

**HAND DELIVERED TO BLM WYOMING STATE OFFICE**

August 2, 2018

Jennifer Fleuret  
Bureau of Land Management  
Wyoming State Office  
5353 Yellowstone Road  
Cheyenne, WY 82009

Re: Wyoming Greater Sage-Grouse Draft RMP/DEIS

Dear Ms. Fleuret:

The following comments are submitted on behalf of the Wyoming Outdoor Council, National Audubon Society, The Wilderness Society, National Wildlife Federation, Natural Resources Defense Council, Western Values Project, and Wyoming Wilderness Association in response to the Bureau of Land Management's proposed amendments the 2015 greater sage-grouse conservation plans described in the above-referenced draft RMP/DEIS.

The National Audubon Society's mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity.

The mission of the Wilderness Society is to protect wilderness and inspire Americans to care for our wild places.

Founded in 1967, the Wyoming Outdoor Council is the state's oldest and largest independent conservation organization. Our mission is to protect Wyoming's environment and quality of life for present and future generations.

Natural Resources Defense Council works to safeguard the earth—its people, its plants and animals, and the natural systems on which all life depends.

The National Wildlife Federation works to unite all Americans to ensure wildlife thrive in a rapidly changing world.

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

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.

As described in the Wyoming Greater Sage-Grouse Draft Resource Management Plan Amendment and Environmental Impact Statement, the BLM proposes to amend ten resource management plans in Wyoming. The same ten plans were amended and/or revised in September 2015 in response to a 2010 finding by the USFWS that listing the greater sage-grouse is warranted. *See* 75 FR 13910, March 23, 2010. In response to the amendments and other conservation actions spanning ten western states, the USFWS determined that the greater sage-grouse no longer warranted listing under the Endangered Species Act. *See* 80 FR 59857, October 2, 2015. The USFWS based its decision in part on regulatory certainty provided by the conservation commitments and management actions in the BLM's and Forest Service's Greater Sage-Grouse land use plan amendments and revisions, along with other related conservation efforts. The BLM now claims that "in discussion with partners, [it has] recognized that several refinements and policy updates would help strengthen conservation efforts,<sup>1</sup> while providing increased economic opportunity to local communities." DEIS at ES-1.

The purpose of the proposed amendments, as stated in the Draft RMP/DEIS, "is to enhance cooperation with the states by modifying the approach to Greater Sage-Grouse management in existing land use plans to better align with individual state plans and/or conservation measures and DOI and BLM policy." DEIS at ES-2; DEIS at 1-2. The DEIS presents only two alternatives: a no-action alternative which would continue current management under the 2015 greater sage-grouse conservation plans and a so-called "management plan alignment alternative" which, the DEIS asserts, would enhance cooperation with the states and foster sage-grouse conservation. *See, e.g.,* DEIS at ES-6, DEIS at 1-2. As described in detail below, the amendments proposed by BLM in the DEIS weaken existing conservation measures and create additional regulatory uncertainty which we believe threatens to undermine the basis of the USFWS's not warranted decision.

Accordingly, and for the reasons described below, the undersigned organizations support the no-action alternative and urge BLM to continue to manage the greater-sage grouse under the existing 2015 land use plans, which were the result of an unprecedented collaborative effort involving a wide range of stakeholders including federal and state wildlife and land management agencies, industry, state and local governments, communities, nongovernmental organizations, and the public.<sup>2</sup> Any changes needed to address specific state concerns can be addressed through carefully tailored plan amendments that keep the essential elements of the 2015 plans intact.

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<sup>1</sup> The BLM should explain in the Final EIS exactly how the proposed amendments would "strengthen conservation efforts." That outcome is not apparent in the DEIS.

<sup>2</sup> Our support of the existing plans is based in large part on the sage-grouse science synthesized by the USGS, along with the views and professional opinions of the nation's top sage-grouse scientists, presented to Secretary Ryan Zinke in a letter dated June 8, 2018. The scientists' letter is attached and incorporated by reference herein.

We previously submitted our *Overarching Comments on Proposed Amendments to 2015 Greater Sage-grouse Plans* (July 24, 2018) to BLM Deputy Director Brian Steed. Those comments are attached and are incorporated by reference into this comment letter as if fully set forth below. The following comments address specific aspects of the Wyoming Draft RMP/DEIS (hereinafter “DEIS”).

## **I. The Current Planning Process Does Not Comply with The National Environmental Policy Act and the Federal Land Policy and Management Act**

The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 *et seq.*, are two overarching statutes that apply to BLM’s efforts to amend the 2015 Sage-grouse Plans and prepare environmental impact statements for those proposed amendments. NEPA is our basic national charter for protection of the environment; it is the cornerstone of our nation’s environmental laws. It seeks to “maintain conditions under which man and nature can exist in productive harmony.” 42 U.S.C. § 4331(a). FLPMA is BLM’s organic act, establishing its basic charter and mission. Together these two laws establish the following requirements that must be met in this land use planning process.

### **A. BLM Has Failed to Follow its Planning Regulations by Failing to Prepare an Analysis of the Management Situation**

BLM has failed to comply with its own planning regulations by ignoring the requirement to prepare an analysis of the management situation. 43 C.F.R. § 1610.4-4. Every version of the BLM’s planning rule since the enactment of FLPMA has contained a requirement for an analysis of the management situation (AMS) as part of a planning process. Yet in this case, without explanation, the BLM has chosen to ignore this critical requirement in the current planning effort.

BLM’s Land Use Planning Handbook provides a detailed description of the process the agency must follow in order to properly analyze the management situation:

The BLM must analyze available inventory data and other information to characterize the resource area profile, portray the existing management situation, and identify management opportunities to respond to identified issues. This analysis provides, consistent with multiple use principles, the basis for formulating reasonable alternatives, including the types of resources for development or protection (43 CFR 1610.4-4).

The analysis should (as briefly and concisely as possible) describe the current conditions and trends of the resources and the uses/activities in the planning area to provide information for the affected environment, provide the basis for the no action/present management alternative, and to create a framework from which to resolve the planning issues through the development of alternatives.

The analysis should describe the status, or present characteristics and condition of the public land; the status of physical and biological processes that affect ecosystem function; the condition of individual components such as soil, water, vegetation, and wildlife habitat; and the relative value and scarcity of the resources. The analysis should also address social and economic conditions that influence how people, communities, and economies interact with the ecosystem.

...

**PRODUCT: ANALYSIS OF THE MANAGEMENT SITUATION**—Field offices should produce a report called the *analysis of the management situation* (AMS). Field offices are encouraged to make a summary of the AMS findings (or the entire report) available to the public. Parts of the AMS should easily translate into the introduction chapter, the no action and action alternatives, and the affected environment chapter of the EIS.

Formulation of the AMS can begin as soon as the planning project is approved. Documentation supporting the AMS should be maintained in the field office for public review. The AMS document can be made available to the public during or after scoping. The scoping report can also be included in a published summary of the AMS if desired. See Appendix F-3 (Annotated Outline of the Analysis of the Management Situation) for additional guidance.

See BLM Planning Handbook H-1601-1 at 20. In addition, the AMS is identified as a “required step” in plan amendments. *Id.* At 17.

Further, the AMS published in August 2011<sup>3</sup> for the 2015 Sage-grouse Plans was completed over 7 years ago. Changes in administration priorities, updated science and conditions on the ground all require an updated AMS for this planning process.

The BLM has failed to provide “an overview of the current management situation in the planning area” that would have answered basic questions about the implementation of the existing 2015 Sage-grouse Plans. Assertions that the goals of the plan amendments and removal of existing protections will somehow not harm habitat and instead will support the survival of the species are not a substitute for preparing the AMS that is required for the amendments.

## **B. BLM’s Purpose and Need for Action Violates NEPA**

The DEIS states that the purpose and need for the action “is to enhance cooperation with the states by modifying the approach to Greater Sage-Grouse management in existing land use plans to better align with individual state plans and/or conservation measures and DOI and BLM policy.” DEIS at 1-2. This statement of purpose and need violates the National Environmental

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<sup>3</sup> See, e.g., [https://eplanning.blm.gov/epl-front-office/projects/lup/9153/23507/24358/Final-Summary-of-the-AMS\\_WY\\_SG.pdf](https://eplanning.blm.gov/epl-front-office/projects/lup/9153/23507/24358/Final-Summary-of-the-AMS_WY_SG.pdf).

