioritized in SFAs. *Id.* at 59877, 59910.

The new plans eliminate over 83% of areas once designated as SFAs. Elimination of SFAs will result in a number of lost or modified protections that applied to SFAs in one or more of the four states. These include provisions under the 2015 Sage-grouse Plans that require oil and gas leasing to only be allowed pursuant to a no surface occupancy (NSO) stipulation that was not subject to waiver, exception or modification (Idaho, Nevada, and Utah); prioritizing SFAs for vegetation and conservation actions (Idaho, Nevada, Utah, and Wyoming); and prohibitions of geothermal development in SFAs (Nevada). These changes all require thorough analysis.

As an example, PHMA formerly designated as an SFA subject to NSO for oil and gas development could now be exposed to destructive activities through waivers, exceptions and modifications now available for that stipulation. Allowing for waivers, exceptions and modifications to lease stipulations results in significant regulatory uncertainty, and removes the ability of the BLM to ensure landscape scale protection for the sage grouse. Protections provided by stipulations, such as NSO stipulations, are only reliable and effective to the extent that the safeguards are applied. Waivers (permanent exemptions that applies to the entire leasehold), exceptions (one-time exemptions for a particular site within the leasehold) and modifications (changes to the lease stipulation, either temporarily or for the term of the lease, that can apply to the entire leasehold or certain areas) all permit an operator to avoid compliance with the requirements of a stipulation. Where these loopholes are permitted and used, the protections that the stipulations are supposed to provide can be undermined. By eliminating the SFA designation in four states, the BLM has removed the certainty of protection afforded by those stipulations Failing to analyze the consequences of this change is a failure to comply with NEPA.

This decision to remove SFAs marks a significant retreat from environmental protections that have been recognized as needed for sage-grouse conservation by the U.S. Fish and Wildlife Service, yet the BLM has failed to conduct any meaningful analysis of this impact. A conclusory statement suggesting the removal of this designation will not result in significant environmental impacts

woefully overlooks the protections, beyond withdrawing lands from mineral entry, afforded by the SFAs, and fails to meet BLM's "hard look" obligations under NEPA.

BLM must also take a hard look at changes to the standards for granting waivers, exceptions and modification from NSO lease stipulations in other states above and beyond those associated with SFAs, including Colorado, which did not have SFAs. Under the 2015 Sage-grouse Plans, NSO stipulations were only subject to exception if agreed upon subject to unanimous agreement among BLM, the state wildlife agency and FWS. These stipulations are now subject to modification and waiver, the role of FWS has been eliminated, and the role of the state wildlife agency is less clear. *See e.g.*. Utah Proposed Amendment, p. 4-19. In addition, in Utah, NSO stipulations were only subject to exceptions if there was proof of "net conservation gain" to sage-grouse habitat. This has now been changed to "no net loss of conservation." Ultimately these changes allow for many more loopholes to important protections. These loopholes will ultimately, as discussed above, reduce the efficacy of the stipulations. BLM must fully analyze these potential impacts.

The Proposed Amendments also change the standard in Utah, Wyoming and Idaho from "net conservation gain" to an undefined no net loss or other standard. When pressed to analyze the meaning of the commitments in the plans, BLM, in its response to comments states:

> There is no law, regulation or policy that requires the BLM achieve a net conservation gain in Greater Sage-Grouse habitat. However, the Draft EIS on page 1-9 clearly notes that the principles of the Proposed Plan's mitigation standard are consistent with the 2015 Approved Plan, **and as such changing "net conservation gain" to "improve the condition of greater sage-grouse habitat" does not require new analysis**.

Utah FEIS p. App-2-33 (emphasis added). In fact, this type of change requires BLM to conduct analysis, because the plans have changed from incorporating specific commitments to ensuring there is a gain of habitat to no longer making such a commitment. Simply "stating without further analysis" that analysis is not required does not fulfill NEPA's hard look requirement or absolve BLM of supplementing the NEPA analysis conducted for the 2015 Sage-grouse Plans, a discussed in further detail below. *See, e.g., New Mexico ex. rel Richardson*, 565 F.3d 683, 714-715, 707 (10th Cir. 2009).

C. BLM has failed to adequately analyze cumulative impacts.

The BLM is required to consider the cumulative environmental impacts to sage-grouse and sage-grouse habitat in these FEISs. Cumulative environmental impacts are defined as:

> The impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions.

40 C.F.R. § 1508.7. "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id.* Cumulative impacts must be considered in the scope of an EIS. *Id.* § 1508.25(c).

Despite this requirement, the BLM makes a conclusory statement that:

> . . . the nature and context of the cumulative effects scenario has not appreciably changed since 2015, and the 2015 analysis covered the entire range of the Greater Sage Grouse, the BLM's consideration of cumulative effects in the 2015 Final EISs adequately addresses most, if not all, of the planning decisions to be made through this planning effort.

See e.g., Wyoming Proposed Plan/FEIS at 4-18; Idaho FEIS at 4-6; Utah FEIS at 4-38; Northwest Colorado FEIS at 4-9. This conclusion fails to account for a fundamental change in the purpose and need for the 2018 Proposed Amendments that has changed the regulatory landscape from one that prioritizes protection of the sage-grouse to one that prioritizes oil and gas leasing and consistency with state plans. This change underscores the inappropriateness of incorporating the 2015 cumulative impacts analysis. BLM must conduct an updated cumulative impact analysis.

While the FEISs list the changes to the 2015 management plans across planning areas, the BLM fails to conduct a thorough analysis of other past, present, and reasonably foreseeable actions. For example, BLM fails to analyze the impacts of large-scale oil and gas projects that are occurring within all states. These projects will result in drilling and construction of wells and related infrastructure, including new roads and pipelines, all of which will have significant impacts on sage-grouse habitat. Although BLM claims the cumulative effects from these projects were considered in previous NEPA documents, changes to other BLM policies will affect their impacts. BLM has changed its policy on compensatory mitigation, now taking the position it cannot mandate it and may enforce it when a proponent volunteers it or a state program requires it. As discussed in detail below, it is unclear whether and how this approach will actually result in compensation for loss of habitat, requiring a reassessment of cumulative impact analysis.

Similarly, the elimination of a "net conservation gain" standard in three states, questions about the enforceability of compensatory mitigation on BLM lands, and the manner in which this will affect the achievement of the "no net loss" standard in other states must be evaluated across the plans, as well. The assumptions on which the cumulative analysis in the 2015 Sage-grouse Plans was conducted are no longer valid, a cumulative impacts analysis must be prepared for the 2018 RMP Amendments.

The BLM has also failed to analyze the reasonably foreseeable cumulative impacts from oil and gas lease sales, which have significantly increased under the current administration. Issuing an oil and gas lease is an irretrievable commitment of resources. *See e.g., New Mexico ex rel. Richardson v. BLM*, 565 F.3d at 718; *Pennaco Energy, Inc. v. United States DOI*, 377 F.3d 1147, 1160 (10th Cir. 2004). Since 2017, BLM has put approximately 1.5 million acres of sage-grouse habitat up for lease, with more than 720,000 acres sold and in excess of 2 million potentially to be leased in February and March 2019. Notably, BLM can project the amount of wells associated with opening areas to leasing and with individual leases, but has failed to do so in connection with these FEISs. BLM must incorporate these details into a compliant cumulative impacts analysis for these plan amendments.

BLM has also changed its approach to prioritizing oil and gas leasing and development outside habitat. The 2015 Sage-grouse Plans commit to prioritizing both leasing and development outside sage-grouse habitat. *See, e.g.,* Record of Decision for the Rocky Mountain Region, p. 1-25. In the 2018 Proposed Amendments, the approach is formally removed from the Utah plan and from GHMA in the Wyoming plan. However, the requirement is also generally removed from all of the plans in guidance issued in December 2017 through Instruction Memorandum 20218-026, which states: "the BLM does not need to lease and develop outside GRSG habitat management areas before considering any leasing and development within GRSG", which revoked the prior guidance interpreting the 2015 Sage-grouse Plans. As shown by the ongoing volume of leasing in sage-grouse habitat, leasing is clearly not being prioritized outside of habitat. The impacts of the formal proposed changes to the 2015 plans and the implementation of the new guidance (if it is retained) must also be analyzed across the range, with regard to current and future leasing.

BLM must analyze the impacts that will result from the elimination of required vital conservation measures incorporated in the 2015 Sage-grouse Plans including: (1) net conservation gain and (2) compensatory mitigation. The 2015 NEPA analyses were conducted on the premise that these measures would be in place. The 2018 Plan Amendments have eliminated or created significant uncertainty regarding these requirements, and as a result the BLM must conduct a revised cumulative impacts analysis that accounts for the impacts that will result from the elimination of these measures across the range.

BLM has also failed to account for and analyze the destruction of vital sage grouse habitat due to wildfires. In 2018, 2,034,318 acres of sage grouse habitat on federal land was damaged by fire. Of these 1,057,309 acres were on BLM land.[3] The loss of this habitat will have a significant impact on sage grouse survival, yet BLM simply states that these losses to fire are accounted for in the 2015 FEIS. *See e.g.,* Utah FEIS at 4-44. 2018 was one of the worst wildfire seasons on record and it is clear that wildfires will become an increasing problem in the West. BLM must sufficiently analyze the threat of rapidly increasing fire to sage grouse.

Ultimately, BLM has failed to look at the cumulative impacts. Reliance on 2015 analysis ignores fundamental changes to regulatory policies that have vastly changed the regulatory landscape since 2015. A cumulative impact analysis "must be more than perfunctory; it must provide 'a useful analysis of the cumulative impacts of past, present, and future projects.'" *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1076 (9th Cir. 2011) (quoting *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1075 (9th Cir. 2002) (additional citation omitted). "To be useful to decision makers and the public, the cumulative impact analysis must include 'some quantified or detailed information; . . . general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.'" 668 F.3d at 1076 (quoting *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 868 (9th Cir. 2004) (additional citation omitted). In this regard, we encourage the BLM to heed the advice from leading sage-grouse scientists in a letter to then-Secretary Zinke:

> Many of the changes proposed in the 2018 DEISs to amend the 2015 LUPs promote management at project-level spatial scales and cumulatively could result in the ineffective management of landscapes required to conserve sage-grouse

[3] See e.g. https://www.nifc.gov/fireandsagegrouse/docs/SG_SMA_Jurisdictional.pdf

> populations. Failure to take into account large-scale dynamics when managing sage-grouse will likely lead to an overall loss of habitat quantity and quality resulting in population declines.

See June 8, 2018 letter to then-Secretary Zinke from sage-grouse scientists, attached and incorporated by reference as Exhibit 1.

BLM has repeatedly ignored calls from scientists to consider cumulative impacts using the best available scientific data. *See* January 8, 2019 letter from Matt Holloran, Review of the BLM Proposed RMPA and FEIS, attached and incorporated by reference as Exhibit 2. In its 2018 FEIS BLM references a 2018 USGS report synthesizing sage-grouse science published since the 2015 ARMPs. U.S. Department of Interior Bureau of Land Management. 2016. Mitigation Handbook H-1794-1. Washington D.C., USA. This report corroborates and underscores the adverse impacts from oil and gas development on sage-grouse populations, and emphasizes the need to manage sage-grouse habitat on landscape and range-wide scales. Yet BLM's new approach promotes project-scale management of energy development, while eliminating landscape-scale and range-wide protections. The best science, developed since the 2015 ARMPA, demonstrates the need for connectivity between sage-grouse habitat "strongholds" (PHMA and SFA). Exhibit 2 at 2. Instead BLM has severely weakened protections for PHMA, eliminated SFA designations in four Western states, and undermined habitat prioritization. These changes would result in BLM managing isolated islands of PHMA (subject to exceptions, modifications, and waivers), without adequately protecting the connectivity between those habitats. The newest and best science shows that population persistence is strongly related to habitat connectivity between these islands, and the 2018 strategy eliminates important management tools for protecting that connectivity, jeopardizing population sustainability. BLM cannot ignore the cumulative impacts of these sweeping changes while paying lip service to science.

