January 29, 2014

VIA U.S. MAIL and E-MAIL

BLM/FS Greater Sage-Grouse EIS
Attn: Quincy Bahr
440 West 200 South, Suite 500
Salt Lake City, UT 84101-1345
blm_UT_comments@blm.gov

Re: Draft Land Use Plan Amendment and Environmental Impact Statement DOI-BLM-UT-9100-2013-0002-EIS

Dear Mr. Bahr:

The National Mining Association (NMA), the American Exploration & Mining Association (AEMA), the Industrial Minerals Association – North America (IMA-NA), and the Utah Mining Association (collectively Commenters) appreciate the opportunity to comment on the Bureau of Land Management (BLM) and United States Forest Service (USFS) (collectively Agencies) Draft Land Use Plan Amendment (LUPA) and Environmental Impact Statements (EIS) for the Greater sage-grouse (GRSG).

These comments are timely filed pursuant to the Notice of Availability published in the Federal Register on November 1, 2013, 78 Fed. Reg. 65,700 (Nov. 1, 2013) (Utah).[1]

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1. The Commenters hereby incorporate by reference the comments filed by NMA on June 27, 2008 (Docket No. FWS-R6-ES-2008-0022)(GRSG status review); and March 23, 2012 (NMA Comments on BLM Notice of Intent to Prepare an EIS on Incorporation of Conservation Measures to Protect the Greater Sage Grouse) (attached respectively as Exhibit 1 and 2).

   The Commenters also incorporate by reference the comments filed by the AEMA March 23, 2012, Re: Notice of Intent to Prepare Environmental Impact Statements and Supplemental Environmental Impact Statements to Incorporate Greater Sage-Grouse Conservation Measures into Land Use Plans and Land Management Plans, 76 Fed. Reg. 77008 (December 9, 2011) (Rocky Mountain Region), March 23, 2012, Re: Notice of Intent to Prepare Environmental Impact Statements and Supplemental Environmental Impact Statements to Incorporate Greater Sage-Grouse Conservation Measures into Land Use Plans and Land Management Plans, 76 Fed. Reg. 77008 (December 9, 2011), and October 12, 2013 Re: Supplement to the Draft Big Horn Basin RMP/EIS *RMP Revision Project* (DSEIS) at 78 Fed. Reg. 41947 (Friday, July 12, 2013).

I. IDENTITY AND INTEREST OF COMMENTERS

A. Identity of Commenters

The National Mining Association (NMA) is a national trade association that includes the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. NMA members mine on public lands in the eleven states that are home to the GRSG and therefore would be directly impacted by any of the proposed alternatives appearing in the DEIS. NMA members mine in the state areas covered by this DEIS, and the habitat of the GRSG coincides with some of the most significant mineral resources in the West.

American Exploration & Mining Association (AEMA) (*formerly Northwest Mining Association*) is a 2,400 member national association representing the minerals industry with members residing in 42 states, seven Canadian provinces or territories, and 10 other countries. AEMA represents the entire mining life cycle, from exploration to reclamation and closure, and is the recognized national voice for exploration, the junior mining sector, and maintaining access to public lands. The broad-based membership of AEMA includes many small miners and exploration geologists as well as junior and large mining companies, engineering, equipment manufacturing, technical services, and sales of equipment and supplies. More than 80% of AEMA's members are small businesses or work for small businesses. Most of AEMA's members are individual citizens.

The Industrial Minerals Association – North America (IMA-NA) represents producers and processors of industrial minerals in North America and associate members providing goods and services to the industrial minerals sector. Membership is comprised of companies that are leaders in the ball clay, barite, bentonite, borates, calcium carbonate, diatomite, feldspar, industrial sand, kaolin, magnesia, mica, soda ash (trona), talc, wollastonite and other industrial minerals industries. Industrial minerals are critical to the manufacturing processes of many of the products used every day, including glass, ceramics, paper, plastics, rubber, detergents, insulation, pharmaceuticals, and cosmetics. They also are used in foundry cores and molds used for metal castings, paints, filtration, metallurgical applications, refractory products and specialty fillers. IMA-NA is the principal trade association representing the industrial minerals industry in North America.