Policy Act by foreclosing consideration of any alternative that does not “align with individual state plans...”

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 Draft EIS that forecloses consideration of any alternative that does not “align with individual state plans. . . .” *See* DEIS Section 1.2. Further, it is apparent that this “purpose and need” was defined not by BLM, as required by NEPA, but by the states/project proponents. Thus, BLM’s “purpose and need” is fundamentally flawed and corrupts the range of alternatives, along with other aspects of the Draft EIS.

In order to provide a satisfactory response to the USFWS’ “not warranted” finding, the BLM should redefine the purpose and need statement to reflect the statement as presented in the 2015 plans: “to develop and adopt ‘adequate regulatory mechanisms’ that would address the long-term ‘conservation needs of the species’ as the guiding and principal purpose for the sage-grouse planning process.” *See, e.g.,* ES-2 Wyoming GRS Proposed LUPA/Final EIS May 2015. With a proper statement of purpose and need framing the analysis, the BLM would be able to develop one or more alternatives that meet that purpose and need while also more closely aligning with Wyoming’s GSG conservation plan.

Our attached *Overarching Comment* letter discusses (at 9-11) the BLM’s failure to develop a lawful purpose and need statement, and is hereby incorporated by reference herein as if fully set forth below.

### **C. The DEIS’s Narrow Range of Alternatives Violates NEPA**

As discussed on pages 11-15 of the attached *Overarching Comments* letter, which is incorporated herein by reference, the Wyoming DEIS fails to analyze an adequate range of alternatives. Only one alternative – the management alignment alternative – addresses the BLM’s narrowly stated purpose and need “to enhance cooperation with the states by modifying the approach to Greater Sage-Grouse management in existing land use plans to better align with individual state plans and/or conservation measures and DOI and BLM policy.” DEIS at ES-2. The no action alternative would retain the 2015 sage-grouse plans.

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. 40 C.F.R. §§ 1502.14(a) and 1508.25(c).

NEPA's requirement that alternatives be studied, developed, and described both guides the substance of environmental decision-making and provides evidence that the mandated decision-making process has actually taken place. Informed and meaningful consideration of alternatives -- including the no action alternative -- is thus an integral part of the statutory scheme.

*Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989) (citations and emphasis omitted).

"An agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action." *Northwest Env'tl Defense Center v. Bonneville Power Admin.*, 117 F.3d 1520, 1538 (9<sup>th</sup> Cir. 1997). An agency violates NEPA by failing to "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action. *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1310 (9<sup>th</sup> Cir. 1990) (quoting 40 C.F.R. § 1502.14). This evaluation extends to considering more environmentally protective alternatives and mitigation measures. *See, e.g., Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1122-1123 (9<sup>th</sup> Cir. 2002) (and cases cited therein).

By only meaningfully considering one alternative and not considering alternatives that would be more protective of greater sage-grouse, BLM has failed to consider a reasonable range of alternatives.

1. Alternatives are measured against purpose and need; BLM has not considered a reasonable range of alternatives in the Draft EIS based on the restated purpose and need.

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). The statement of "purpose and need" is the basis upon "which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. §1502.13 and *City of Carmel-by-the-Sea v. U.S. Dep't. of Transportation*, 123 F.3d 1142, 1155 (9th Cir. 1997). Therefore, if the purpose and need of the 2018 Draft EIS for the Greater Sage-Grouse changes from the purpose and need for the 2015 EIS, then the range of alternatives must necessarily change as well. Even the 2018 Draft EIS recognizes that the "BLM's purpose and need for this planning action helps define the scope of proposed alternative actions..." DEIS at ES-2.

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 2001 Roadless Rule that it replaced. The court found:

This argument fundamentally misconstrues the role of the consideration of reasonable alternatives, which lies at the heart of any NEPA analysis. Failure to

consider reasonable alternatives thwarts the goals of informed decisionmaking and meaningful public comment before the environmental die is cast.

*Lockyer* at 905 (citations omitted). The Forest Service proposed the 2005 Roadless Rule as a means to give states more authority over designating roadless areas on federal land. In fact, the Forest Service called the 2005 rule the “State Petitions” rule. 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.

The Wyoming BLM’s 2018 Draft EIS is clear that its purpose and need is different from the 2015 EIS. Under the heading “Purpose of and Need for Action,” the Draft EIS state that “The purpose of this land use plan amendment is to enhance cooperation with the states by modifying the approach to Greater Sage-Grouse management in existing land use plans to better align with individual state plans and/or conservation measures and with DOI and BLM policy.” DEIS at 1-2. Because the 2018 Draft EIS states a different purpose and need compared to the 2015 EIS, the BLM, pursuant to *Lockyer*, must necessarily consider a new range of alternatives to meet that new purpose and need. Under *Lockyer*, BLM in 2018 cannot tier to alternatives considered for the different purpose and need of the 2015 EIS.

The 2018 DEIS also states (at 1-2) that the purpose and need is to “better align with ... DOI and BLM policy.” That policy was issued on June 7, 2017, through Secretarial Order 3353, “Greater Sage-Grouse Conservation and Cooperation with Western States.” The Secretarial Order stated that one of the policy goals for managing the Greater Sage-Grouse is to “give appropriate weight to the value of energy and other development on public lands” in compliance with President Trump’s Executive Order of March 28, 2017, “Promoting Energy Independence and Economic Growth” (EO 13783) The new “DOI and BLM policy” is completely opposite of the purpose and need expressed in the 2015 EIS, which identified the “major threats” to sage grouse habitat as oil and gas development. See Wyoming GRSG Proposed LUPA/Final EIS at ES-6.

The purpose and need for the 2018 DEIS — and thus the basis for the 2018 alternatives — has shifted from sage-grouse conservation in 2015 to energy development in 2018: “As analyzed in the 2015 Final EIS (Alternative C), all of the previously analyzed alternatives, including one proposing constraints stricter than the current management plan, were predicted to result in a *loss* of development opportunities on public lands (emphasis added).” DEIS at 2-3. The purpose and need of the 2018 DEIS, pursuant to Secretarial Order 3353, is to “contribut[e] to economic growth and energy independence” (Id.), or, in other words, *increase* development opportunities on public lands. Therefore, BLM cannot base the pro-development alternatives in its 2018 DEIS upon the 2015 alternatives that had a purpose and need focused on species conservation and avoidance of an ESA listing, not energy independence and economic growth.

Because the “range of reasonable alternatives is measured against the ‘Purpose and Need’ section,” *Lockyer* at 905, the range of alternatives in the 2018 DEIS fails to account for the

dramatic change in purpose and need compared to the 2015 EIS, which is a violation of NEPA. 40 CFR § 1502.13. In another section of these comments we discuss the purpose and need issue in the 2018 DEIS in more detail.

2. The No-Action Alternative in the DEIS is the baseline, not a real alternative.

The 2018 DEIS for the Greater Sage-Grouse purports to compare two alternatives — the “No Action Alternative” versus the “Management Alignment Alternative.” DEIS at 2-3. But under *Lockyer*, the “no action alternative generally does not satisfy the proposed action’s purpose and need; its inclusion in the Environmental Impact Statement is required by NEPA as a basis for comparison.” *Lockyer* at 905, quoting Ronald E. Bass, Albert I. Herson & Kenneth M. Bogdan, The NEPA Book: A Step-by-Step Guide on How to Comply with the National Environmental Policy Act, 95 (2d. ed. 2001).

Because the No Action Alternative fails to satisfy the purpose and need of the 2018 DEIS, the DEIS effectively proposes only one alternative: the Management Alignment Alternative. When there is only one alternative, it is not, by definition, an alternative at all. “[T]he agency must consider a range of alternatives that covers the full spectrum of possibilities.” *Sierra Club v. Watkins*, 808 F. Supp. 852, 872 (D.D.C. 1991). By proposing the “Management Alignment Alternative” as the only option to the status quo, BLM has failed to “consider a range of alternatives that covers the full spectrum of possibilities.” *Id.* at 872.