To meet legal and scientific requirements, BLM must look at the impacts of its proposed changes on a landscape level, across the entire range and planning area, looking at the policy changes, projected oil and gas lease sales and development, and changes to habitat to develop a compliant cumulative impacts analysis.

D. BLM has improperly relied on incorporation by reference to avoid adequate analysis.

In its "rangewide response to comments" BLM has taken the position that it is not tiering to the cumulative impact analysis in the 2015 plans but instead is incorporating it by reference and seeks to justify this approach to limiting its range of alternatives and analysis of environmental consequences. In support of this position, BLM states: "Incorporation of the 2015 EIS is allowable under BLM regulations and is appropriate in this circumstance because the purpose of this action builds upon the goals and objectives of the 2015 EIS." *See,* Wyoming Proposed Plan/FEIS at App. E-12, 13. However, as discussed in detail above, the goals and objectives of these amendments are starkly different from the 2015 Sage-grouse Plans. Instead of focusing on conserving the greater sage-grouse and avoiding the need for a listing, this amendment process has focused on accommodating new policies to make energy development (a primary threat to greater sage-grouse) easier in grouse habitat and seeking consistency with the plans of certain states regardless of whether those plans advocate removing protection from entire habitat classifications (again, a

key component of the FWS decision that the 2015 Sage-grouse Plans justified a finding that listing under the ESA was no longer warranted). The resulting decisions in these Proposed Amendments are in direct conflict with the commitments made in the 2015 Sage-grouse Plans and, as a result, cannot justify incorporate of the 2015 EISs' cumulative impact analysis or range of alternatives.

In discussing the purpose and need and range of alternatives, however, BLM also leaves room to both tier and incorporate by reference, stating in its rangewide response to comments:

> BLM is using incorporation by reference to streamline our analysis consistent with Administrative priorities. Incorporation of the 2015 EIS by reference is allowable under BLM regulations and is appropriate in this circumstance because the purpose of this action builds upon the goals and objectives of the 2015 EIS. Further, the CEQ 40 Questions, Question 24c, states that, "Tiering is a procedure which allows an agency to avoid duplication of paperwork through the incorporation by reference of the general discussions and relevant specific discussions from an environmental impact statement of broader scope into one of lesser scope or vice versa." The BLM has summarized and referenced applicable aspects of the 2015 EIS throughout the 2018 EIS, but especially in Chapters 2 and 4.

Wyoming Proposed Plan/FEIS at App. E-12, 13. However, neither tiering nor incorporating by reference can be justified when the purpose and need, the goals and objectives and the "Administrative priorities" are all opposed to those that set the direction of the 2015 Sage-grouse Plans.

As discussed in our comments on the Draft RMP Amendments, in order to incorporate documents by reference, BLM "must determine that the analysis and assumptions used in the referenced document are appropriate for the analysis at hand" (43 C.F.R. § 46.135(a)) and incorporating material by reference can only be done "without impeding agency and public review of the action." 40 C.F.R. § 1502.21. Further, NEPA requires that any tiering "must include a finding that the conditions and environmental effects described in the broader NEPA document are still valid or address any exceptions." 40 C.F.R. § 46.140.

BLM has not met any of these requirements. Simply stating that its previous analyses are incorporated by reference or can be tiered to does not address our concerns. The Draft RMP Amendments do include lists of the analysis or sections of the previous EISs that BLM tiers to and/or incorporates by reference. However, the agency has not, because it cannot, rely upon these to justify the lack of analysis for the actions contemplated in these RMP Amendments or the development of alternatives that tie to the stated purpose and need of this process, both of which are required to provide both the BLM and the public with the ability to make an information evaluation and decision.

E. BLM has failed to consider an adequate range of alternatives

In the Draft Plan Amendments, BLM considered only a no action alternative and a Management Alignment Alternative. Of course, the no action alternative could not be adopted, since it was inconsistent with the purpose and need of the amendment process of "modifying the approach to

Greater Sage-Grouse management in existing RMPs to better align with individual state plans and/or conservation measures and DOI and BLM policy." As a result, BLM actually evaluated only one alternative. At both scoping and with our comments on the Draft RMP Amendments, we submitted a standalone proposed alternative and identified specific alternatives that should be evaluated, such as completing the supplemental NEPA required to maintain Sagebrush Focal Areas, considering an alternative that would both strengthen protections from oil and gas development while improving consistency with state plans or considering an alternative to maintain net conservation gain in all states. BLM did not evaluate any of these alternatives.

In response to our comments, BLM's only response, set out in its rangewide response to comments is:

> The range is adequate to address the agency's purpose and need for considering these amendments. And by incorporating the 2015 plans by reference, BLM avails itself of a larger range of management options previously analyzed in a broadly distributed EIS. Further, BLM considered a number of alternatives and issues during scoping that the agency determined not to carry forward.

Wyoming Proposed Plan/FEIS, App. E-10, 11.

The range of alternatives is "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. NEPA requires BLM to "rigorously explore and objectively evaluate" a range of alternatives to proposed federal actions, including considering more environmentally protective alternatives and mitigation measures. *See* 40 C.F.R. §§ 1502.14(a) and 1508.25(c); *see also*, *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094,1122-1123 (9th Cir. 2002) (and cases cited therein).

When developing an EIS, the "range of reasonable alternatives is measured against the 'Purpose and Need' section…." *Cal. ex rel. Lockyer v. U.S. Dep't. of Agriculture*, 459 F. Supp. 2d 874, 905 (N.D. Calif., 2006), *aff'd*, 2009 U.S. App. LEXIS 19219 (9th Cir. 2009). Because the purpose and need for the 2018 Proposed Amendments is so different from the purpose and need that drove the 2015 Sage-grouse Plans, BLM cannot tier to the alternatives generated for the prior plans. In *Lockyer*, the Forest Service argued that it could base its EIS for the new 2005 version of the "Roadless Rule" upon the EIS (and its alternatives) for the 2001 Roadless Rule that it replaced, even though the 2005 rule was focused on giving states more authority over designating roadless areas on federal land. While the Forest Service argued the 2005 rule and the 2001 rule "share the same purpose and need," the Court concluded that their purposes were "plainly quite different" because the 2005 rule granted state-specific exemptions. *Lockyer* at 906. Based on the same reasoning, BLM cannot tier to alternatives considered for the different purpose and need of the 2015 Sage-grouse Plans.

BLM's flippant response to our detailed proposal of alternatives for consideration is similarly insufficient. A recent decision by a federal court in Colorado reinforces the importance of evaluating specific alternative approaches, including alternatives that could consider different approaches to fossil fuel development. In *Wilderness Workshop v. Bureau of Land Management,* the plaintiffs proposed an alternative where low and medium potential lands were closed for

leasing. BLM declined to consider the alternative, claiming it had already considered and discarded a "no leasing" alternative. The court found: "This alternative would be 'significantly distinguishable' because it would allow BLM to consider other uses for that land." *Wilderness Workshop v. Bureau of Land Management*, No. 1:16-cv-01822-LTB, Memorandum Opinion and Order, (D.Colo. October 17, 2018), p. 38. *See also, Colorado Environmental Coalition v. Salazar,* 875 F.Supp. 2d 1233, 1249-50 (D.Colo. 2008) (Community Alternative for protecting the top of the Roan Plateau while keeping majority open to leasing through use of no surface occupancy stipulations was feasible and distinct from other alternatives under consideration. BLM's failure to separately analyze the Community Alternative violated NEPA.).

The alternatives we recommended meet this standard and are also consistent with addressing both BLM's purported (and invalid) purpose and need, as well as an appropriate purpose and need for evaluating alternatives that would consider consistency with state plans and meaningful conservation of sage-grouse habitat that would still meet the goals and objectives of the 2015 Sage-grouse Plans, including avoiding the need to list the species under the ESA.

F. Supplemental NEPA is required due to major changes in the policies and circumstances underlying the plans

Supplemental NEPA analysis is required for "substantial changes in the proposed action that are relevant to environmental concerns" or "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(i), (ii). There are a number of changes that have been made to the 2015 Sage-grouse Plans without sufficient NEPA analysis that require supplemental NEPA.

First and foremost, as discussed in detail in our comments on the Draft RMP Amendments and accompanying Draft EISs, BLM's abandonment of its authority to require compensatory mitigation is a radical change to one of the cornerstones of the 2015 Sage-grouse Plans and the agreements with the states. As discussed in detail in Section III below, BLM's conclusion that FLPMA does not provide authority to require compensatory mitigation is without basis. However, setting aside BLM's ultimate ability to sustain its legal position, the function of the 2015 Sage-grouse Plans depends on the agency's commitment to carrying out compensatory mitigation. The states' plans, incorporated into the BLM plans, rely on compensatory mitigation to address residual impacts and/or to justify waivers, exceptions or modifications from oil and gas lease stipulations. In addition, the FWS cited compensatory mitigation as one of the "regulatory mechanisms and conservation efforts" that justified its finding the 2015 Sage-grouse Plans provided sufficient certainty the greater sage-grouse no longer warranted listing under the ESA.

These changes are neither "minor" nor "qualitatively within the spectrum of alternatives" evaluated in the Draft EISs. *See* Council on Environmental Quality, 40 Most Questions Asked Questions Concerning CEQ's NEPA Regulations at 22, *available at* https://www.energy.gov/sites/prod/files/G-CEQ-40Questions.pdf. Rather, they go to the very heart of the conservation strategy set forth in the 2015 Sage-grouse Plans and ratified by the "not warranted" determination. *See, e.g.,* 80 Fed. Reg. at 59,881 ("Requiring mitigation for residual impacts provides additional certainty that, while impacts will continue at reduced levels on Federal lands, those impacts will be offset to a net conservation gain standard."). Additionally, BLM's

new legal interpretation and guidance (set out in Instruction Memorandum 2019-018) represents the very sort of "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" that demand further analysis. BLM's response to these substantial concerns in its response to rangewide comments is limited to the following:

> Because this clarification simply aligns the Proposed Plan Amendment with BLM policy and with the scope of compensatory mitigation authority expressly provided by FLPMA, and because any analysis of compensatory mitigation relating to future projects would necessarily be fact-specific and evaluated in project-specific NEPA documents, there is limited value in attempting to do so at the level of land use planning.

Wyoming Proposed Plan/FEIS, App. E-23.

In addressing the overall impacts of the Management Alignment Alternative, BLM proffers a self-serving explanation of both why there are unlikely to be more than "nominal" impacts and why it cannot actually analyze impacts from the changes to its approach to compensatory mitigation:

> This clarification simply aligns the Proposed Plan Amendment with BLM policy and the scope of compensatory mitigation authority expressly provided by FLPMA. Any analysis of compensatory mitigation relating to future projects is speculative at this level of land use planning; therefore, analysis of compensatory mitigation is more appropriate for future project-specific NEPA. In other words, it is speculative to assume the impacts from voluntary compensatory mitigation at the planning level without knowing the frequency with which project proponents would proffer voluntary actions. The applicability and overall effectiveness of voluntary actions cannot be fully assessed until the project level when the specific location, design and impacts are known.
>
> However, the effects of the changes to compensatory mitigation in the Proposed Plan Amendments would be nominal, in part, because the BLM would continue to ensure consistency of its actions and authorizations with the land use planning level goals and objectives of the Proposed Plan Amendments. The implementation of compensatory mitigation actions would be directed by MOAs that describe how the BLM would align with State authorities and incorporated in the appropriate NEPA analysis subsequent to the Proposed Plan Amendment. While the conservation benefit of compensatory mitigation may be limited when weighed against the threats to Greater Sage-Grouse, particularly in the Great Basin region where wildland fire remains a key threat, the BLM is committed to implementing state-imposed mitigation recommendations to help minimize the impacts of anthropogenic disturbance and habitat fragmentation throughout the range of Greater Sage-Grouse.