The Utah Mining Association (UMA) is a 99 year old, 118 member, non-profit, non-partisan trade association representing the interests of the mining industry in Utah. UMA members are actively involved in exploration and mining operations on public and private lands throughout the state. UMA's diverse membership includes every facet of the mining industry, including geology, exploration, mining, engineering, power generation, equipment manufacturing, legal and technical services, and sales of equipment and supplies.

B. Interest of Commenters

The Commenters strongly support conservation of the GRSG. They also strongly support efforts by Federal agencies whose actions affect this species to conserve the GRSG. The Commenters are deeply committed to ensuring that the United States Fish & Wildlife Service (USFWS or

Service) arrives at a legally-supportable conclusion that the listing of the GRSG under the Endangered Species Act (ESA) is "not warranted" under 16 U.S.C. § 1533(b)(3)(B)(i).[2]

The mining community represented in these comments practice stewardship on the public lands – lands upon which the sustainability of their business models depend. They are poised to be adversely impacted by the proposed Agencies' Land Use Plan Amendments and have, since the GRSG listing petition was originally received by the USFWS in 2002,[3] been fully engaged in conservation of the species. Indeed, well before the first GRSG listing petition was presented to the Service and became a prominent ESA issue in the Western United States, constituencies of the Commenters were robust participants in species conservation as a regulatory commitment of their operations on this Nation's public lands.[4]

The BLM, along with the USFS, can contribute to achieving this outcome under the ESA through a thoughtful, carefully-balanced approach faithful to clear Federal statutory directives that frame this outcome. These statutory commands directing the Agencies' operations can be executed while simultaneously exercising the margins of discretion that Congress has appropriately left with the land management agencies and, ultimately, the agency responsible for making the ESA listing determination, the USFWS.

II. INTRODUCTION AND SUMMARY OF COMMENTS

The LUP Amendment initiative by the Agencies subject to analysis under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370h, as far as can be ascertained, is unprecedented in its scope.

The Agencies proposed overhaul of its LUPs is in response to the 2010 decision by the Service that the listing of the GRSG was "warranted but precluded" (WBP) under 16 U.S.C. § 1533(b)(3)(B)(iii), *see generally* Endangered and Threatened Wildlife and Plants; 12-Month Findings for the Petitions to List the Greater Sage-Grouse (Centrocercus urophasianus) as Threatened or Endangered; Proposed Rule, 75 Fed. Reg. 13,910 (March 23, 2010) (hereinafter "2010 Determination"). The scoping and the responsiveness by BLM to shore up a perceived deficiency by the USFWS under the ESA has proceeded at a pace[5] which could, not surprisingly,

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2. The Obama Administration has agreed to take action under the ESA on some 750 species, including 251 previously listed as "warranted but precluded." The Administration further agreed with environmental groups to take immediate action for the sage-grouse by the end of fiscal year 2015. *See In re Endangered Species Act Section 4 Deadline Litig.*, Misc. Action No. 10-377 (EGS), MDL Docket No. 2165 (D.D.C.)

3. *See* 75 Fed. Reg. 13,910 (March 23, 2010) (reciting the history of multiple, serial GRSG listing petitions).

4. In the context of hard rock mineral development, operators have an obligation to prevent unnecessary and undue degradation of public lands. The BLM presently defines unnecessary and undue degradation as "surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations." 43 C.F.R. § 3809.0-5(k). Protection of GRGS habitat falls well within the scope of this obligation.

5. The Federal public land mass covered by this and the other LUPA/DEIS documentation, coupled with the *de facto* denial of a request for an extension of time to file comments, raise the specter of whether the public generally will have had an opportunity to meaningfully participate in review of the proposed reordering of

prove fatal as a matter of law and policy and thus further undermine, not advance, the laudable goal of protecting the GRSG.