3. BLM must evaluate additional management alternatives.

By failing to thoroughly evaluate more than one alternative, BLM is not complying with NEPA. See *TWS v. Wisely*, 524 F. Supp. 2d 1285, 1312 (D. Colo. 2007) (BLM violated NEPA by failing to consider “middle-ground compromise between the absolutism of the outright leasing and no action alternatives”); *Muckleshoot Indian Tribe v. US Forest Serv.*, 177 F.3d 800, 813 (9<sup>th</sup> Cir. 1999) (NEPA analysis failed to consider reasonable range of alternatives where it “considered only a no action alternative along with two virtually identical alternatives”).

BLM must consider additional alternatives, including alternatives that offer more protection for greater sage-grouse than the Management Alignment Alternative. The purpose and need of the 2015 Sage-grouse Plans is to “conserve, enhance, and restore GRSG habitat by eliminating or minimizing threats to their habitat” (Rocky Mountain Record of Decision, p. 1-21), while the 2018 amendments are based on a purpose to “enhance cooperation with the states.” To comply with NEPA, BLM must consider an alternative that is explicitly focused on enhancing cooperation with the states while conserving, enhancing and restoring sage-grouse habitat. For instance, the projection of on-the-ground treatment activities set out in Table ES-1 of the 2018 DEIS shows a reduction in restoration efforts, but a more conservation-oriented alternative would consider increasing these projects. Similarly, this alternative would evaluate how to enhance cooperation with the states while retaining more of the core protections and management approaches that made the previous plans the basis for the FWS determination that listing was no longer warranted under the ESA. This alternative would be more protective

of greater sage-grouse and provide more certainty. We have developed a proposed alternative that would accomplish these goals, set out in detail in our Proposed Alternative to Maintain the “Not Warranted Finding, attached to this letter and incorporated herein by reference.

BLM should also have considered alternatives to, and completed additional analysis of, key protective provisions that it is proposing to eliminate: net conservation gain, Sagebrush Focal Areas (SFA) and compensatory mitigation. The DEIS states:

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.

DEIS at ES-6 and 2-16. The Management Alignment Alternative presented in the DEIS proposes to remove this standard. DEIS at ES-6 and Table 2-1. Rather than seeking comments only on eliminating this approach, BLM should evaluate an alternative that would retain the approach, while leaving the agency flexibility to determine applicable standards by working with the states.

The DEIS also proposes to eliminate Sagebrush Focal Areas (SFAs). DEIS at ES-6. BLM’s scoping notice stated that the agency “seeks comments on the SFA designation” in response to the decision in *Western Exploration, LLC v. U.S. Dep’t of the Interior*, 250 F. Supp. 3d 718 (D. Nev. 2017), which found BLM must conduct supplemental NEPA analysis in order to support the designation. 82 Fed. Reg. 47248, 47249 (Oct. 11, 2017). BLM should evaluate the impacts of the SFAs without the previously-proposed mineral withdrawal, which has now been withdrawn, in light of how those designations and the important protective measures they provide (in addition to the withdrawal protections) benefit sage-grouse habitat and how application can be better coordinated with the states.

4. The BLM may incorporate documents by reference, but those documents must still be appropriate for the current use and context; BLM cannot incorporate by reference analysis of alternatives from the 2015 Sage-grouse Plans into this DEIS.

The BLM states it is incorporating the 2015 Wyoming greater sage-grouse EISs by reference, “including the entire range of alternatives evaluated through those previous planning processes...” DEIS at 2-2. However, 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). As discussed above, the analysis of alternatives in the 2015 plans did not relate to the purpose and need of these amendments and is not appropriate to reference in this context.

Further, as prescribed by the Council on Environmental Quality, “[a]gencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described.” 40 C.F.R. § 1502.21. BLM has not met these requirements either. Simply stating that the previous analysis of alternatives are incorporated by reference does not explain why the analysis is sufficient, what was analyzed, how it pertains to the focus of these amendments or why it obviates the need for analysis of alternatives in this EIS. Moreover, failing to analyze alternatives in this DEIS is not providing the public with a sufficient opportunity to review and evaluate the proposed course of action.

BLM has attempted to rely on authority to incorporate documents by reference without clarification and without actually meeting the applicable standards. BLM cannot simply look to the 2015 plans to avoid completing necessary NEPA analysis. The agency must analyze a reasonable range of alternatives in this NEPA process that addresses the new purpose and need.

#### **D. The Analysis of Environmental Impacts of the Management Alignment Alternative fails to satisfy NEPA’s “hard look” requirement.**

##### 1. The BLM’s Cumulative Impacts Analysis is Inadequate

NEPA requires the BLM to consider the cumulative environmental impacts to sage-grouse and sage-grouse habitat in the DEIS. 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).

The BLM’s cumulative impacts analysis is insufficient and invalid. Despite the requirement to consider cumulative environmental impacts in the sage-grouse land use plan amendment DEIS, the BLM has failed to do this adequately. For one, the BLM claims that the cumulative effects analysis from the 2015 sage-grouse land use plan amendments meets the cumulative effects analysis requirement for the proposed plan amendment. That assertion is incorrect.

As noted in the attached *Overarching Comment* letter, tiering is only appropriate when a subsequent narrower environmental analysis relies on an earlier broader environmental analysis. See 40 C.F.R. § 1508.28 (a) (stating that tiering is appropriate when a program, plan, or

policy environmental impact statement is used to support a new analysis of “lessor scope” or which is site-specific). But we do not have that here; the scope of the current analysis is as broad as the 2015 analysis. There is no “step down” present here, therefore the cumulative impacts analysis from the 2015 plans cannot “incorporate[ ] by reference the analysis in the 2014 and 2015 Final EISs and the 2016 Draft Sagebrush Focal Area Withdrawal EIS.” DEIS at 4-20. In addition, BLM cannot simply incorporate the previous analysis by reference without justifying how it is appropriate and summarizing how it applies, neither of which has been done in the Draft EIS. *See*, 43 C.F.R. § 46.135(a). BLM also must ensure any incorporation by reference does not impede review by the public, which it surely does here. *See* 40 C.F.R. § 1502.21. Moreover, the purpose and need for the 2018 EIS differs from that of the 2015 EIS, which underscores why neither tiering nor incorporation by reference is appropriate.

Second, although the DEIS identifies a number of projects in Table 4-3 *Range Wide Impacts from Past, Present, and Reasonably Foreseeable Future Actions* that may cause cumulative effects to greater sage-grouse, this list of projects omits many large ongoing and proposed oil and gas development projects that should be considered in the cumulative effects analysis. The cumulative impacts from the following projects have not been considered in the DEIS:

- Continental Divide-Creston Oil and Gas Project (8,950 new wells proposed)
- Normally Pressured Lance Oil and Gas Project (3,500 new wells proposed)
- Converse County Oil and Gas Project (5,000 new wells proposed)
- Moneta Divide Natural Gas and Oil Development Project (4,250 new wells proposed)
- Greater Crossbow Oil and Gas Project (1,500 new wells proposed).

These massive projects – which together will involve drilling over 23,000 new oil and gas wells and constructing thousands of miles of new roads and pipelines, will have significant impacts on sage-grouse and sage-grouse habitats. *See, e.g.*, Converse County Oil and Gas Project Draft EIS at 3.18-57, estimating that 54 leks will be abandoned due to project activities (“Despite the recent upward trend in peak male attendance, all greater sage-grouse leks in the analysis area are at risk of being abandoned as development continues to increase.”)

Yet, none of these projects were considered in the DEIS. And even if the cumulative effects from these projects had been considered in some other NEPA document(s), the analyses would have under-reported the impacts because it would have assumed based on then-existing policy that the projects would have achieved a net conservation gain for greater sage-grouse, an outcome that is no longer required or assured due to DOI/BLM’s repeal of the agency’s net conservation gain and compensatory mitigation policies.

Other projects having the potential to cause cumulative effects to greater sage-grouse are missing from Table 4-3. Although past and upcoming oil and gas lease sales are mentioned, the list is incomplete. Although the June lease sale (198,588 acres) is mentioned (at 4-35) neither the upcoming September (366,151 acres) or December (698,589 acres) lease sales are discussed. The DEIS should include accurate and up to date information on leasing activity in general and priority habitat management areas, and provide an analysis of the cumulative impacts associated with those leasing proposals.