Wyoming Proposed Plan/FEIS at 4-14, 15.

The foregoing "explanation" from the BLM actually reinforces the need for a thorough evaluation of the reasonably foreseeable impacts of BLM no longer enforcing compensatory mitigation, including the BLM actually explaining how its proposed approach will operate, looking at the impacts to mitigation overall, and providing an opportunity for comment. As reiterated by the U.S.

Court of Appeals for the Tenth Circuit, where the BLM makes significant changes to the approach it is taking, and those changes "may produce wildly different impacts," even those impacts are of a similar type, then "NEPA does not permit an agency to remain oblivious to differing environmental impacts, or hide them from the public." *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 707 (10th Cir. 2009). Similarly, the BLM cannot simply decide the analysis is "impracticable" because NEPA requires analysis to be conducted at the earliest possible time. *Id.* at 707-708 (citations omitted).

Supplemental NEPA is also justified in connection with this process as a result of changes from previous commitments in certain plans, such as Utah, Wyoming and Idaho, that abandoned the net conservation gain standard. As noted above, FWS relied on this standard as making an important contribution to conserving the greater sage-grouse and changing that standard can have a significant effect across the range, but BLM has not addressed this change in its cumulative impact analysis.

Similarly, while the commitment to prioritize oil and gas leasing and development outside sage-grouse habitat was formally removed from the Utah plan and from the Wyoming plan as it applied to GHMA, it was also effectively removed from all plans due to the issuance of Instruction Memorandum 2018-026 (Implementation of Greater Sage-Grouse Resource Management Plan Revisions or Amendments – Oil & Gas Leasing and Development Prioritization Objective)[4] which re-interpreted the commitment in the 2015 Sage-grouse Plans to provide that: "In effect, the BLM does not need to lease and develop outside of GRSG habitat management areas before considering any leasing and development within GRSG habitat." And also permitted BLM to "prioritize" instead based on unrelated considerations such as "office workload capacity." We have seen the effects of this change in policy through about 1.5 million acres of sage-grouse habitat offered for lease since 2017, with more than 700,00 sold, and more than 2 million acres of habitat up for lease in February and March 2018. The effects of this change on sage-grouse habitat significant and certainly should be analyzed as part of these EISs.

In addition, the change in circumstances due to ongoing fires in sage-grouse habitat over the last three years, burning millions of acres, should be evaluated in supplemental analysis. *See*, Information Bulletin No. FAIB 2017-009, Greater Sage-grouse Habitat Data for Wildland Fire Management Decision Making and Reporting of Acres Burned (updated October 23, 2018), attached as Exhibit 3.

G. The new plans are incomprehensible based on their revised mitigation approach.

In setting out an approach to mitigating the impacts of planning decisions, especially through the use of compensatory mitigation, the Proposed RMP Amendments contain numerous inconsistencies that essentially render the plan incomprehensible, as well as interfere with the public comments BLM supposedly sought on this very topic.

In the Draft RMP Amendments, BLM indicated that it was seeking comment on compensatory mitigation, stating:

[4] Available at https://www.blm.gov/policy/im-2018-026

> The DOI and the BLM have also modified their mitigation policies since the 2015 plans were finalized. The public did not have the opportunity to comment specifically on a net conservation gain approach to compensatory mitigation during the 2015 land use planning process. In addition, the DOI and the BLM are evaluating whether the implementation of compensatory mitigation standard on public lands is appropriate and consistent with applicable legal authorities. We request public comment about how the BLM should consider and implement mitigation with respect to the Greater Sage-Grouse, including alternative approaches to requiring compensatory mitigation in BLM land use plans.

See, e.g., Wyoming Greater Sage-Grouse Draft RMP Amendment/EIS, at 2-4. During this time, BLM also issued new guidance on compensatory mitigation, Instruction Memorandum (IM) 2018-093, which was later replaced with IM 2019-018, concluding that, in fact, (1) BLM could and would no longer require compensatory mitigation on federal lands but (2) could incorporate voluntary or state requirements in certain circumstances, although (3) it might not ever enforce such requirements. Consequently, in reality, any such public comment could not have been meaningful, since the conflicts between the Draft RMP Amendments and the BLM's guidance cannot be reconciled.

The Proposed RMP Amendments perpetuate and build upon these inconsistencies. The Proposed Amendments, as discussed in detail in Section III, below, and similar to the language in IM 2019-018, set out conflicting provisions regarding whether BLM can or will enforce federal, voluntary or state requirements for compensatory mitigation. Further, they rely on state guidance that has yet to be issued or is likely to be challenged as unenforceable. For example, Idaho has not even finalized its compensatory mitigation program. This makes it even more difficult for the public to discern what the mitigation approach in each plan could or would be, as well as how it could function across the range of the greater sage-grouse, factors that are vital for analyzing the cumulative impacts of mitigation measures for this species.

The lack of coherence in the Proposed Amendments frustrates the public's ability to understand what BLM intends to propose and to evaluate the likelihood of its effectiveness; further, because it is only just being presented in the FEISs, the public has yet to have an opportunity to provide meaningful comments. Courts have invalidated such "incomprehensible" agency plans and environmental analyses that contain conflicting and confusing information. *See, e.g.*, *California ex rel. Lockyer v. U.S. Forest Service*, 465 F. Supp. 2d 917, 948-50 (N.D.Cal. 2006).

H. The Proposed RMP Amendments and Final EISs fail to address necessary information regarding current use of waivers, exceptions, and modifications, and post-2015 oil and gas leasing in sage-grouse habitat.

A serious flaw in the Proposed RMP Amendments and Final EISs is BLM's failure to provide and evaluate data on two categories of information: (1) its own current practices for granting waivers, exceptions, and modifications to oil and gas lease stipulations, and (2) the amount of oil and gas leasing that has occurred in sage-grouse habitat since 2015. Because this information is necessary for completing the required analysis of environmental consequences under NEPA, BLM must address this flaw before finalizing these RMP Amendments.

As to the first category of data, and as noted earlier in these comments, the 2015 Sage-grouse Plans rely on restrictive lease stipulations to protect sage-grouse from the harmful effects of oil and gas development—protections that are hamstrung whenever operators are permitted not to comply with them. The Proposed RMP Amendments greatly expand when and where waivers, exceptions, and modifications may be granted, and this expansion's environmental impacts can only be properly assessed against baseline information showing how waivers, exceptions, and modifications are currently being used.

Specifically, the Final EISs should, but do not, provide and evaluate the following information:

- The number of applications operators have submitted to receive waivers, exceptions, and modifications, broken down by time and region (e.g. year and state);
- The number of waivers, exceptions, and modifications BLM has granted, broken down by time and region;
- For each instance where a waiver, exception, or modification was granted, information showing what kind of activity the operator subsequently pursued.

Regarding the second category of information, oil and gas leasing has skyrocketed under the Trump Administration's "energy dominance" policy agenda, with nearly 17 million acres of public land offered for lease in the United States since 2017—much of this within sage-grouse habitat. These sage-grouse leases are by default subject to no surface occupancy and other protective stipulations, but that does not guarantee that development will not actually occur. In fact, as discussed in more detail below, at least some BLM offices receive numerous requests for stipulation exceptions and grant a non-trivial number of them. This means that leases issued in sage-grouse habitat carry a risk of development, stipulations notwithstanding. With the current proposal to expand waivers, exceptions, and modifications, combined with the general uptick in leasing on sage-grouse habitat, it is foreseeable that drilling in sage-grouse habitat will increase. Disclosing and evaluating the numbers behind this risk is imperative. Yet the Final EISs (including the putatively cure-all USGS science review) do not provide comprehensive numbers or trends for post-2015 oil and gas leasing in sage-grouse habitat.

Accordingly, the Final EISs should, but do not, provide and evaluate the following information:

- The number of parcels and number of acres leased for oil and gas development in sage-grouse habitat since 2015;
- Historical data showing the number of parcels and acres leased in sage-grouse habitat such that post-2015 data may be contextualized and trends may be observed.

This information's absence renders the Proposed RMP Amendments and Final EISs unlawful. NEPA requires that "high quality" environmental information be "available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). When there is "incomplete or unavailable information," BLM must "make clear that such information is lacking." 40 C.F.R. § 1502.22. When the missing information is "relevant to reasonably foreseeable significant adverse impacts" and "essential to a reasoned choice among alternatives," the agency must obtain the information and include it in the EIS, unless the costs of obtaining it are

"exorbitant" or "the means to obtain it are not known." 40 C.F.R. 1502.22(a). In the latter case, where costs or practical limitations make the data unavailable, BLM is required to do the next best thing and include in the EIS (1) a statement that the information is incomplete or unavailable, (2) a statement of the information's relevance to foreseeable significant impacts, (3) a "summary of existing credible scientific evidence" relevant to evaluating impacts, and (4) the agency's evaluation of impacts based on "theoretical approaches or research methods generally accepted in the scientific community." 40 C.F.R. 1502.22(b).

In other words, BLM is required to obtain any information that is relevant and essential to the NEPA analysis and include it in the EIS. This requirement is excused only if obtaining the information is exorbitantly costly or impossible, in which case BLM must follow the four steps prescribed in 40 C.F.R. § 1502.22(b). These legal obligations have not been satisfied in the Proposed RMP Amendments and Final EISs.

First, both categories of information—exceptions, modifications and waivers, and post-2015 oil and gas leasing in sage-grouse habitat—are "relevant to reasonably foreseeable significant adverse impacts" and "essential to a reasoned choice among alternatives." 40 C.F.R. §1502.22(a). Regarding data on waivers, exceptions, and modifications, the regularity and frequency with which these loopholes are granted bears directly on sage-grouse viability and the efficacy of putative protections, and would help illuminate differences in how NEPA alternatives might impact sage-grouse and their habitat. Similarly, information about post-2015 oil and gas leasing within sage-grouse habitat helps contextualize the risk of stipulation loopholes and quantify a known risk to sage-grouse. Because both categories of information are relevant and essential, they must be considered. *See*, *e.g.*, *Envtl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1189 (N.D. Cal. 2004) (finding the Forest Service failed to take a hard look at the cumulative impacts of a timber sale because it lacked information about past timber sales and did not consider all of the information it had about a reasonably foreseeable future sale); *Sierra Club v. Van Antwerp*, 709 F. Supp. 2d 1254, 1271 (S.D. Fla. 2009) (finding the Army Corps of Engineers violated NEPA by failing to include a county's estimate of costs for potential upgrades to a water treatment system, or any analysis by the Corps as to whether those upgrades were reasonably foreseeable).

Second, the information is available or obtainable. For information on current use of waivers, exceptions, and modifications, the data is far from perfect, but does exist. A 2017 GAO report zeroed in on this issue and concluded that "[t]he extent to which [BLM] approved requests for exceptions to oil and gas lease and permit requirements is unknown," and that "fewer than half" of BLM field offices tracked this data.[5] The report found poor tracking habits and inconsistent anecdotal accounts, observing that "[o]ne official estimated that the office might receive 10 requests per year, while other officials within the same office estimated they have had years with more than 100 requests." While this report is hardly a glowing endorsement of BLM's tracking

[5] *Oil and Gas Development, Improved Collection and Use of Data Could Enhance BLM's Ability to Assess and Mitigate Environmental Impacts*, United States GAO report April 2017, available at https://www.gao.gov/assets/690/684254.pdf. Ultimately, the report found that "[b]ecause BLM does not consistently track exception request data or have a consistent process for considering requests and clearly documenting decisions, BLM may be unable to provide reasonable assurance that it is meeting its environmental responsibilities."

data, it reveals that at least some offices and some officials do track exceptions data. Indeed, publicly available databases confirm that BLM tracks at least some data, even if incomplete.[6] Moreover, the data is likely available from the Wyoming Game and Fish Department, which reviews and approves such requests. Consequently, BLM is required to assess and include in its NEPA documents the information it does have, while acknowledging its shortcomings.