The 2010 Determination was a moment in time. Under Section 4 of the ESA, the USFWS must make its decision whether to list the GRSG by September 2015 based on the most current and available science. The effort by BLM to amend its LUPs to respond to the 2010 WBP decision presumes that the state of science as to the need to list the GRSG has remained static. As will be discussed below, that is not the case.[6]

III. BACKGROUND

A. Legal Context for the BLM/USFS Land Use Plan Amendments

If the Agencies are to achieve a lawful outcome in this administrative process, the Agencies must critically analyze and carefully balance their obligations under five key bedrock substantive Federal laws: (1) the Federal Land and Policy Management Act, 43 U.S.C. §§ 1701 *et seq.*; (2) the General Mining Act of 1872, 30 U.S.C. §§ 21-54; (3) the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a; (4) the National Forest Management Act, 16 U.S.C. §§ 1604, *et seq.*; and (5) the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.*

Although important "valid existing rights" under the General Mining Act of 1872 (Mining Law) are acknowledged in the DEIS documents, the Agencies must properly protect those rights, and associated energy and mineral interests which may fall short of the Agencies' definition of "valid existing rights." Of course, coupled with these obligations, the Agencies must comply with NEPA, the procedural mechanism by which each of these cornerstone Federal statutes are evaluated and inform the agency's decision-making process.

There is a path for the agencies to manage the challenging convergence of these Federal laws and act lawfully. However, the Agencies cannot comply with the Mining Law by defying existing mining rights or impairing mineral exploration and development through the proposed LUPAs.

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public land uses. *See, e.g.*, *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C.Cir.1988) (holding that, not only must an agency give adequate time for comments, but it also "must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully"); *see also* Letter from Idaho Governor "Butch" Otter to the Department of Interior, Secretary Jewell, dated January 17, 2014, requesting an extension of the public comment period for this DEIS. A copy of this letter is attached hereto as Exhibit 3. As of the date of this filing and upon information and belief, the request has not been acknowledged and an extension to file has not been granted.

6. Under the ESA, the procedural outcome of a determination that the listing of the species is "warranted but precluded" under Section 4(b)(3)(B)(iii) is that the species becomes a "candidate" species. *See* 16 U.S.C. § 1533(b)(3)(C)(i) ("A petition with respect to which a finding is made under subparagraph (B)(iii) shall be treated as a petition that is resubmitted to the Secretary ... on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.") In other words, by self-execution of the ESA, the original listing petition for a species to be determined WBP is simply placed in the queue again and reviewed annually.

   In the present case, the result is that the current scientific state of the GRSG, including the scientific basis underpinning the original bases for listing, must again be accounted for by the USFWS since in its original 2010 Determination. A simple decision of "warranted" in 2010 does not permanently enshrine the underlying science as the Service moves to gather the appropriate data for its decision by September, 2015, per stipulation.

Likewise, the appropriate balancing of interests required by FLPMA cannot be achieved if the Agencies select an alternative that is weighted too heavily for the conservation of a species that has yet to be formally protected under the ESA. Finally, any failure to thoroughly assess agency obligations under the panoply of this statutory framework will result in a fatally flawed NEPA process.

B. The Key Federal Laws that Must Be Harmonized in these BLM Land Use Plan Amendments

1. The General Mining Act of 1872

The General Mining Act of 1872, (Mining Law) Ch. 152, 17 Stat. 91 (codified as amended at 30 U.S.C. §§ 22-24, 26-30, 33-35, 37, 39-43, 47 (2000)), has, for more than a century and half, recognized claims based on individual actions appropriating hard rock minerals from Federal lands.

The Mining Law invites citizens to locate mining claims on public lands open to location by declaring that "all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase . . . ." 30 U.S.C. § 22. This statutory command grants a valid existing right to all United States citizens to use lands open to mineral entry, with or without a mining claim, for all uses and purposes reasonably incidental to prospecting, mining and processing, including rights of ingress and egress.