The BLM should review the list of projects shown in Tables 4-3 causing cumulative impacts and ensure they are as comprehensive as is required to include “the incremental impact[s] . . . when added to other past, present, and reasonably foreseeable future actions.” We note again the projects we have mentioned were not considered in the 2015 sage-grouse plan amendment EISs. These are “collectively significant actions taking place over a period of time” that must be considered in the cumulative impacts analysis, but which have not been. In addition, BLM should evaluate the cumulative effects of these projects across the planning areas of the 2015 Sage-grouse Plans.

Under Council on Environmental Quality (CEQ) guidance, BLM must consider the current aggregate effects of past actions in a cumulative impacts analysis. CEQ, Guidance on the Consideration of Past Actions in Cumulative Effects Analysis, available at [https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/Guidance\\_on\\_CE.pdf](https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/Guidance_on_CE.pdf). This means the BLM must consider what the impacts of *implementing* the 2015 plans has been on cumulative impacts. BLM cannot just incorporate the 2015 plans by reference as its cumulative effects analysis, rather it must consider the “identifiable present effects of past actions,” which the 2015 plans clearly are. Under the 2015 plans BLM has taken hundreds of actions, and in total those actions have had cumulative environmental impacts. An analysis of those cumulative impacts is missing from the current EISs, which is not permissible.

“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 (9<sup>th</sup> Cir. 2011) (quoting *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1075 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 2004) (additional citation omitted). In its DEIS, the Wyoming BLM has offered nothing more than a perfunctory cumulative impacts analysis. There is no useful analysis of past projects, including hundreds of projects that have been implemented since the approval of the 2015 sage-grouse plans. There is no quantifiable or detailed information about those projects, and there are not even any general statements about the cumulative impacts of those projects, many of which have undergone a NEPA analysis. Based on the above, it is evident the cumulative impacts analyses in the 2018 DEIS is invalid and must be expanded to fully address the cumulative impacts from the amendments.

In addition, the BLM has failed to fully and accurately analyze cumulative impacts to greater sage-grouse that will result from the proposed amendments that lack key conservation measures including in the 2015 plan amendments. The DEIS claims that “the Management Alignment Alternative’s effects, including its cumulative effects, are entirely within the range of effects analyzed by the 2014 and 2015 Final EISs.” DEIS at 4-21. This statement is not correct. The environmental effects of reasonably foreseeable future actions analyzed in 2014 and 2015 were premised on the implementation of the conservation measures contained in the plan

amendments, including, importantly, prioritizing oil and gas leasing and development outside of priority habitat management areas, implementing net conservation gain, requiring compensatory mitigation, effective noise controls in general as well as in priority habitat, mineral withdrawals in special focal areas, compliance with required design features, etc. The proposed plan lacks these critical measures. For the analysis of impacts to be accurate, it must examine the direct, indirect and cumulative effects of habitat-disturbing actions in sage-grouse habitat without the implementation of those conservation measures. This was not done here.

Table 4-3 (at p. 4-34) states that “BLM Wyoming issued approximately 3,000 ROWs in the planning area between 2015 and 2017” and claims that “for ROWs occurring in sage grouse habitat, effects were offset by the management prescriptions in the RMPs and ARMPA.” We have encountered numerous instances of BLM’s failure to implement the conservation measures in the 2015 ARMPA and therefore, rather than accepting BLM’s unverified assertion, request that specific evidence be included in a Supplemental DEIS to support the claim that impacts have been offset.

The DEIS (at p. 4-36) claims that “[i]ncreased flexibility for other uses within Greater Sage-Grouse habitat do [sic] not necessarily increase potential impacts on other wildlife or plant species. Site-specific NEPA analyses, including an evaluation of impacts on special status species, is required for on-the-ground projects within the planning area.” This statement is not accurate. The BLM routinely approves oil and gas drilling under categorical exclusions to NEPA authorized pursuant to section 390 of the Energy Policy Act. For these wells, numbering in the hundreds, if not thousands, the BLM does *not* prepare “site-specific NEPA analyzes.” The BLM should clarify that site-specific NEPA analyses is routinely *not* prepared for APDs approved under Section 390 of the Energy Policy Act. The absence of site-specific analysis in this DEIS coupled with the probable lack of any future site-specific analysis (due to increasing number of CEs issued under the Energy Policy Act, and new BLM policy calling for NEPA “streamlining”) results in the complete absence of site-specific analysis required by NEPA. In this regard, we encourage the BLM to heed the advice of the sage-grouse scientists:

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 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 Letter from Dr. Matt Holloran, et al., to DOI Secretary Ryan Zinke, dated June 8, 2018 (attached). The absence of an adequate cumulative effects analysis, coupled with a management approach that seemingly refuses to recognize landscape scale dynamics, does not bode well for the future of greater sage-grouse.

2. The environmental impacts to greater sage-grouse in Wyoming associated with the elimination of the Sagebrush Focal Area Mineral Withdrawal have not been disclosed.

The DEIS indicates that under the proposed Management Alignment Alternative, “no areas would be designated as SFA” and thus no areas would be recommended for mineral withdrawal. DEIS Table 2-1 at 2-5; DEIS at 4-15. This proposal completely reverses management direction specified in the 2015 ARMPA: “252,160 acres would be recommended for withdrawal from the General Mining Act of 1872, subject to valid existing rights.” ARMPA MD MR 12. Yet BLM makes the incredible claim that “[t]he Management Alignment Alternative does not propose changes to any decisions associated with locatable minerals, which were sufficiently analyzed on the existing plans.” DEIS Table 4-3 at 4-35.

The BLM’s decision to abandon the recommended mineral withdrawal will have significant consequences on the BLM’s ability to avoid and mitigate impacts from hard rock mining in core grouse habitat, yet the DEIS brushes off any negative effects of the BLM’s decision to eliminate the Sagebrush Focal Area mineral withdrawal, claiming it offers only “minimal benefit” to greater sage-grouse. DEIS at 4-37.

We disagree. Absent the mineral withdrawal, nearly a quarter-million acres of core area habitat that is vitally important for the greater sage-grouse would be open to mineral location and entry under the 1872 mining law: new mining claims could be located, and new mining operations that would otherwise not be possible could occur in core (PHMA) habitat. On the other hand, if these lands were withdrawn from mineral entry, new mining claims –and mining activities on those claims– would not be permitted. The DEIS fails disclose the impacts of mining on those lands previously recommended for withdrawal, stating merely that “future impacts would be analyzed in future EISs, adhering to existing requirements of the RMPs and ARMPA.” DEIS Table 4-3 at 4-35.

The DEIS also fails to disclose whether mining within these sensitive habitats will be subject to the full range of conservation measures contained in the State’s EO. The question BLM must answer – directly and without equivocation - is whether hard rock mining activities in core area authorized under 43 C.F.R. Part 3809 will be subject to the density and disturbance limits and other stipulations contained in the State’s EO and incorporated into the BLM’s preferred management alignment alternative? Or as opponents of regulation suggest, will “valid existing rights” under the General Mining Law override the ability of the state and federal land management agencies to implement the density and disturbance limits and enforcement of stipulations? The BLM has failed to answer this key question, a question that goes directly to the efficacy of the conservation measures proposed in the BLM’s preferred alternative. The DEIS purports to address this issue by referencing 43 CFR Part 3809:

These regulations ensure that operators comply with environmental standards in conducting exploration, mining, and reclamation. For example, the BLM must approve a plan of operations for locatable mining operations on public lands, which includes compliance with the National Environmental Policy Act, National Historic Preservation Act, and Endangered Species Act. Plans of operation must

also include those measures to meet specific performance standards and to prevent unnecessary or undue degradation of the lands (43 CFR 3809.411).

See DEIS 4-37, footnote 2.