Similarly, information about the number of oil and gas leases issued within sage-grouse habitat since the plans were approved in 2015 is readily available to BLM. BLM tracks and reports all of the lease sales it conducts, and the location of oil and gas lease parcels is easily overlaid with sage-grouse habitat—a process that readily provides the number of parcels and acres leased in sage-grouse habitat.

For the remaining information—untracked or incomplete information about waivers, exceptions, and modifications—BLM must "make clear that such information is lacking" and explain why it is either exorbitantly costly or impossible to obtain. 40 C.F.R. § 1502.22(b). However, the Final EISs entirely neglect to acknowledge this apparent information gap.[7] For example, in Section 4.4, titled "Incomplete or Unavailable Information," BLM lists several categories of missing data, but does not mention waivers, exceptions, and modifications to oil and gas lease stipulations. *See* Wyoming Proposed Plan /FEIS, at 4-19. Nor do the Final EISs bring up this information gap in other parts of the documents. *Contra*, *e.g.*, *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 875 (9th Cir. 2017) ("The final EIS consistently acknowledged that information was incomplete with respect to a critical aspect of the withdrawal — namely, the connection between uranium mining and increased uranium concentrations in groundwater in the withdrawn area."); *see*, *e.g.*, *Lands Council v. Forester of Region One of the United States Forest Serv.*, 395 F.3d 1019, 1031-32 (9th Cir. 2004) (finding a Forest Service EIS violated NEPA because it failed to disclose that a scientific model entailed incomplete or unavailable information). Thus, the Final EISs fail to "make clear" (or even allege) that information is missing, as it must under 40 C.F.R. § 1502.22.

Finally, even if BLM ultimately concludes that this information is in fact unobtainable, it must follow the steps outlined in 40 C.F.R. § 1502.22(b). *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 497 (9th Cir. 2014) (holding that the steps specified by § 1502.22(b) are required if the agency finds "'essential' information to be unobtainable"); *accord Nat'l Mining Ass'n*, 877 F.3d at 875. But BLM has not even addressed this data, much less complied with § 1502.22(b).

In sum, the Final EISs are deficient for failing to include relevant, essential information that is available to BLM—critical information about the frequency with which waivers, exceptions, and modifications are currently granted, and data on the number of parcels and acres that have been leased to oil and gas developers in sage-grouse habitat since the plans were approved in 2015. BLM must include this information in the Final EIS and evaluate it. For any information that BLM does not currently have, it must make a good faith effort to compile this data from its field

[6] *See*, *e.g.*, 2008-2009 Wildlife Exceptions, Waivers & Modifications: Log of Exceptions, Waivers and Modifications FY 2009, available at https://web.archive.org/web/20150909155115/http:/www.wy.blm.gov/rfo/wildlife/exceptions.htm. This log includes four instances of exceptions being granted in sage-grouse habitat.

[7] And if BLM is of the opinion that *all* information on waivers, exceptions, and modifications is incomplete or unavailable, it has still failed its duty because it does not discuss missing waivers, exceptions, and modifications information in any capacity.

offices, report it in the EIS, and then evaluate it. If the data is truly unobtainable, BLM must explain why and follow the steps prescribed in 40 C.F.R. § 1502.22(b). Until BLM fully discloses and discusses all relevant information—and follows § 1502.22(b) for unobtainable information—the Final EISs violate NEPA and CEQ regulations.

I. BLM failed to respond to substantive comments.

NEPA imposes an obligation on BLM to respond to substantive comments:

> An agency preparing a final environmental impact statement shall assess and consider comments **both individually and collectively**, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:
> **(1)** Modify alternatives including the proposed action.
> **(2)** Develop and evaluate alternatives not previously given serious consideration by the agency.
> **(3)** Supplement, improve, or modify its analyses.
> **(4)** Make factual corrections.
> **(5)** Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

40 C.F.R. § 1503.4(a) (emphasis added). In the Proposed Amendments and FEISs, BLM utterly failed to comply with this obligation.

Each Proposed Amendment includes an Appendix that purports to set out both a rangewide response comments and a state-specific response to comments by first summarizing comments, then responding to those summaries and then setting out the "full text of parsed comments." However, the summaries of comments are so broad that they do not accurately represent the comments submitted. For example, the issue of maintaining a net conservation gain standard was specifically called out for comment in the Draft RMP Amendments. As stated in the Draft Wyoming RMP Amendment:

> At the request of the State, the Management Alignment Alternative in this Draft RMPA/EIS proposes a change to compensatory mitigation by modifying the net conservation gain standard that the BLM incorporated into its plans in 2015. The DOI and BLM have also modified their mitigation policies since the 2015 plans were finalized. The public did not have the opportunity to comment specifically on a net conservation gain approach to compensatory mitigation during the 2015 land use planning process. In addition, DOI and the BLM are evaluating whether the implementation of a compensatory mitigation standard on public lands is appropriate and consistent with applicable legal authorities. We request public comment about how the BLM should consider and implement mitigation with respect to the Greater Sage-Grouse, including alternative approaches to requiring compensatory mitigation in BLM land use plans.

Wyoming Greater Sage-Grouse Draft RMP Amendment at ES-6. Yet, BLM's summary of the range of comments submitted on the complex issue of maintaining a next conservation gain

standard, is "Summary: Mandatory net-gain and compensatory mitigation is supported by some commenters, and objected to by others" and "Summary: Various commenters argued that the "net conservation gain" standard should be retained, modified or eliminated. Many commenters requested clarification of the BLM's authority to impose compensatory mitigation." Wyoming Proposed Plan/FEIS App. E-8. The summarized response to each of these is only one paragraph. For example, the response to the second consolidated comment is just:

> Response: Following extensive review of FLPMA, including existing regulations, orders, policies, and guidance, the BLM has concluded that FLPMA does not explicitly mandate or authorize the BLM to require public land users to implement compensatory mitigation to offset environmental effects beyond the proponents level of impact. The Proposed Plan seeks to clarify that the mitigation standard applies not at the project level, but rather as a planning-level goal and objective unless specifically required under a state management authority. The BLM is pursuing agreements with the States of Colorado, Idaho, Nevada, Oregon, Utah and Wyoming to clarify how BLM, project proponents, and state management agencies will collaborate to implement a State's compensatory mitigation plan.

Wyoming Proposed Plan/FEIS App. E-9. This in no way evidences that the agency has not individually considered or assessed the comments submitted and the response provided has not provided sufficient explanations as required by NEPA. Moreover, the summarized comments and responses cover just over 41 pages, while the "parsed comments" require over 200 pages – highlighting just how inadequate the agency's summaries and responses are.

Courts have reiterated that BLM cannot be so cavalier in its approach to responding to the substantive comments submitted and important issues raised with respect to the draft amendments and EISs. "An agency preparing an EIS has a duty to assess, consider, and respond to *all* comments." *Oregon Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1120 (9th Cir. 2010) (quoting *Or. Natural Res. Council v. Marsh*, 52 F.3d 1485, 1490 (9th Cir.1995) (emphasis in original). Further, failure to respond to public comments in a manner consistent with 40 C.F.R. § 1503.4 may constitute a failure to take a "hard look" in violation of NEPA. *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 445-46 (4th Cir. 1996). Where an agency does not meet this "minimum requirement," courts will remand an EIS and require an agency to fulfill its duty under NEPA. *See*, *e.g.*, *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.2d. 520, 537 (8th Cir. 2003). BLM must provide responses to comments that comply with 40 C.F.R. § 1503.4(a).

J. BLM has not relied on the best available science.

BLM cannot evaluate consequences to the environment without adequate data and analysis. NEPA's hard look at environmental consequences must be based on "accurate scientific information" of "high quality." 40 C.F.R. § 1500.1(b). "Agency regulations require that public information be of 'high quality' because 'accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.' 40 C.F.R. § 1500.1(b)." *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998). Essentially, NEPA "ensures that the agency, in reaching its decision, will have available and will carefully consider detailed

information concerning significant environmental impacts." *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 349.

In our comments on the Draft RMP Amendments, we highlighted numerous studies that BLM had not taken into account in the Draft EISs and also noted that BLM was not following the clear direction from this best available science, which indicated that moving away from the direction in the 2015 Sage-grouse Plans would jeopardize the survival of the greater sage-grouse and the FWS's 2015 finding that the species no longer warranted listing under the ESA. In its response to comments, BLM identified additional science that had been or would be evaluated, but then concluded that: "Overall, submitted studies did not offer information that changed the analysis of the plans/EISs and did not offer any new conditions or other information the BLM had not considered already." Utah Proposed Amendment, p. App-2-5.

BLM's conclusion is not sustainable. As discussed in the June 2018 letter from leading sage-grouse scientists (Exhibit 1), the research upon with BLM relies in the Proposed Amendments and FEISs actually points to the need to sustain the direction in the 2015 Sage-grouse Plans, including maintaining a landscape-scale approach, retaining priority and general habitat management areas and preserving protections from oil and gas development. However, many of these elements of the plans are being weakened or removed altogether in contravention of this accepted science. In addition, more recent science has only reinforced this interpretation of the weight of existing, applicable science (including BLM's USGS Synthesis). For instance, a report by Burkhalter et al. found that landscapes associated with a higher abundance of males on leks were those located in highly connected, sagebrush-dominated areas with limited energy development.[8] A report by Lipp, T.W. and Gregory, A.J., found that, as energy demands continue to increase, and with multiple species of grouse listed or nominated for listing under the ESA, negative impacts attributed to energy development are likely to continue.[9] And a study by Row, et al., finds that, although population strongholds will likely have much higher suitability values, maintaining areas outside of these regions should help maintain connectivity between these existing protection areas.[10] This new science emphasizes the importance of retaining protections from energy development, maintaining connectivity and ensuring that management is conducted at a landscape-scale.

BLM must both incorporate the best available science and draw the appropriate conclusions from this science, in order to analyze the environmental consequences of its proposed actions. In the Proposed Amendments and FEISs, BLM has ignored the conclusions of current science and must update the FEISs to acknowledge the likely consequences of the Proposed Amendments.

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[8] Burkhalter et al. (2018), Animal Conservation. Landscape-scale habitat assessment for an imperiled avian species https://zslpublications.onlinelibrary.wiley.com/doi/full/10.1111/acv.12382

[9] Lipp, T.W. and Gregory, A.J., 2018, Environmental Impacts of Energy Development on Prairie-Grouse and Sage-Grouse in the Continental U.S. http://www.academia.edu/37497955/Environmental_Impacts_of_Energy_Development_on_Prairie-Grouse_and_Sage-Grouse_in_the_Continental_United_States

[10] Row, J.R., Doherty, K.E., Cross, T.B., Schwartz, M.K., Oyler-McCance, S.J., Naugle, D.E., Knick, S.T., and Fedy, B.C., 2018, Quantifying functional connectivity—The role of breeding habitat, abundance, and landscape features on range-wide gene flow in sage-grouse: Evolutionary Applications, v. 11, no. 8, p. 1305–1321, https://doi.org/10.1111/eva.12627.

III. BLM Improperly Removed Federally Enforceable Compensatory Mitigation From The Plan.

In 2015, in its ESA listing decision, FWS found that "the greater sage-grouse is not in danger of extinction now or in the foreseeable future throughout all or a significant portion of its range and that listing the species is no longer warranted." The Service's finding was based not on the stability of the species' population, but rather on the "adequacy of regulatory mechanisms and conservation efforts".[11] Mitigation – avoidance, minimization and, where appropriate, compensatory mitigation – was an essential regulatory and conservation tool that supported this decision.