Stated generally, the Mining Law authorizes and governs prospecting, exploration, development and mining for economic minerals on Federal public lands. It was designed to encourage individuals to prospect, explore and develop the mineral resources of the public domain through an assurance of exclusive possession of the developed minerals. *United States v. Shumway*, 199 F.3d 1093, 1098-99 (9th Cir. 1999) ("The miners' custom, that the finder of valuable minerals on government land is entitled to exclusive possession of the land for purposes of mining and to all the minerals he extracts, has been a powerful engine driving exploration and extraction of valuable minerals . . . .") The Mining Law has also encouraged the private development of the minerals and metals America needed and would need without risking the public treasury.

Mining claim location is a self-initiated act that does not require approval of the United States to establish property rights. When a mining claimant properly locates a mining claim, the claimant requires a "unique form of property." *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963). This unique property interest includes the right to use so much of the surface as is reasonably necessary to develop the discovered valuable mineral deposit and the right to extract all valuable locatable minerals without payment to the United States. Accordingly, the Mining Law provides mining claimants with considerable rights to conduct operations to extract minerals from public lands.

Under the Mining Law, all citizens have the right to enter public lands open to mineral entry and locate mining claims or mill site claims. *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 506 (9th Cir. 1997). Once a claim is staked, the holder "has the exclusive right to possession and enjoyment of all the surface included within the lines of the locations, but the United States retains title to the land." *Id.* Moreover, "[i]f a discovery of a 'valuable mineral deposit' is made,

the claim can be held indefinitely so long as the annual assessment work is performed, the necessary filings are made, fees are paid, and a valuable mineral deposit continues to exist." *Id.*at 507.

It is well established that "[t]he owner of a mining claim owns property, and is not a mere social guest of the Department of the Interior to be shooed out the door when the Department chooses." *United States v. Shumway*, 199 F.3d1093, 1103 (9th Cir. 1999); *accord United States v. Locke*, 471 U.S. 84, 86 (1985) ("[A]n unpatented mining claim remains a fully recognized possessory interest."). In other words, a mining claim, even without more, implicates significant rights.

2. The Federal Land Policy Management Act of 1976 (FLPMA)

The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1784, is the organic framework for the BLM. The FLPMA sets forth the principles governing the management of lands owned by the United States and administered by the Secretary of the Interior through BLM.

Under FLPMA, BLM is required to manage the public lands on the basis of multiple use and sustained yield. 43 U.S.C. § 1701(a)(7) (2006) " 'Multiple use management' is a concept that describes the complicated task of achieving a balance among the many competing uses on public lands, 'including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.' " *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004) (quoting 43 U.S.C. § 1702(c)).

In enacting FLPMA, Congress explicitly acknowledged the continued vitality of the Mining Law of 1872. Section 302(b) of FLPMA states:

> Except as provided in Section 1744, Section 1782, and Subsection (f) of Section 1781 of this title and in the last sentence of this paragraph, 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 the act, including, but not limited to, rights of ingress and egress.

43 U.S.C. § 1732(b). The House Committee on Interior and Insular Affairs described this provision more particularly when it stated:

> This section specifies that no provision of the Mining Law of 1872 will be amended or altered by this legislation except as provided in Section 207 (recordation of mining claims), Subsection 401(f) (regulation of mining in the California desert), Section 311 (wilderness review areas and wilderness areas), and except for the fact that the Secretary of the Interior is given specific authority, by regulation or otherwise, to provide that prospecting and mining under the mining law will not result in unnecessary or undue degradation of the public lands. The secretary is granted general authority to prevent such degradation.

H.R. Rep. No. 94-1163 at 6 (1976). Under this regulatory framework, BLM is required to strike an appropriate balance between potentially competing interests and land management objectives. Moreover, this balance is to be achieved in the LUPA process.

Under Section 202(c)(9) of FLPMA, 43 U.S.C. § 1712(a) and (c)(9), BLM's LUPs "shall be consistent with State and local plans to the maximum extent . . . consistent with Federal law and the purposes of this Act," and BLM must "assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands," and "assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans." *See also Yount v. Salazar*, 2013 WL 93372, *13 (D. Ariz. 2013) (not reported) (stating "[b]oth FLPMA and NEPA require meaningful participation of and consultation with local governments, and, to the extent possible, consistency of federal actions with local land use plans.").