While all of this is true, it doesn't answer the key question: does either BLM or the State of Wyoming have the authority (along with the intention) to enforce the disturbance and density limits and other stipulations contained in the State's sage-grouse EO in the context of hard rock mining? The question is not merely academic: in previous legal filings regarding a challenge by a conservation organization of the Lost Creek In-situ Leach (ISL) uranium mine, the State of Wyoming argued, and the United States District Court for the District of Wyoming agreed, that Wyoming lacked legal authority to enforce the density and disturbance limits and other stipulations contained in the sage-grouse EO on federal lands, finding that compliance with the EO was "voluntary." See Biodiversity Conservation Advocates v. Bureau of Land Management, Case No. 2:12-CV-252-SWS, Order Denying Motion for Preliminary Injunction, March 1, 2013, at 19. ("Further, unlike oil and gas, uranium is a mineral locatable under the Mining Law of 1872 with different applicable requirements and making the operator's compliance with the suggested conservation measures voluntary.") The court explained that "Except with respect to preventing UUD and certain provisions unrelated to this action, "no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress." 43 U.S.C. § 1732(b)." *Id.* at Footnote 5.

In order to understand and disclose the potential environmental consequences of hard rock mining in core area, it is critical to know whether this is still Wyoming's view.

Also remaining unanswered is whether the BLM will commit to determining that exceedances of density and disturbance thresholds or violations of the surface protection/use stipulations (e.g., seasonal timing limitations and 0.6 mi NSO lek buffer) constitute unnecessary or undue degradation of the land which therefore, under 43 C.F.R. Part 3809, must be prevented? We would appreciate a clear and direct response to this question.

The BLM claims that "decisions associated with locatable minerals ... were sufficiently analyzed on [sic] the existing plans..." yet then notes that "[b]etween 2015-2017, the BLM has approved 17 new mines and/or expansions within the planning area (including non-habitat)." DEIS Table 4-3 at 4-35. But it doesn't include any other relevant information about these mines, such as their location (e.g., within or outside sage-grouse habitat), likely impacts to sage-grouse, and mitigation measures that may have been required, and their effectiveness. Table 4-3 also indicates that the "BLM is currently reviewing 26 plans of operation for new mines, mine expansions and notice-level activities. This number also includes 10 pending mine patents, which are in the process of being patented into private ownership." *Id.* But again, the DEIS fails to include any information that would be required to understand the potential negative direct and cumulative impacts to sage-grouse from these activities.

The potential threat to greater sage-grouse from hard rock mining is heightened further by BLM's recent decision to avoid requiring compensatory mitigation to achieve a net conservation gain for sage-grouse. See BLM Instruction Memorandum No. 2018-093, July 24, 2018. Under the exiting 2015 ARMPA (the DEIS no-action alternative) the BLM would require compensatory mitigation to offset the impacts of mining, especially important if the BLM determined that valid existing rights limited the agency's ability to enforce the density and disturbance limits. In those circumstances, the ability to compensate for the loss of habitat and other environmental disturbances associated with mining operations would lessen the impact and, with the application of compensatory mitigation, potentially achieve a net conservation gain for greater sage-grouse. No more. Mining in greater sage-grouse habitat would, in all cases, result in a net loss (i.e., removal) of habitat, except in the unlikely event that the project proponent volunteers to provide compensatory mitigation.

The BLM's position is to defer to the State's plan, and to rely on the State's assurance that it would require compensatory mitigation for impacts related to hard rock mining activities that exceed density and disturbance thresholds or fail to comply with timing and surface use stipulations. We hope so, but are concerned by the state's reluctance to identify any constitutional, statutory or regulatory authority that would allow it to require compensatory mitigation, particularly for hard rock mining taking place on federal lands. To address this concern, we recommend that BLM receive a State Attorney General Opinion setting forth the legal authority for the state's compensatory mitigation framework. Without this, the BLM (and USFWS) have no assurance that an adequate regulatory mechanism exists for requiring compensatory mitigation.

### 3. Clarifications of planning decisions in the 2015 amendments and revisions should be undertaken in accordance with NEPA and BLM planning regulations.

DEIS Section 1.5.2 proposes that several "issues with existing planning decisions" raised during scoping will be addressed "outside the land use planning process." DEIS at 1-9. Those issues include—

- Whether restrictions described in the 2015 plans should apply only to PHMA.
- Direction on how to incentivize development outside PHMA.
- Procedures to categorically exclude activities described by Wyoming as "de minimis."
- Clarification on the use of required design features.

Related to the above, the BLM also seeks "flexibility" to "adjust habitat management area boundaries without the need for a plan amendment." DEIS at ES-3.

We caution BLM against any effort to alter or modify what are in essence fundamental planning decisions "outside the planning process." DEIS at ES-4. For example, the DEIS states that: "Clarification is required for implementation-level actions on restrictions that should only be applied to PHMA. Based on language in the existing land use plans, there has been some confusion regarding application of PHMA-type restrictions in non-PHMA. The BLM will clarify

this with step-down guidance for implementation-level actions.” DEIS at ES-4. Importantly, the BLM should identify and discuss each specific “implementation-level action” it intends to address through “step-down guidance” and disclose the environmental consequences of the changes, some of which may rise to the level of significance. We have seen on more than one occasion how BLM’s “clarifications” of management direction in the 2015 plans have amounted to wholesale reinterpretations of fundamental plan requirements, such as net conservation gain. The BLM should understand that these “restrictions,” collectively, comprise a suite of conservation measures analyzed and adopted in the 2015 ARMPA. Whether a restriction (e.g., noise controls, or Required Design Feature) applies to PHMA or to both PHMA and GHMA is a fundamental planning-level decision. Any changes to these restrictions should be addressed in this plan amendment process, rather than through “step-down guidance” as proposed. Because guidance documents are not subject to NEPA review, the public would have no opportunity to review and/or comment on draft language before final adoption by BLM.

The BLM proposes to “work with the State of Wyoming in determining the appropriate path forward in incentivizing development outside PHMAs.” DEIS at 1-9. In situations where the public owns the public lands and/or public minerals outside PHMA (which is the majority of land in Wyoming), the public has a direct stake in this matter and therefore should be involved in any discussions leading to the creation of incentives. We have significant concerns over a “closed door” process that may lead to what some might feel are “sweatheart” deals for industry, which already benefits from significant federal and state-supported incentives.

As a general matter, we would not object to the development of guidance for the use of categorical exclusions “for those actions where categorical exclusions exist” provided the guidance is consistent with all existing legal and regulatory authorities. Any effort on the part of BLM to “re-write” NEPA or its implementing regulations via agency guidance would be problematic.

The DEIS states (at p. 1-9) that Wyoming BLM “will develop guidance and clarification on the use of required design features (RDFs) when they are applied at the implementation level.” Again, the concern for us would be guidance and/or clarification that fundamentally alters or weakens the existing 2015 RDFs. We would prefer to see BLM focus on ensuring proper and faithful implementation of the 2015 RDFs, which we have reason to believe –based on our experience with the Rawlins Field Office – has not been the case.

4. The environmental effects of BLM’s decisions to not require compensatory mitigation and to strip the net conservation gain mitigation standard from the management alignment alternative must be analyzed in the EIS.

As noted above, and as described in DEIS Table 2-1, the BLM’s 2015 greater sage-grouse conservation plans provide that “the BLM would require and ensure mitigation that provides a net conservation gain to the species including any accounting for any uncertainty associated with the effectiveness of such mitigation. This would be achieved by avoiding, minimizing, and compensating for impacts by applying beneficial mitigation actions... The BLM would implement

actions to achieve the goal of net conservation gain consistent with the Wyoming Strategy (EO 2015-4) that includes “compensatory mitigation as a strategy that should be used when avoidance and minimization are inadequate to protect Core Population Area Greater Sage-Grouse.”

The commitment by the BLM to apply the CEQ’s mitigation hierarchy, including compensatory mitigation, was a key factor in the USFWS’s 2015 determination that listing the sage-grouse was not warranted:

*Mitigation*—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 (CEQ) (40 CFR 1508.20; *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.

See 80 FR 59858, 59881 (October 2, 2015). See also FR at 59935 (“Lastly, all projects implemented in GHMAs (and PHMAs) are required to be fully mitigated to a net conservation gain for sage-grouse; these measures are a substantial improvement from management in 2010, where no avoidance, minimization, or mitigation was required.”)