Specifically, the FWS stated:

> All of the Federal Plans require that impacts to sage-grouse habitats are mitigated and that compensatory mitigation provides a net conservation gain to the species. All mitigation will be achieved by avoiding, minimizing, and compensating for impacts following the regulations from the White House Council on Environmental Quality (*e.g.,* avoid, minimize, and compensate), hereafter referred to as the mitigation hierarchy. If impacts from BLM/USFS management actions and authorized third party actions that result in habitat loss and degradation remain after applying avoidance and minimization measures (*i.e.,* residual impacts), then compensatory mitigation projects will be used to provide a net conservation gain to the species. Any compensatory mitigation will be durable, timely, and in addition to that which would have resulted without the compensatory mitigation.[12]

BLM, however, has now proposed to eliminate the 2015 Sage-grouse Plans' requirement to use compensatory mitigation. Under the December 2018 Proposed RMP Amendments and Final EISs, compensatory mitigation would no longer be required. *See, e.g*., Wyoming Proposed Plan Amendment/FEIS at ES-7, 4-14. BLM states that: "following extensive review of FLPMA, existing regulations, orders, policies, and guidance, the BLM has determined that FLPMA does not explicitly mandate or authorize the BLM to require public land users to implement compensatory mitigation as a condition of obtaining authorization for the use of BLM-administered lands (Instruction Memorandum 2018-093, Compensatory Mitigation, July 24, 2018)." *Id*. at ES-7.

A. BLM's conclusion that it cannot require compensatory mitigation is based on flawed reasoning and not supported by law.

First, we would note that there is now a new Instruction Memorandum (IM) on Compensatory Mitigation (IM 2019-018), issued December 6, 2018, but that IM still concludes that BLM cannot require compensatory mitigation under FLPMA and relies on a Solicitor Memorandum M-37046, "Withdrawal of M-37039, "The Bureau of Land Management's Authority to Address Impacts of its Land Use Authorizations Through Mitigation." (June 30, 2017). Solicitor Memorandum M-

[11] U.S. Fish and Wildlife Service. *Endangered and Threatened Wildlife and Plants: 12-Month Finding on a Petition to List Greater Sage-Grouse as an Endangered or Threatened Species.* 80 Federal Register 59858 (October 2, 2015).
[12] *Id.* at 59881 (citation omitted).

37046 withdraws a previous Solicitor Opinion that confirmed BLM's authority to address land use authorizations through mitigation but did not conclude BLM did not have the subject authority; rather, it "attempted to answer an abstract question." In actuality, the direction in both IM 2019-018 and the Proposed RMP Amendments are arbitrary and capricious, and in violation of law.

BLM is subject to a broad range of authorities supporting mitigation measures to avoid, minimize and offset unavoidable impacts on federal lands. FLPMA requires BLM to manage for multiple use and sustained yield, and to avoid unnecessary or undue degradation of resources and values.[1] NEPA and regulations require BLM to analyze potential impacts and consider ways to avoid, minimize and mitigate impacts – in accordance with the mitigation hierarchy.

FLPMA unquestionably provides BLM with ample support for applying the mitigation hierarchy, including requiring compensatory mitigation, not least through its direction to manage public lands in a manner to ensure the protection of ecological and environmental values, preservation and protection of certain public lands in their natural condition, and provision of food and habitat for wildlife;[13] and to "manage the public lands under principles of multiple use and sustained yield".[14] The principles of multiple use and sustained yield pervade and underpin each of BLM's authorities under FLPMA, including the policies governing the Act,[15] the development of land use plans,[16] the authorization of specific projects,[17] and the granting of rights of way.[18] While FLPMA does not elevate certain uses over others, it does delegate discretion to the BLM to determine whether and how to develop or conserve resources, including whether to require enhancement of resources and values through means such as compensatory mitigation.[19]

Case law confirms that multiple use/sustained yield principles do "not mandate that every use be accommodated on every piece of land; rather, delicate balancing is required." *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 710 (10th Cir. 2009). The mitigation hierarchy, including compensatory mitigation, provides an important tool for achieving a balance among the multiple uses allowed on public lands. BLM can authorize a consumptive use, like oil and gas development, but balance that use by providing compensatory mitigation for the unavoidable losses suffered by the affected species, such as sage-grouse. In other words, the mitigation hierarchy can have the effect of expediting and defending authorized consumptive uses of the public lands while simultaneously protecting fish and wildlife resource values in perpetuity. In sum, these statutory policies encompass the protection of environmental and ecological values on the public lands and the provision of food and habitat for fish and wildlife and are furthered by the implementation of the mitigation hierarchy, including compensatory mitigation, to protect and preserve habitat for the sage grouse.

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[13] 43 U.S.C. § 1701(a)(8). Among other things, public resources should be managed to "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values" and "provide food and habitat for fish and wildlife".
[14] 43 U.S.C. § 1732(a).
[15] 43 U.S.C. § 1701(a)(7).
[16] 43 U.S.C. § 1712(c)(1).
[17] 43 U.S.C. § 1732(a).
[18] 43 U.S.C. § 1765(a)(i).
[19] P. L. 94-579 (Oct. 21, 1976) (stating an intent "[t]o establish public land policy; to establish guidelines for its administration; to provide for the management, protection, development, *and enhancement of the public lands;* and for other purposes." (emphasis added)).

As a distinct authority, BLM also has the obligation to ensure that authorizations do not result in "undue or unnecessary degradation." FLPMA states that BLM "shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands."[20] A number of cases have found that BLM met its obligation to prevent unnecessary or undue degradation based, in part, on its imposition of compensatory mitigation. *See e.g., Theodore Roosevelt Conservation Partnership v. Salazar ("TRCP")*, 616 F.3d 497, 518 (D.C. Cir. 2010) (BLM decision to authorize up to 4,399 natural gas wells from 600 drilling pads did not result in "unnecessary or undue degradation" in light of substantial mitigation required from permittees, including prohibition of new development outside core area until comparable acreage in the core was restored to functional habitat, and a monitoring and mitigation fund of up to $36 million); *see also Gardner v. United States Bureau of Land Management*, 638 F.3d 1217, 1222 (9th Cir. 2011) (FLPMA provides BLM "with a great deal of discretion in deciding how to achieve the objectives" of preventing "unnecessary or undue degradation of public lands.")

BLM's implementation of a standard requiring compensatory mitigation was recently confirmed in *Western Exploration, LLC v. U.S. Department of the Interior*, 250 F.Supp.3d 718 (D.Nev. 2017).[21] In considering the argument that a net conservation gain standard for compensatory mitigation violated FLPMA, the court stated:

> The FEIS states that if actions by third parties result in habitat loss and degradation, even after applying avoidance and minimization measures, then compensatory mitigation projects will be used to provide a net conservation gain to the sage-grouse. The Agencies' goals to enhance, conserve, and restore sage-grouse habitat and to increase the abundance and distribution of the species, they argue, is best met by the net conservation gain strategy because it permits disturbances so long as habitat loss is both mitigated and counteracted through restorative projects. If anything, this strategy demonstrates that the Agencies allow some degradation to public land to occur for multiple use purposes, but that degradation caused to sage-grouse habitat on that land be counteracted. The Court fails to see how BLM's decision to implement this standard is arbitrary and capricious. Moreover, the Court cannot find that BLM did not consider all relevant factors in choosing this strategy… In sum, Plaintiffs fail to establish that BLM's challenged decisions under FLPMA are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[22]

BLM's conclusions in the 2018 Proposed RMP Amendments, and in IM 2018-019, cannot be supported by applicable law, as reviewed in Solicitor's Opinion M-37039 (Dec. 21, 2016) (attached and incorporated by reference as Exhibit 4). As detailed in M-37039, FLPMA and other applicable laws allow BLM to require compensatory mitigation. Taking the opposite approach based on a misreading of the law is both arbitrary and capricious and contrary to law, and moreover violates FLPMA's requirement to avoid unnecessary or undue degradation (UUD).

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[20] 43 USC § 1732(b).

[21] BLM cited this the case in its determination to issue its Notice of Intent opening this rulemaking process. *See* Notice of Intent to Amend Land Use Plans Regarding Greater Sage-Grouse Conservation and Prepare Associated Environmental Impact Statements or Environmental Assessments. 82 Fed.Reg. 47248 (October 11, 2017). Docket No.: LLWO200000/LXSGPL000000/17x/L11100000.PH0000.

[22] *Western Exploration, LLC v. U.S. Department of the Interior*, at 747.

Abandoning compensatory mitigation as a tool to prevent habitat degradation would violate this requirement. As noted above, the UUD standard prohibits degradation beyond that which is avoidable through appropriate mitigation and reasonably available techniques. *TRCP*, 661 F.3d at 76-77; *Colo. Env. Coal*, 165 IBLA at 229.

Offsite compensatory mitigation is a well-established, reasonable and appropriate tool that has long been used to limit damage to public lands. Refusing to use that tool is therefore both arbitrary and capricious in light of the well-established authority under NEPA and FLPMA, but also fails to meet FLPMA's requirement that BLM avoid unnecessary or undue degradation. BLM's conclusions to the contrary in both IM 2019-018 and the 2018 Proposed RMP Amendments are arbitrary and capricious and cannot be supported by law.

B. The approach to compensatory mitigation set out the Proposed RMP Amendments is based on flawed policy and cannot be relied upon to mitigate the likely impacts to grouse habitat of the planning decisions.

As discussed above, BLM's conclusion that it cannot require compensatory mitigation is based on unsupportable legal reasoning. However, even trying to work within BLM's self-imposed limitations, the approach to compensatory mitigation set out in the Proposed Amendments is so flawed as to be likely unworkable, unenforceable and unreliable.

In the Proposed Amendments (consistent with IM 2019-018), BLM confirms that it has "determined that FLPMA does not explicitly mandate or authorize the BLM to require public land users to implement compensatory mitigation as a condition of obtaining authorization for the use of BLM-administered lands." However, the Proposed Amendments then retain language referring to compensatory mitigation as possibly being part of the plans on a "voluntary" basis, stating:

> . . . consistent with valid existing rights and applicable law, when authorizing third-party actions that result in habitat loss and degradation, the BLM will *consider* voluntary compensatory mitigation actions only as a component of compliance with a State mitigation plan, program, or authority, or when offered voluntarily by a project proponent.

See, e.g., Wyoming Proposed Plan/FEIS, Table 2-1 at 2-21 (emphasis added). In this manner, compensatory mitigation will not be "required" it will be "considered." Similarly, the Proposed Amendments state: "The BLM will not deny a proposed authorization in Greater Sage-Grouse habitat solely on the grounds that the proponent has not proposed or agreed to undertake voluntary compensatory mitigation." *See, e.g.,* Wyoming Proposed Plan/FEIS at ES-8, and Errata Sheet at 36. This is consistent with the language in IM 2019-018, which also states "BLM must not deny authorization for a project or activity based solely upon a project proponent's refusal to adopt a compensatory mitigation proposal that BLM has identified."

Based on BLM's lack of commitment to enforcing compensatory mitigation, the agency cannot rely on the effectiveness of this tool to address harm to habitat, under the standards set out by NEPA and related case law. By statute and regulation, an environmental impact statement must include a discussion of possible mitigation measures to avoid adverse environmental impacts. *See* 40 C.F.R. §§ 1502.14(f), 1502.16(h); *see also Robertson v. Methow Valley Citizens Council*, 490

U.S. 332, 351-52 (1989); *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998).

At the same time BLM is clearly intending to rely on state compensatory mitigation policies to ensure harm to sage-grouse habitat is addressed. For instance, The Wyoming Proposed Plan/FEIS provides:

> To align this planning effort with the BLM's compensatory mitigation policy (IM 2018-093) and the State of Wyoming's mitigation framework, the Proposed RMP Amendment clarifies that the BLM would consider compensatory mitigation only as a component of compliance with a state mitigation plan, program, or authority, or when offered voluntarily by a project proponent.

Wyoming Proposed Plan/FEIS at ES-7. Similarly, the Colorado Proposed Amendments states:

> To support the State of Colorado's management goals, as outlined in the Management Alignment Alternative, while complying with the compensatory mitigation policy, mitigation goals and objectives were further clarified (SSS-3, Section 1.5.2, Clarification of Planning Decisions in the 2015 ROD/ARMPA). The clarification allows the State of Colorado to manage the species under its authority on a landscape scale using its policy for compensatory mitigation.

Colorado Proposed Amendment, p. 2-4. Likewise, the Nevada/California Proposed RMP Amendment states that:

> . . the BLM has coordinated with the State of Nevada to develop a memorandum of agreement (MOA) to guide the application of the mitigation hierarchy and compensatory mitigation actions for future project authorizations in Greater Sage-Grouse habitat on Nevada BLM-administered lands.

The Proposed Nevada/California Proposed Amendment further provides that:

> . . . when the BLM receives applications for projects in Greater Sage-Grouse habitat on BLM-administered lands in Nevada, the BLM would notify the State of Nevada to determine if the State requires or recommends any additional mitigation—including compensatory mitigation—under State regulations, policies, or programs related to the conservation of Greater Sage-Grouse and its habitat.

Even more specifically, in the Colorado Proposed Amendment, exceptions and modifications to no surface occupancy stipulations may be granted if:

> . . . impacts anticipated by the proposed activity would be fully offset through compensatory mitigation developed in coordination with the State of Colorado (as a requirement of State policy or authorization or as offered voluntarily by leaseholder) that meets principles of compensatory mitigation. . .

Colorado Proposed Amendment, pp. 2-5 – 2-6. This approach envisions that the compensatory mitigation requirements would then be incorporated into the permit to drill, which is consistent with language in IM 2019-018, stating that: "Where compensatory mitigation is required as part of a state plan, program or authorization, or required by Federal laws other than FLPMA, the BLM will include the required mitigation in all of its action alternatives in a NEPA analysis."

The Proposed Amendments also provide that "The BLM will defer to the appropriate State authority to quantify habitat offsets, durability, and other aspects used to determine the recommended compensatory mitigation action." In this manner, BLM is proposing to incorporate compensatory mitigation into these plans via state mitigation plans or voluntary measures, then permit activities, such as drilling in PHMA, that would otherwise not have been permitted by relying on these other requirements or voluntary measures. At some point along the way, BLM would then ostensibly find a manner to make these measures enforceable.

Of course, to the extent states require or permit payment of funds, it is unclear how BLM will reconcile this with the prohibition on mandating compensatory mitigation on BLM lands or accepting a monetary contribution for implementing compensatory mitigation set out in IM 2019-18. Indeed, ***given that BLM has determined it cannot enforce compensatory mitigation under its own authority, it is unclear how it can then enforce compensatory mitigation that states may require – and BLM does not provide an explanation.***

Moreover, there is further uncertainty raised by the "requirements" that are ostensibly going to be imposed by the states. For Idaho, the Proposed Amendment refers only to an executive order that BLM expects will be issued by the end of 2018, calling into question when and if these requirements will come into effect and what exactly those requirements will be. In Nevada, an executive order was issued requiring that:

> The Sagebrush Ecosystem Council shall adopt regulations requiring compliance with the Nevada Sage-Grouse Conservation Plan and Nevada Conservation Credit System for the conservation of the Greater Sage-Grouse and their habitats using compensatory mitigation for anthropogenic disturbances on federal and state lands that cannot be avoided or further minimized as determined through the Conservation Credit System.

Executive Order 2018-32 *Order Establishing Use of the Nevada Greater Sage-Grouse Conservation Plan and Credit System* (December 7, 2018).[23] While this Order would mandate compensatory mitigation occur on federal lands, it is unclear to what extent they are enforceable on federal public lands. *See*, *Cal. Coastal Comm'n v. Granite Rock*, 480 U.S. 572 (1987).

Moreover, the Western states have recently reiterated the importance of compensatory mitigation in conserving species such as the greater sage-grouse and their ongoing expectation that the BLM continue enforcing compensatory mitigation on public lands. The Western Governors Association

[23] Available at: http://gov.nv.gov/News-and-Media/Executive-Orders/2018/2018-32-Order-Establishing-Use-of-the-Nevada-Greater-Sage-Grouse-Conservation-Plan-and-Credit-System/

issued Policy Resolution 2019-03[24] on Compensatory Mitigation on December 13, 2018[25], shortly after the Proposed RMP Amendments were released. Section 4 states:

> Compensatory mitigation plays an important role in fish and wildlife management and conservation, and states rely on its use in developing and executing species conservation strategies. Compensatory mitigation strategies employed by states include, but are not limited to, habitat protection, habitat restoration, establishment, enhancement, or conservation activities and advance mitigation where conservation benefits are secured before project impacts occur.

And Section 7 emphasizes the vital role of the federal government:

> Governors believe that federal mitigation policies should be developed in coordination with Governors, and the state agency officials they designate, to achieve the following objectives:
>
> - Provide measurable and documentable habitat and conservation values, services and functions that are at least equal to the lost or degraded values, services and functions caused by the impact.
> - Incorporate measures to account for a level of risk that a particular compensatory mitigation action may fail or not achieve its stated objectives, and uncertainty about the level and duration of estimated impacts.
> - Compensatory mitigation projects should be sited and designed strategically to support the most effective conservation or restoration projects; the effectiveness of mitigation actions should be based on the best available science.
> - Provide benefits that are durable and in place for at least the duration of the residual adverse impacts.
> - Encourage the application of compensatory mitigation prior to the impact occurring to ensure no lag time occurs between impacts and offsets.
> - Offer transparency and certainty to developers, regulators, and the public to the extent feasible. This necessitates early and substantive consultation with states and consistency with state-designed compensatory mitigation standards where they exist.

Taken as a whole, the approach to compensatory mitigation set out in the Proposed Amendments is beset with uncertainties. First, BLM repeatedly states that it cannot and will not commit to enforcing compensatory mitigation on federal lands, both in the plans and in IM 2019-018. After then indicating that it intends to enforce compensatory mitigation commitments made voluntarily or imposed by states, it is unclear how BLM will be able to do so, given the agency's position that it cannot enforce compensatory mitigation requirements and/or accept monetary contributions (which, of course, is neither rational nor legal, but is the agency's stated position). Further, the approaches taken by the states are in many cases not final, thorough or sure to be enforceable, making it harder for the BLM to be able to rely on those to use to force compliance. Finally, the states are also depending on the BLM to hold up its end of this partnership and require compensatory mitigation, as well.

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[24] Available at: http://westgov.org/images/editor/WGA_PR_2019-03_Compensatory_Mitigation.pdf
[25] http://westgov.org/resolutions/

Requested Remedy: As written, the Proposed Amendments cannot provide a reliable or enforceable path to addressing the impacts to sage-grouse habitat that are permitted by the management decisions made in these plans. BLM must return to requiring compensatory mitigation in a manner consistent with law, policy and its commitments to the affected states and stakeholders.

IV. BLM Has Eliminated All Meaningful Requirements to Prioritize Oil and Gas Leasing and Development Outside Sage-Grouse Habitat.

The Wyoming FEIS asserts that "the BLM would prioritize leasing outside PHMA…. *See* Wyoming Proposed RMPA/FEIS at 4-16. As demonstrated by ongoing management actions, those words are meaningless. BLM is not prioritizing oil and gas leasing outside of core habitat despite a clear responsibility to do so under the existing 2015 Wyoming ARMPA. And recent policy changes emphasizing energy dominance make it less likely that the agency will do so under this proposed plan. Unfortunately, despite that plain language, the Wyoming BLM currently does not, and likely will not, prioritize leasing (or development) outside greater sage-grouse habitat. In fact, the evidence shows the opposite is true: Wyoming BLM appears to be prioritizing leasing *inside* grouse habitat. The proof of this is threefold:

First, the BLM is currently on track to break all records for leasing inside PHMA. The Wyoming BLM offered to lease about 858,767 acres in PHMA in the first three quarterly lease sales in 2018 and is proposing leasing in the first quarter 2019 of 163,917 acres and in the February 2019 special lease sale of 768,942 acres that had been previously proposed in sage-grouse habitat.

Second, an oil and gas specialist for the Wyoming BLM stated in an open session of the Wyoming Sage Grouse Implementation Team (SGIT) that BLM does not prioritize leasing outside PHMA.[26]

Third, the BLM's Washington Office issued an Instruction Memorandum, IM 2018-026,[27] revising the prioritization requirement, and (as evidenced in #2 above) the policy is being fully implemented.

The evidence is irrefutable and overwhelming: the Wyoming BLM does not prioritize leasing outside PHMA –despite an existing plan requirement to do so– and any notion that BLM will suddenly change its tune under this proposed plan –given the evidence above- is dubious at best.

Accordingly, the BLM should immediately issue a public correction to the inaccurate and misleading FEIS language. Equally important, the BLM should analyze as part of this plan amendment process the environmental effects of the massive recent explosion of oil and gas

[26] Statement of Michael Madrid, WY BLM oil and gas specialist, at a meeting of the Wyoming Sage Grouse Implementation Team in Lander, WY on June 13, 2018. Mr. Madrid's statement concerning prioritization begins 43:34 into the meeting. The video is available on Youtube: https://www.youtube.com/watch?v=076hOzUmeBQ

[27] The IM is being challenged in two lawsuits. *Montana Wildlife Fed. v. Zinke,* Case No. CF-18-69-GF-BMM (D. Mont.) and *Western Watersheds Project v. Zinke,* Case No. 1:18-cv-00187-REB (D. Idaho). Under IM 2018-026, "the BLM does not need to lease and develop outside GRSG habitat management areas before considering any leasing and development within GRSG habitat", in contrast to the much clearer and specific provisions to prioritize that had been in IM 2016-143.

leasing in core habitat which appears likely to continue under the administration's energy dominance mandate. The 2015 Sage-grouse Plans commit to prioritizing leasing and development outside sage-grouse habitat (both GHMA and PHMA), and the disclosure of effects in the EISs supporting those plans was based on the assumption that the prioritization requirement would be faithfully implemented. But we now know not only that this requirement is not being implemented—it is in fact being flaunted. The BLM should be honest with the American people and tell the truth about what it is doing on –and to-- the public lands. The RMP is the place to do that.

We encourage BLM to get back to the business of sage-grouse conservation and prioritize federal oil and gas leasing outside the bird's most important habitat. Prioritizing leasing and development outside of sage grouse habitat is strongly supported by the best available science, which BLM must base its plans on. For this reason, the 2015 Sage-grouse Plans commit to prioritizing leasing and development outside of sage-grouse habitat. As stated in the Record of Decision (ROD) and Approved Resource Management Plan Amendments (ARMPA) for the Rocky Mountain Region:

> . . . the ARMPs and ARMPAs prioritize oil and gas leasing and development outside of identified PHMAs and GHMAs. This is to further limit future surface disturbance and encourage new development in areas that would not conflict with GRSG. This objective is intended to guide development to lower conflict areas and as such protect important habitat and reduce the time and cost associated with oil and gas leasing development by avoiding sensitive areas, reducing the complexity of environmental review and analysis of potential impacts on sensitive species, and decreasing the need for compensatory mitigation.

Rocky Mountain ROD at 1-25. This ROD –which is still in effect and binding on BLM- also identifies prioritizing oil and gas leasing and development outside habitat as a "key component" and a "key management response." *See, e.g.*, Rocky Mountain ROD, pp. 1-18, 19. More localized sage-grouse management plans such as the Wyoming Greater Sage-Grouse ARMPA have similar provisions. These plan provisions were thoroughly analyzed in the 2015 Sage-grouse Plans and were determined to be a needed and appropriate management provision. Wyoming ARMPA at 24, Management Objective #14. Scaling back oil and gas leasing in core areas is essential for the conservation of the greater sage-grouse. As determined in the Interior Department's Conservation Objectives Team (COT) Report (2013),

> Sage-grouse populations can be significantly reduced, and in some cases locally extirpated, by non-renewable energy development activities, even when mitigative measures are implemented (Walker et al. 2007). The persistent and increasing demand for energy resources is resulting in their continued development within sage-grouse range, and may cause further habitat fragmentation … Both non-renewable and renewable energy developments are increasing within the range of sage-grouse, and this growth is likely to continue given current and projected demands for energy.