Despite its essential role in the overall conservation strategy, the BLM’s proposed Management Alignment alternative strips ‘net conservation gain’ from all management actions across all RMPs (DEIS Table 2-1 at 2-14) and fails to disclose the environmental consequences likely to result from that decision.

And while the DEIS states that “the 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” and requests 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 (DEIS at ES-6) it is clear that DOI and BLM have already decided the issue. BLM Instruction Memorandum No. 2018-093, issued on July 24, 2018 – a little over a week before the close of the public comment period for this DEIS– states that the BLM will no longer require compensatory mitigation to achieve net conservation gain for greater sage-grouse. Instead, the BLM intends to “[f]ollow the State of Wyoming’s Greater Sage-Grouse Compensatory Mitigation Framework.” DEIS at 2-4. The BLM must prepare a supplemental analysis disclosing how this significant policy change may impact the efficacy of the BLM’s conservation plans.

This dramatic change in policy raises additional concerns. First, unlike the 2015 ARMPA, the State's mitigation framework does not require compensatory mitigation until and unless density and disturbance "thresholds" have been exceeded. Consequently, oil and gas development that meets the EO thresholds can take place in core habitat without any requirement for compensatory mitigation to offset the impacts. This obviously results in a *net loss* of habitat. Second, the BLM has never established that the State of Wyoming has the legal authority to require compensatory mitigation. So, while Wyoming Executive Order 2018-3, issued by Governor Mead on July 23, 2018, reiterates that "compensatory mitigation is an essential component of a long-term conservation strategy..." neither the mitigation framework nor the Governor's EO cite to any legal authority to support the state's plan to impose compensatory mitigation. The lack of a reference to specific legal authority to support the imposition of compensatory mitigation of course raises the question whether such authority exists. We recommend that before adopting this approach the BLM should ask the state to provide an Attorney General's Opinion setting forth this authority. In light of BLM IM 2018-093, the AG Opinion should specifically address the State's authority to require compensatory mitigation on federal lands. We are of course concerned that a successful legal challenge of the state's authority to require compensatory mitigation could result in a situation where compensatory mitigation is not implemented on federal lands, or worse, anywhere within Wyoming.

5. The DEIS fails to disclose the impacts of the BLM's radically different interpretation of the requirement in the 2015 greater sage-grouse conservation plans to prioritize oil and gas leasing and development outside core (PHMA) areas.

Under the subheading, *Prioritization of Fluid Mineral Leasing*, the DEIS states that:

[t]his action identifies that the BLM would prioritize leasing outside PHMA, as a method of incentivizing development in GHMA and other non-habitat areas. Impacts associated with prioritizing leasing outside PHMA would be beneficial to Greater Sage-Grouse conservation in Wyoming, with the potential for locally adverse impacts on habitat in GHMA. This would be a result of potentially concentrating development in the GHMA or non-core areas; however, locally adverse impacts would not be likely to affect the conservation of Greater Sage-Grouse in Wyoming.

DEIS at 4-19

This statement suggests that BLM actually intends to prioritize leasing and development outside core area, but the on-the-ground reality appears quite different. According to Mike Madrid, an oil and gas expert in the BLM Wyoming State Office, the Wyoming BLM is not prioritizing leasing outside core area. Rather, the Wyoming BLM is offering lease parcels nominated by industry, regardless of whether the parcels are inside or outside core area. In a

meeting of the Sage-Grouse Implementation Team (SGIT) in Lander on June 13, 2018, Mr. Madrid stated:

The one thing I'll say about the priority is – the way I understand the IM, if you have a backlog of leases, you offer the leases that are in non-habitat first, then general habitat, and then priority.... There is no backlog. And another thing I'll say is recently another item came out from Washington that said you are going to offer everything every six months that is nominated. It didn't distinguish non-habitat, core habitat. I'll say that in Wyoming there really isn't a prioritization. It goes into effect when you have a backlog. And like I said earlier, sorry to be repetitive, if you have a backlog then you issue parcels that aren't in habitat, good habitat, first, then general habitat, then priority. We've never had a backlog in Wyoming. And this other IM that I talked about that just recently came out, Washington is frowning on deferrals. Their opinion is we deferred a lot of nominated parcels in the past and they don't want to see that continue to happen. We have to go to Washington to get permission to defer a parcel.”<sup>4</sup>

The video is available on Youtube at:

<https://www.youtube.com/watch?reload=9&v=076hOzUmeBQ>

Despite this candid summary from Mr. Madrid, the DEIS claims that “impacts related to changes in the prioritization of leasing outside of PHMA would be likely to beneficially affect Greater Sage-Grouse conservation in Wyoming.” DEIS at 4-38. This rather astonishing claim is made without reference to any supporting data or information. The BLM should explain and document how “the change proposed to fluid mineral leasing prioritization under the Management Alignment Alternative” will benefit greater sage-grouse. Further, the EIS should be supplemented with an analysis and disclosure of impacts likely to result from indiscriminate and now widespread leasing in greater sage-grouse core areas. The analysis should include information, data, tables, maps etc., that reveal the recent surge in oil and gas leasing in core habitat, and present an assessment of the potential impacts to greater sage-grouse from leasing and subsequent potential development of hundreds of thousands, if not millions, of acres in core habitat. The EIS should also explain how prioritization of oil and gas leasing and development –as described in the 2015 sage grouse plans- has changed in light of Department of Interior policies and BLM instruction memorandum, including but not limited to Instruction Memorandum No. 2018-026.

The BLM's approach to prioritization, or more accurately, its non-approach, is directly contrary to the justification set forth in the USFWS's 2015 “not warranted” finding, which determined that: “The Federal Plans prioritize the future leasing and development of nonrenewable-energy resources outside of sage-grouse habitats.” See 80 FR 59858, 59891, October 2, 2015. Since this is clearly not the case, the BLM must explain what it meant when it committed to prioritizing leasing outside of core habitat, and analyze in this EIS the impacts of its revised understanding.

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<sup>4</sup> Mr. Madrid's statement has been edited for clarity.

## **THE BLM MUST ADDRESS A NUMBER OF OTHER SIGNIFICANT RESOURCE ISSUES BEFORE FINALIZING THE AMENDMENTS**

### **1) BLM should reevaluate issues and resource topics not carried forward for additional analysis**

DEIS Section 1.5.3 describes issues that “do not require additional analysis in this RMPA/EIS” because they “were analyzed in the 2015 Final EISs and no significant new information has emerged.” DEIS at 1-9. Among the issues identified in the list is “[m]itigation for oil and gas development.” The idea that “no significant new information has emerged” with respect to mitigation is deeply troubling to us. Since the Wyoming ARMPA was finalized in 2015, the BLM has 1) rescinded its 2016 Mitigation Handbook, 2) removed “net conservation gain” as the mitigation standard for development inside PHMA (DEIS at 2-14), and 3) decided that it will not require compensatory mitigation. See BLM IM 2018-093, July 24, 2018. The requirement in the 2015 ARMPA that impacts in core habitat be mitigated to achieve a net conservation gain is a central element on the BLM’s conservation strategy and was a key factor underpinning the USFWS’ “not warranted” decision. See 80 FR 59858, 59935 (“Lastly, all projects implemented in GHMAs (and PHMAs) are required to be fully mitigated to a net conservation gain for sage-grouse; these measures are a substantial improvement from management in 2010, where no avoidance, minimization, or mitigation was required.”) Clearly, the DEIS must analyze the impacts of these decisions on the overall efficacy of the conservation strategy.

### **2) The DEIS fails to properly address issues associated with noise impacts to greater sage-grouse.**

#### **1. The DEIS fails to analyze the impacts of limiting the application of noise controls to core population areas.**

The BLM proposes a significant change to an existing requirement in the 2015 greater sage-grouse plans that limits project-related noise levels to 10 decibels above baseline. The existing sage-grouse plans apply this restriction to development activities in all sage-grouse habitats, including both core and non-core areas. See DEIS Table 2-1 at 2-12. The BLM now proposes to “clarify” that this noise limit only applies “[w]ithin PHMA (Core) across all RMPs.” *Id.* Far from being just a “clarification” the proposal to limit noise controls to core/PHMA is a radical departure from existing plan direction, yet the environmental effects of this “clarification” are not analyzed in the DEIS, including, especially: 1) the impacts of this change to wintering sage-grouse in Winter Concentration Areas which, under the State EO, must be “protected” and 2) situations where noise (now uncontrolled) from non-core area projects is audible at the perimeter of core area leks.