COT Report at 10.[28] The report went on to recommend "[e]nergy development should be designed to ensure that it will not impinge upon stable or increasing sage-grouse population trends." *Id.* at 43.

Echoing the COT findings, a group of preeminent sage-grouse scientists has recognized the need to maintain the prioritization of leasing and development outside sage-grouse habitat. It is critical that there continues to be a focus "on conserving the landscapes necessary to sustain sage-grouse populations." *See,* June 8, 2018, letter to then-Secretary Zinke from sage-grouse scientists, Exhibit 1 at 1. There is a need to focus management on maintaining the "landscape matrix" and therefore the scientists "recommend that sagebrush habitats be managed holistically and collectively . . ." *Id.* The scientists recommend that "management approaches and objectives established [in the 2015 plans] be used as minimum standards in sage-grouse habitats." *Id.* Eliminating the prioritization requirement in Wyoming would fly in the face of the best available science and should therefore be avoided.

It is clear that abandoning the prioritization directive – as Wyoming BLM appears to have done-- is tantamount to abandoning the landscape scale, range-wide conservation program that was the centerpiece of the 2015 Sage-grouse Pans. As recognized by sage-grouse scientists "we must continue to build on the momentum generated through development of the 2015 plans and allow the processes established in those plans to mature and evolve to realize the sustained conservation of sagebrush landscapes and the wildlife and people dependent thereon." Exhibit 1 at 1. "It is critical that Federal agencies retain measures outlined in the LUPs collectively focused on conserving the landscapes necessary to sustain sage-grouse populations." *Id.* They therefore "recommend that sagebrush landscapes be managed holistically and collectively, and that all sage-grouse habitats regardless of designation remain an integral component of that management approach." *Id.* at 2.

In conclusion, as discussed above, BLM should maintain and strengthen the prioritization requirement, not only in Wyoming, but throughout the range in order to meet the best available science obligation as shown in the COT report, NTT report, and the letter from sage-grouse scientific experts; in order to provide for landscape scale conservation of sage-grouse which has been the hallmark of sage-grouse conservation, as recognized by the FWS; and in order to maintain the FWS Endangered Species Act not warranted listing decision. To accomplish this, BLM should clarify the direction in all of the plans to reiterate that prioritization is required and commit to issuing new guidance that will be consistent with the language in the original Records of Decision, revoking IM 2018-026, which is inconsistent with the best available science and will likely be overturned in pending legal challenges.

Requested Remedy. The Wyoming Proposed Plan/FEIS inaccurately asserts that the BLM would prioritize leasing outside PHMA. Based on the recent explosion of leasing in Wyoming's core areas, and the recent enactment of policies weakening the prioritization requirements, that statement is at best questionable and therefore must be corrected in the ROD. In addition, the BLM should revoke IM 2018-026, which as two court cases will show is illegal, and return to oil and gas leasing and development prioritization policies in PHMA and GHMA that are more in alignment

[28] Available at https://www.fws.gov/greatersagegrouse/documents/COT-Report-with-Dear-Interested-Reader-Letter.pdf.

with the policies in IM 2016-143. The BLM should abandon all plans to eliminate or weaken existing plan provisions that require it to prioritize leasing and development outside greater sage-grouse habitat, and instead issuing a strong statement in the ROD that these policies will be retained. A similar statement should be made regarding prioritization in all of the states with sage-grouse plans.

V. Endangered Species Act Consultation Is Required.

The ESA provides that, "[e]ach federal agency shall ... insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." *Id.* § 1536(a)(2); 50 C.F.R. § 402.14(a). The obligation to "insure" against a likelihood of jeopardy or adverse modification requires the agencies to give the benefit of the doubt to endangered species and to place the burden of risk and uncertainty on the proposed action. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987). In fulfilling this obligation, "each agency shall use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2).

Section 7 of the ESA establishes an interagency consultation process to assist federal agencies in complying with their duty to ensure against jeopardy to listed species or destruction or adverse modification of critical habitat. An agency must initiate consultation with FWS whenever it takes an action that "may affect" a listed species or its critical habitat. *See* 50 C.F.R. § 402.14(a). Agencies also must consult with FWS "on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under [ESA Section 4] or result in the destruction or adverse modification of critical habitat proposed to be designated for such species." 16 U.S.C. § 1536(a)(4); *see also* 50 C.F.R. § 402.10. "The minimum threshold for an agency action to trigger consultation with FWS is low." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011). "Section 7(a)(2) consultation is required so long as a federal agency retains 'some discretion' to take action for the benefit of a protected species." *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014) (en banc). "Actions that have any chance of affecting listed species or critical habitat—even if it is later determined that the actions are 'not likely' to do so—require at least some consultation under the ESA." *Karuk Tribe v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (en banc). Even effects that are mitigated or "trivial" may meet the 'may affect' threshold. *Swan View Coal. v. Weber*, 52 F. Supp. 3d 1133, 1145–47 (D. Mont. 2014).

The proposed amendments will affect not only the greater sage-grouse, but also hundreds of other species. The grouse is an "umbrella species,"[29] and BLM has estimated that "some 350 species of plants and wildlife depend" on the same habitat.[30] In its 2015 plans, BLM acknowledged that there are dozens of threatened and endangered plant and animal species, as well as candidate species, in the planning area.[31] For example, BLM and FWS determined that the 2015 plans "may

[29] https://www.fs.fed.us/pnw/pubs/journals/pnw_2006_rowland001.pdf .
[30] https://www.blm.gov/programs/fish-and-wildlife/sage-grouse .
[31] *See, e.g.*, Nevada and Northeastern California Greater Sage-Grouse FEIS (June 2015) at 3-70 to 3-71, https://eplanning.blm.gov/epl-front-office/projects/lup/103343/143716/176930/8_Volume_2_Chapter_3_NVCA_GRSG.pdf (Nevada and California 2015 Plan); Proposed LUPA/FEIS for the Casper, Kemmerer, Newcastle, Pinedale, Rawlins, and Rock Springs Field Offices and Bridger-Teton and Medicine Bow National Forests and Thunder Basin National Grassland for Public

affect" the grizzly bear, Canada lynx, California condor, yellow-billed cuckoo, Ute-ladies tresses, prebles meadow jumping mouse, Mexican spotted owl, Utah prairie dog, northern long-eared bat, Autumn buttercup, blowout penstemon, Colorado hookless cactus, Uintah Basin hookless cactus, Debeque phacelia, Parachute beardtongue, and webbers ivesia, among other listed plant and animal species.[32] As documented above, BLM appropriately consulted with FWS in preparing the 2015 Sage-grouse Plans.

BLM, however, does not appear to have consulted with FWS about the proposed amendments or even evaluated their impacts to listed species, critical habitat, or species proposed for listing. *See, e.g.*, BLM, Wyoming Greater Sage-Grouse Proposed RMPA/Final EIS (Nov. 2018) at 5-1 to 5-4 ("Consultation and Coordination" section of EIS does not mention ESA consultation); BLM, Nevada and Northeastern California Greater Sage-Grouse Proposed RMPA/Final EIS (Nov. 2018) at 5-1 to 5-5 (same). The changes incorporated in the Proposed Amendments will weaken protections and increase the likelihood of damage to sage-grouse habitat, as discussed in detail above. However, because of the hundreds of other plants and wildlife species that rely on this same habitat, the changes made in the Proposed Amendments will also affect plants and wildlife species, including those that are listed as threatened or endangered under the ESA. Since these are new risks of harm, related to the new purpose and need, circumstances and policies that underlay these Proposed Amendments, BLM cannot rely on findings from the 2015 ESA consultations. The ESA requires that BLM again undertake consultation with FWS under the ESA before amending the 2015 Sage-grouse Plans.

Requested Remedy: BLM must engaged in ESA Consultation regarding the Proposed Amendments.

Lands Administered by the Bureau of Land Management Wyoming State Office and National Forest System Lands Administered by the Medicine Bow and Bridger-Teton National Forests and Thunder Basin National Grassland (June 2015) at 3-235 to 3-236, https://eplanning.blm.gov/epl-front-office/projects/lup/9153/58490/63911/09_Chapter-3_Affected-Environment_AD-FEIS_052115.pdf (Wyoming 2015 Plan); Northwest Colorado Greater Sage-Grouse Proposed LUPA/Final EIS (June 2015) at 3-37 to 3-54, https://eplanning.blm.gov/epl-front-office/projects/lup/36511/58676/63739/NWCO_3_FEIS_201506_508.pdf (Colorado 2015 Plan); Utah Greater Sage-Grouse Proposed LUPA/Final EIS (2015) at 3-101 to 3-107, https://eplanning.blm.gov/epl-front-office/projects/lup/103346/143749/177040/Chapter3.pdf (Utah 2015 Plan); Idaho and Southwestern Montana Greater Sage-Grouse Proposed LUPA/Final EIS at 3-47 to 3-48 (June 2015), https://eplanning.blm.gov/epl-front-office/projects/lup/103344/143612/176727/07_-_ID_swMT_FEIS_Chapter_3.pdf (Idaho and Southwest Montana 2015 Plan).

[32] *See, e.g.*, Wyoming 2015 Plan Appx K at 441, https://eplanning.blm.gov/epl-front-office/projects/lup/9153/63200/68442/013_Wyoming_ARMPA_Appendix_K_Biological-Assessment.pdf (Biological Assessment and FWS concurrence letter); Nevada and California 2015 Plan Appx W at 28 (Biological Assessment); Colorado 2015 Plan Appx L at L-2 to L-3 (Biological Assessment summary), https://eplanning.blm.gov/epl-front-office/projects/lup/105596/143687/176887/NWCO_L_BA_FEIS_20150424_508.pdf; Utah 2015 Plan Appx O at 92-102 (Biological Assessment), https://eplanning.blm.gov/epl-front-office/projects/lup/103346/143763/177166/AppendixO_BiologicalAssessment.pdf; Idaho and Southwest Montana 2015 Plan Appx Y at 141-150 (Biological Assessment, https://eplanning.blm.gov/epl-front-office/projects/lup/103344/143648/176763/Y_-_IDswMT_FEIS_-_BA.pdf .

VI. BLM'S plan fails to protect Greater sage-grouse from noise impacts.

A. The Proposed Plan does not "align" with Wyoming Executive Order 2015-4.

Although a stated purpose of the proposed RMP amendment is to achieve "alignment" with the State's sage-grouse conservation plan, the proposed revision to noise restrictions does not achieve that alignment and would likely nullify the requirement altogether.

The Wyoming Executive Order 2015-4 provides that for activities taking place in core areas,

> New project noise levels, either individual or cumulative, should not exceed 10 decibels (as measured by L_{50}) above baseline noise at the perimeter of a lek from 6:00 pm to 8:00 am during the breeding season (March 1 to May 15). Specific noise protocols for measurement and stipulations for implementation will be developed as additional research and information emerges.

Executive Order 2015-4, Attachment B, at 8.

BLM's proposed language mirrors that requirement, *except* that newly added verbiage - not identified as such in either the draft or final EIS- creates this loophole: "These measures would be considered at the site-specific project level where and when appropriate." Wyoming Proposed Plan/FEIS at A-48 (Noise SS WL-4025). This loophole essentially nullifies the restriction by requiring only that it be *considered*, and by allowing BLM line officers to determine—without any plan guidance or direction- not only *where* to apply it but also *when* to apply it. The existing language is clear: the restriction applies in core areas (answering the where question) in situations where noise from industrial activities such as oil and gas fracking could exceed 10 decibels above baseline at the perimeter of the lek (answering the when question). The proposed language creates yet another bureaucratic mechanism to avoid implementation of noise restrictions which will undoubtedly further weaken already greatly degraded protections for greater sage-grouse.

B. BLM cannot lawfully avoid developing protocols for the measurement of noise and stipulations for the implementation of noise restrictions.

BLM has not developed protocols for measurement of ambient background noise in sage grouse habitat, despite demands from conservation organizations and industry alike. Clear measurement protocols are necessary in order to comply with Wyoming's Sage Grouse Executive Order and Core Area Strategy, which provide that noise levels, either individual or cumulative, should not exceed 10 decibels (as measured by L50) above baseline noise at the perimeter of a lek from 6:00pm to 8:00am during the breeding season (March 1 to May 15).

When consultants hired by project proponents are permitted to measure ambient (baseline) noise levels for NEPA analyses, they invariably report higher levels. ("Baseline noise data was collected in 2012 using a protocol that is inconsistent with current guidance. The proposed ambient noise level of 25.1 dBA is likely inaccurate and inappropriate to use a as baseline across the NPL project

area.")[33] Without protocols, suspect methods have been used to skew data and avoid the monetary costs of muffling operations. Microphones are often either the wrong type (incapable of recording ultra-low noise levels common in rural areas of Wyoming), or placed at higher distances from the ground than is appropriate (picking up wind sounds), or placed in locations where noise from ongoing industrial activity is present, leading to inflated ambient readings. These problems are compounded by BLM itself when it publishes erroneous information in NEPA documents reporting much higher ambient noise levels, as it did recently in the EA prepared for a well proposed in the Greater Little Mountain Area in Sweetwater County, Wyoming; "The BLM has estimated that an average noise level in Wyoming rural areas is between 30 and 40 decibels on the A-weighted scale (dBA) (BLM 1997)." *See* Environmental Assessment for the North Dutch John Unit Well #1, DOI-BLM-WY-D040-2015-0065-EA (December 2018), at 16, available at: https://eplanning.blm.gov/epl-front-office/eplanning/projectSummary.do?methodName=renderDefaultProjectSummary&projectId=112337

These estimates are magnitudes higher than the best available science suggests. As discussed at length in our August 2, 2018 letter on the BLM's draft plan and DEIS, a noise study commissioned by the Wyoming Game and Fish Department to resolve ongoing controversy regarding this topic measured ambient, or natural baseline, noise in several rural areas of Wyoming.[34] The levels of ambient noise measured by Ambrose, et al., at multiple locations averaged 15.4 dBA (L_{50}). Sound levels recorded in the study were frequently close to the lower limit, or "noise floor" of the monitoring equipment used (13.5 dBA), such that actual background noise was lower than reported. When more sensitive microphones were used, they detected L90 and L50 levels of 7.2 and 14 dBA respectively in Wyoming sagebrush habitat, suggesting sound levels in undeveloped areas are actually lower than the study indicates.

To ensure scientific integrity, the study followed certain protocols, which BLM should adopt: First, monitoring equipment must be sensitive enough to accurately record background noise levels. When sound levels are recorded close to the noise floor of monitoring equipment (i.e. within 10 dBA of the noise floor), the recorded levels will be inaccurate and lower than reported. BLM must use appropriate equipment to obtain valid results. Second, microphone height should be at 12" to approximate the ear height of Greater sage-grouse and to reduce the impact of wind, which can artificially inflate background noise levels. During periods of high winds, microphones at higher heights will record higher noise levels. Third, American National Standards Institute (ANSI) standards require that windspeed data be collected at the measurement location, and that 1-second wind speed data be matched with 1-second dB data, and when winds exceed 5m/s for each second, those data should not be used in analysis. If wind speeds were recorded off site, for instance relying on wind speed data from nearby airports, those data do not meet ANSI standards and are not appropriate when correcting for wind speeds greater than 5 m/s. Finally, ambient noise levels should not be recorded during hours of operation, so that truck traffic and other industrial noise do not artificially inflate background noise levels. Additionally, the best available science suggests that the best management strategy is not to exceed 10 dBA over background noise levels,

[33] Letter from John Kennedy, Deputy Director, WGFD to Phillip Blundell, Rock Springs Field Office, re: PDEIS for the NPL project, dated April 15, 2016.
[34] Ambrose, S., C. Florian, and J. MacDonald. 2014a. Ambient Sound Levels in Sage Habitats in Wyoming, April 2014. Unpublished report to Wyoming Department of Game and Fish, Cheyenne, WY.

and not to exceed an L50 of 26 dBA. Ambrose et al. recommend keeping noise levels below 10 dBA over background at all hours rather than just lekking hours.[35] Outside the lekking period, noise may impact foraging, roosting, nesting, and brood-rearing.

A 2014 study conducted by Hayden-Wing Associates at the request of WGFD and the Petroleum Association of Wyoming (PAW) echoes the need for clear protocols. That study notes that "noise levels were close to the floor of our microphones (<17.5 dBA), suggesting that actual sound levels were lower than what our SLMs reported," that microphone height has an impact on noise measurements," that "ANSI standards do recommend placing microphone height in response to what is being measured," and suggests "a protocol that promotes standards for replication is needed."[36]

BLM must develop and apply a standard protocol for establishing background noise levels and for monitoring. Wyoming noise restrictions cannot be effectively implemented absent reliable background noise levels, tested using protocols based on the best available science. We suggest a statewide presumption of ambient noise levels at 16 dBA based on the best available science, and ensuring that noise levels do not exceed 26dBA during lekking hours, which is a 10 dBA increase over background noise as mandated by Wyoming's Core Area Protection Strategy. This presumption would decrease cost to industry by eliminating the need for baseline measurements and reduce the risk of inaccurate measurements from flawed studies. Outside of lekking hours, reasonable efforts should be made to keep noise levels as close to these limits as possible. Compliance should be monitored with equipment capable of accurately measuring background noise levels, at a microphone height of 12", during lekking hours, during the breeding season, for a minimum of 7 days. Sounds of strutting birds should not be considered background noise. Measurement methods should follow published ANSI standards. BLM must accurately record ambient noise levels and accurately monitor compliance to ensure the prescribed standards are met.

In addition, the BLM acted unlawfully by not analyzing and adopting "stipulations for implementation" particularly when readily available information exists to develop such stipulations. Noise restrictions have been applied by Wyoming BLM as conditions of approval (COAs) in drilling permits- thus there is no justification that would allow BLM to not move forward with the development of stipulations.

The BLM should not be permitted to delay any further the adoption of proper protocols for the measurement of ambient noise, along with stipulations to implement E.O 2015-4 noise restrictions that are a critical and necessary component of greater sage-grouse conservation efforts in Wyoming. The Pinedale Field Office has adopted protocols for noise monitoring—they should be presented for analysis here as part of this planning process. *See* WGFD comments on the Normally Pressured Lance Natural Gas Development Project EIS – Comment Form, Preliminary Draft EIS (PDEIS) for Cooperating Agency Review, submitted for review February 19, 2016 ("We are

[35] Ambrose et al. Sound Levels in Sagebrush in Wyoming, and Acoustic Impacts to Greater Sage-grouse. April 2014 Presentation to SGIT.
[36] Noise Monitoring in the Pinedale and Jeffery City Area (2014). Hayden-Wing Associates LLC. Prepared for Wyoming Game and Fish Department.

concerned for the validity of the noise data provided for the project as the microphone height was reported as being 2.43 meters (8 feet) above ground. Protocols for noise monitoring were established for the Pinedale Field Office, Pinedale Anticline Project Area which requires a microphone height of 0.3 m (1 foot) to address the influence of wind on sound measurement.")

Requested Remedy: 1) Delete the following language from the proposed revision: "These measures would be considered at the site-specific project level where and when appropriate." 2) Adopt in this planning process existing science-based protocols for measuring noise and establish stipulations to implement noise restrictions.

VII. Proposed changes to Appendix C fundamentally alter the standard for protection of Greater sage-grouse.

Appendix C of the Wyoming Proposed Plan/FEIS contains the BLM's habitat management strategy for greater sage-grouse. Step 2.3 of the strategy provides, in part, that:

> The BLM's goal for any new activity or development proposal within core areas is to provide consistent implementation of project proposals that meet the BLM's ARMPA goals and the population management objectives of the state. Activities would be consistent with the strategy where it can be sufficiently demonstrated that *no declines to core populations* would be expected as a result of the proposed action…."

See Appendix C at C-10 (emphasis added). BLM proposes to change "no declines to core populations" to "no undue harm." Revealed for the first time in the Wyoming Errata Sheet, the change proposed by BLM substantially alters the standard for determining whether activities would be considered consistent with the habitat management strategy. The effects of the proposed change are not discussed or analyzed in the EIS, nor is the term, "undue harm" defined. The absence of both a definition of undue harm and an analysis of the effects of the proposed revision precludes lawful adoption of this amendment.

Requested Remedy: The BLM should not adopt the proposed amendment to Appendix C. Instead it should retain the existing language in the 2015 plan.

CONCLUSION

The changes proposed to the BLM's sage-grouse conservation plans represent a devastating, politically motivated repudiation of the unprecedented west-wide effort to conserve the greater sage-grouse and, if adopted, will likely put the species on a path to a listing under the Endangered Species Act. Many key components of the plans the USFWS deemed essential to the conservation of the species have been stripped and replaced with half measures and loopholes designed to avoid what little remains of the key 2015 conservation measures. The steps BLM has taken to weaken the 2015 plans include:

- eliminating net-conservation gain as the required mitigation standard for projects located within core population areas;

- eliminating federally-required compensatory mitigation and relying on state mitigation plans that i) may not be legally enforceable, and ii) unlike the exiting plans, only require compensatory mitigation for projects in core area when density/disturbance thresholds are exceeded, or to support requests for waivers, exceptions, or modifications of lease stipulations;
- eliminating the requirement to prioritize oil and gas leasing and development outside greater sage-grouse habitat;
- eliminating SFAs and associated locatable mineral withdrawals on 252,160 acres of key habitat in the South Pass core area;
- expanding opportunities for exceptions, modification and waivers of the most essential conservation measures while at the same time constraining the public's ability to participate in and monitor those decisions;
- authorizing the disposal of public lands within core areas if "that disposal is in the public's best interest" rather than determining that the disposal "will provide a net conservation gain to Greater sage-grouse" as required by the 2015 plans;
- removing the management tool provided in the 2015 plans that allows BLM to reject or defer a project approval (errata sheet, C-11);
- replacing a standard that prohibits declines to core sage-grouse populations with a new and undefined standard: "no undue harm" (errata sheet, C-10);
- eliminating monitoring and reporting tools and a web-based implementation tracker;
- eliminating the existing requirement that BLM must prepare a DDCT for activities proposed on federal lands (errata sheet C-4 at p. 33);
- making the application of Required Design Features (RDF), which were required in the 2015 plans, discretionary (i.e., "as necessary and when appropriate");
- eliminating noise restrictions in general habitat (non-core) areas;
- removing the requirement for mandatory noise restrictions in core habitat and replacing with a loophole which provides that "measures would be *considered* at the site-specific project level *when and where appropriate*;" and
- failing to disclose through the NEPA process the negative environmental effects of these changes.

We object to and protest each and every measure discussed above, and look forward to a prompt decision on this protest of the Wyoming Sage-Grouse RMP Amendment and Final Environmental Impact Statement. Thank you.

Sincerely,

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List of Exhibits

1. June 8, 2018 letter to then-Secretary Zinke from sage-grouse scientists

2. Matt Holloran Letter, "Review of the BLM Proposed RMPA and FEIS" (January 8, 2019).

3. Information Bulletin No. FAIB 2017-009, "Greater Sage-grouse Habitat Data for Wildland Fire Management Decision Making and Reporting of Acres Burned" (updated October 23, 2018).

4. Solicitor's Opinion M-37039 (Dec. 21, 2016).