The DEIS states that “[t]he need for the application of a noise measurement and monitoring COA to a project would be identified at the time of site-specific environmental review. It would likely impact only the proposed land use, such as fluid mineral development, and Greater Sage-

Grouse.” DEIS at 4-18. Given the pervasive impacts to grouse from project-related noise<sup>5</sup>, the BLM cannot properly defer analysis of the impacts –particularly the cumulative impacts– of this proposed “clarification” to the site-specific project level authorization. Yet that is exactly what the BLM intends to do:

Under the Management Alignment Alternative, language would be added to clarify how implementation level decisions would be guided in regard to appropriate noise standards around leks in PHMA. Impacts on resource uses associated with the application of a noise COA would be reviewed in a site-specific NEPA analysis (i.e., environmental assessment) and there is no additive, population-scale impact anticipated from this action.

See DEIS Section 4.6 Cumulative Effects Analysis, at 4-38. The BLM’s proposal to defer environmental analysis of this significant change in management direction to the site-specific stage all but assures that cumulative impacts will not be addressed properly.<sup>6</sup> It also fails to take into account that site-specific NEPA analysis of oil and gas drilling projects may not occur at all due to the BLM’s increasing reliance on categorical exclusions under Section 390 of the Energy Policy Act. The BLM should correct this and other misleading statements in the DEIS that claim environmental impacts will be addressed in site-specific NEPA reviews.

The BLM should require uniform, scientifically-sound protocols for measuring baseline noise levels.

As discussed above, the BLM’s proposed management alignment alternative proposes to change the management decision for noise. The proposed language provides that:

**Within PHMA (Core) across all RMPs:** New project noise levels, either individual or cumulative, should not exceed 10 dB(A) (as measured by the L50) above baseline noise at the perimeter of a lek from 6:00 p.m. to 8:00 a.m. during the breeding season (March 1–May 15). Specific noise protocols for measurement and stipulations for implementation would be developed as additional research and information emerges.

DEIS Table 2-1 at 2-12 (emphasis in the original).

We understand that the Pinedale Field Office in Wyoming has already developed “specific noise protocols for measurement...” of noise levels. Those protocols should be considered for statewide adoption. According to comments submitted by WGFD on the Normally Pressured

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<sup>5</sup> See, e.g., Western Agencies Sage and Columbian Sharp-Tailed Grouse 31<sup>st</sup> Biennial Workshop proceedings, June 18-21, 2018, at page 41 (“Significant relationships between elevated sound levels and declines in counts of male sage-grouse at leks were documented in the gas field.”) attached.

<sup>6</sup> See attached Letter from Dr. Matt Holloran, et al., to DOI Secretary Ryan Zinke, dated June 8, 2018.

Lance PDEIS, “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.” See Normally Pressured Lance Natural Gas Development Project EIS – Comment Form, Preliminary Draft EIS (PDEIS) for Cooperating Agency Review, Submitted for Review: February 19, 2016, attached hereto. Among other things, the WGFD’s comments were highly critical of a recent noise study in the Pinedale Field Office that: 1) placed microphones 8 feet above the ground (amplifying the sounds of wind), 2) failed to exclude data from three microphones that had tipped over during the study, and 3) failed to adhere to noise protocols developed for Wyoming, resulting in artificially high ambient background levels. Skip Ambrose also found problems with the study, including the use of wind speed data from the Big Piney and Pinedale airports located several miles from the study location instead of anemometers at each microphone location, and the use of sound level meters (SLMs) influenced by electrical self-noise leading to incorrect readings of low level noise levels. Ambrose’s critique of that study is included as an attachment to this letter.

The point that BLM must understand –and address in a supplemental DEIS- is that there are “right” and “wrong” ways to measure ambient noise levels. A proper and accurate determination of “baseline noise” is critical because the State’s EO and the BLM’s proposed management alignment alternative establish project-related noise limits of 10 dBA “above baseline noise” measured at the perimeter of the lek. Improper measurements of baseline noise based on faulty or improper equipment, or that include sounds from nearby oil and gas activities and/or the amplified sounds of wind (because microphones were placed 8 feet above the ground) will inevitably lead to a situation where escalating noise levels well above the tolerance limit for sage-grouse will be permitted. This situation must be avoided, and the DEIS must disclose the impacts and potential consequences of its reliance on improper/inadequate studies to measure ambient noise levels. To ensure scientific integrity in the process, the protocols developed by experts in this field for the measurement of baseline noise levels in Wyoming’s rural wildlife habitats should be required by the BLM and State of Wyoming.

#### The BLM should set ambient baseline levels

An effective remedy to counter the difficulties associated with accurately measuring baseline noise levels is to simply establish a baseline noise level for rural Wyoming. A baseline level of 16dBA is suggested, based on best available science. This is the approach recommended by Ambrose, et al.,<sup>7</sup> and is our recommendation as well. Please see our “Recommended Approach – New Stipulations for Noise” attached to this letter. We ask that this approach be evaluated as an alternative in a supplemental DEIS.

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<sup>7</sup> Ambrose presented his findings and recommendations to the Western Association of Fish and Wildlife Agencies, Western Agencies Sage and Columbian Sharp-Tailed Grouse 31<sup>st</sup> Biennial Workshop proceedings, June 18-21, 2018, Billings, MT.

Ambrose, et al., presented his findings and recommendations at the WAFWA 31<sup>st</sup> Biennial Workshop proceedings, June 18-21, 2018, in Billings, Montana. A copy of his Powerpoint presentation, “Sound Levels in Sagebrush in Wyoming, and Acoustic Impacts to Greater Sage-grouse” is attached to this letter. Below is an abstract of his presentation which appears on Page 41 of the attached WAFWA workshop Program.

### **SOUND LEVELS IN SAGEBRUSH HABITATS IN WYOMING AND THE INFLUENCE OF ANTHROPOGENIC SOUNDS ON GREATER SAGE-GROUSE**

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**Abstract.** We measured sound levels at 26 locations in WY from 2013–2017, six in rural, undeveloped areas and 20 in an active natural gas field. All sites were in sagebrush habitats. Our measurements in undeveloped areas revealed a very quiet acoustic environment. Mean sound levels at six rural sites were:  $L_{90}$  = 15 dBA (background sound level),  $L_{50}$  = 20 dBA (median sound level), and  $L_{eq}$  = 26 dBA (energy average sound level). In the gas field, mean sound levels were  $L_{90}$  = 23 dBA,  $L_{50}$  = 26 dBA, and  $L_{eq}$  = 30 dBA. Sound levels in the gas field were strongly correlated with distance to gas field activity. Significant relationships between elevated sound levels and declines in counts of male sage-grouse at leks were documented in the gas field. At leks where  $L_{50}$  > 25 dBA, mean trend was -0.255 (92% were declining), and at leks where  $L_{50}$  < 25 dBA, mean trend was +0.020 (90% were stable or increasing). Current management practices rely on a “not-to-exceed 10 dBA over background” approach, and our analysis suggests that this approach is appropriate. However, it is essential that accurate background levels be used, and establishing such is often difficult or impossible due to ongoing activities.

Based on the work of Ambrose and others, more than sufficient “additional research and information” exists to support: 1) the adoption of standardized protocols for the measurement of wind in rural areas of Wyoming and, 2) the establishment of statewide baseline noise levels. These actions should be undertaken in this planning update.<sup>8</sup>

**3) Statements in the DEIS that environmental impacts will be addressed in site-specific NEPA analysis are in many cases false and must be corrected in a Supplemental DEIS.**

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<sup>8</sup> See, e.g., Review of noise protocols for sage-grouse in the BLM Approved Resource Management Plan Amendment for Sage-Grouse (9 Plan) and Wyoming Governor’s Executive Order 2015-4 and recommendations for revisions, Ambrose, et al., May 11, 2016, attached hereto.

Throughout the DEIS the BLM claims that environmental impacts will be addressed in “site-specific NEPA analysis” or in “project-level analyses.” It must be understood, however, that due to BLM’s increasing use of categorical exclusions under Section 390 of the 2005 Energy Policy Act, the subsequent site-specific environmental analysis repeatedly promised by BLM may in fact never occur. To ensure an accurate and truthful environmental document, we recommend that the BLM correct these statements in a supplemental DEIS and disclose to the reader that in many cases, no subsequent site-specific NEPA analysis will occur.<sup>9</sup> The BLM should also acknowledge that because of that, the programmatic, planning level analyses presented in this DEIS may not be sufficient to satisfy the requirements of NEPA, particularly the requirement to take a “hard look” at impacts before actions are taken and before decisions are made.

The DEIS (at p. 4-38) claims that noise impacts “would be reviewed in a site-specific NEPA analysis (i.e., environmental assessment) and there is no additive, population-scale impact anticipated from this action.” Again, the BLM should acknowledge that drilling activities approved under Section 390 of the Energy Policy Act are NOT analyzed in site-specific NEPA analyses, and explain how the effects of “implementation level decisions” such as drilling operations will be addressed given the absence of site-specific NEPA analysis.

#### **4) The BLM’s position that its land use plans must be consistent with federal, state, tribal, and local policies and plans adds an element of uncertainty to sage-grouse conservation efforts.**

DEIS section 1.6 states that “[t]he BLM amendments must be consistent with the following:

- Official approved or adopted resource-related plans
- The policies and programs other [sic] federal agencies, state and local governments, and Native American tribes.

DEIS at 1-10. We have seen how a change in administrations can have a profound impact on the ten-state sage-grouse conservation effort. Amendments proposed in the DEIS raise serious concerns about whether the federal government is truly committed to sage-grouse conservation. The possibility that additional policy changes, either at the federal or state level, might further erode or undermine the efficacy of the 2015 plans (or the proposed 2018 plans) must be taken into account in discussions and decisions concerning whether the plans provide sufficient regulatory certainty to support a decision by the USFWS that listing the greater sage-grouse under the ESA is not warranted. The BLM Wyoming State Office should clearly explain in the EIS how new or revised agency policy can influence both the interpretation and implementation of key conservation measures outlined in the BLM’s sage-grouse conservation plans. A recent example of this is the WY BLM’s Decision in the Nala North State Director Review No. WY-2018-015 WOC et al., February 28, 2018, attached to this letter. Referencing policies adopted since 2017, the Wyoming BLM decided that authorizing drilling permits for 17

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<sup>9</sup> BLM reviews APDs under 43 CFR 3162.3-1, and although it must prepare an “environmental record of review” pursuant to 43 CFR § 3162.5-1, that internal review process does not entail a NEPA analysis unless the BLM decides to prepare an EA or EIS.

new oil and gas wells in the Buffalo core area would achieve a “net conservation gain” for greater sage-grouse, despite not requiring any kind of compensatory mitigation, and despite disclosing “the potential for adverse effects to the Greater sage-grouse in the project area (Revised EA at pages 24-26.)”<sup>10</sup>

#### **5) Decisions modifying habitat management area designations should be made in accordance with NEPA and FLPMA**

The process described by BLM for modifications to habitat management area designations adds a new layer of regulatory uncertainty to an already precarious “not warranted” determination. As part of the proposed management alignment alternative, the “BLM would update its Greater Sage-Grouse habitat management areas, including biologically significant units (BSUs), in conjunction with the State of Wyoming’s core areas, upon issuance of any Wyoming Governor’s Executive Order revising or amending the core area boundaries.” DEIS Table 2-1 at p. 2-5. *See also* DEIS at 4-14, 15 (“The BLM would update its Greater Sage-Grouse management areas in conjunction with the State of Wyoming’s core areas, upon issuance of any Wyoming Governor’s executive order revising or amending the core area boundaries.”). Although Wyoming’s current Governor, Matthew Mead, has consistently demonstrated an unwavering commitment to conservation of the greater sage-grouse, whether the next governor will do the same is completely unknown. A federal plan that depends entirely on the existence and validity of a state executive order is untenable. What if Wyoming’s next governor issues an executive order shrinking the designated core areas by 50%? Or issues an EO that eliminates them entirely? Would the BLM take the action it claims it would and “update its Greater Sage-Grouse management areas in conjunction with the State of Wyoming’s core areas, upon issuance of any Wyoming Governor’s executive order revising or amending the core area boundaries.”? DEIS at 4-14, 15. To address this uncertainty, the federal plan must adopt the core areas as they exist now, and commit to addressing any subsequent changes prompted by revisions or amendments to the EO through applicable regulatory processes required by FLPMA for plan amendments and, to the extent appropriate, maintenance actions. Efforts by BLM to “quickly update habitat management areas based on information” provided by the State of Wyoming (DEIS at 2-4) should not be made at the expense of compliance with NEPA and FLPMA.

#### **6) Adaptive management decisionmaking must be open and transparent**

The BLM’s proposed management alignment alternative creates an Adaptive Management Working Group that “would define a process to review and reverse adaptive management actions once the identified causal factor is resolved (e.g. returning to previous management once objectives of interim management strategy have been met.”). DEIS Table 2-1 at p. 2-13.

We have a number of concerns with this process and offer suggestions for improving it. First, as discussed in the attached June 8, 2018 letter to Ryan Zinke, from Dr. Matt Holloran and twenty other distinguished sage-grouse scientists, it appears that BLM has not integrated into the

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<sup>10</sup> See Nala North SDR No. WY-2018-015 WOC et al., February 28, 2018, at pages 7-9.

proposed plan amendments several “decision support tools and monitoring approaches that, if employed, would facilitate the adaptive implementation of sage-grouse management strategies (Synthesis pgs. 25 and 29).” We encourage BLM to follow the recommendations of the USGS and the sage-grouse scientists by integrating these tools into the agency’s decisionmaking process.

Second, the BLM should identify and publically disclose the membership of this group, along with their affiliations, credentials, and expertise. Membership should be limited to representatives of state and federal agencies and, if necessary, designated third-party participants with technical expertise deemed essential to the process. Second, the BLM should ensure that the group operates in a fully open and transparent manner with adequate advance notice of meetings and public access to recordings and meeting minutes. All records of the group should be made readily available to the public without the need for a FOIA request. Third, the BLM should prohibit individuals with a financial interest in the action from participating on the working group or joining its discussions. Fourth, proposed decisions to return to previous management should be available for pre-decisional public review and comment. All of these measures are necessary to ensure scientific integrity and fundamental credibility of the process.

We hope you will give our comments careful consideration. We would appreciate being notified of any additional public comment opportunities provided by BLM in connection with its proposal to amend the 2015 greater sage-grouse plans.

Sincerely,



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Attachments:

- 1) Overarching Comments Letter to BLM Deputy Director Brian Steed, dated July 24, 2018.
- 2) Proposed Alternative to Maintain the “Not Warranted” Finding.
- 3) Recommended Approach – New Stipulations for Noise, dated 6/27/18.
- 4) Letter from Dr. Matt Holloran, et al., to DOI Secretary Ryan Zinke, dated June 8, 2018.
- 5) Western Agencies Sage and Columbian Sharp-Tailed Grouse 31<sup>st</sup> Biennial Workshop proceedings, June 18-21, 2018.
- 6) Sound Levels in Sagebrush in Wyoming, and Acoustic Impacts to Greater Sage-grouse, Ambrose et al. (copy of Powerpoint presentation presented at WAFWA workshop).
- 7) Normally Pressured Lance Natural Gas Development Project EIS – Comment Form, Preliminary Draft EIS (PDEIS) for Cooperating Agency Review, Submitted for Review: February 19, 2016
- 8) Nala North SDR No. WY-2018-015 WOC et al., February 28, 2018
- 9) Review of noise protocols for sage-grouse in the BLM Approved Resource Management Plan Amendment for Sage-Grouse (9 Plan) and Wyoming Governor’s Executive Order 2015-4 and recommendations for revisions, Ambrose, et al., May 11, 2016

***These comments are submitted on behalf of the Wyoming Outdoor Council, National Audubon Society, The Wilderness Society, Natural Resources Defense Council, National Wildlife Federation, Western Values Project, and Wyoming Wilderness Association.***