A land use planning process such as the present cannot close an area to the operation of the Mining Laws. Withdrawals of the magnitude proposed in this DEIS can only be achieved through a Congressional act, and conflict with the FLPMA's multiple use mandate and the Property Clause of the United States Constitution, which gives Congress sole power to regulate the public lands, U.S. CONST., ART. IV, § 3, CL. 2.

In the DEIS, the Agencies state that the working assumption will be that any land withdrawals will comply with FLPMA. DEIS at 1-18. FLPMA greatly modified the prior law of withdrawals, reservations, and classifications of Federal public lands.

Section 204 of FLPMA provides detailed procedures, including public participation, to govern exercise of this authority. For withdrawals of less than 5,000 acres, Congress has no oversight role over the Executive Branch.[7] For withdrawals of more than 5,000 acres, however, FLPMA requires the Secretary to submit the withdrawal to Congress, providing an opportunity for either house to veto the proposal.[8] BLM's proposals effectively would withdraw many times that number of acres without following the procedures required in FLPMA, which is contrary to law.

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7. 43 U.S.C. section 1714 (d) provides that:
(d) Withdrawals aggregating less than five thousand acres; procedure applicable
A withdrawal aggregating less than five thousand acres may be made under this subsection by the Secretary on his own motion or upon request by a department or an agency head—
(1) for such period of time as he deems desirable for a resource use; or
(2) for a period of not more than twenty years for any other use, including but not limited to use for administrative sites, location of facilities, and other proprietary purposes; or
(3) for a period of not more than five years to preserve such tract for a specific use then under consideration by the Congress.

8. 43 U.S.C.A. section 1714(c)(1) provides in pertinent part:

(c) Congressional approval procedures applicable to withdrawals aggregating five thousand acres or more
(1) On and after October 21, 1976, a withdrawal aggregating five thousand acres or more may be made (or such a withdrawal or any other withdrawal involving in the aggregate five thousand acres or more which terminates after such date of approval may be extended) only for a period of not more than twenty years by the Secretary on his own motion or upon request by a department or agency head. The Secretary shall notify both Houses of Congress of such a withdrawal no later than its effective date and the withdrawal shall terminate and become ineffective at the end of ninety days (not counting days on which the Senate or the House of Representatives has adjourned for more than three consecutive days) beginning on the day notice of such withdrawal has been submitted to the Senate and the House of Representatives, if the Congress has adopted a concurrent resolution stating that such House does not approve the withdrawal.

Alternatives B, C, and D fail to recognize the Nation's need for domestic mineral sources, are overly restrictive, unreasonable and contrary to law and other BLM policy. Withdrawals of the magnitude proposed under Alternatives B, C, and D conflict with the FLPMA's multiple use mandate, § 22 of the General Mining Law, the Mining and Minerals Policy Act, and cannot be implemented through the LUPA process. Public land withdrawals of this magnitude can only be made by an Act of Congress or by the Secretary pursuant to the requirements and procedures of FLPMA § 204 for a period not to exceed 20 years. The public lands should remain open and available unless doing otherwise is clearly in the National interest and, absent such a finding, the validity of Alternatives B, C, and D are called into question.

3. Mining and Minerals Policy Act of 1970

The Mining and Minerals Policy Act of 1970, which declares that it "is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, mineral, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs, ..." 30 U.S.C. § 21a. BLM's planning criteria for the proposed LUPA omit any reference to this important Congressional policy statement. It is also evident that BLM and the Forest Service overlooked this important national policy in formulating LUPA elements and alternatives.[9]

The proposed withdrawal of millions of acres from energy and mineral exploration and leasing is directly at odds with this statute. The Agencies must reconsider these measures in light of its multiple use obligations under FLPMA and the Mining and Minerals Policy Act.

For example, there is no analysis of why the proposed withdrawal from mineral entry based on risk to GRSG and its habitat is necessary where the same objective can be achieved through avoidance, minimization of impacts, and mitigation of impacts within the designated areas. Further, because mineral exploration and development are recognized and acceptable uses of public lands, the multiple use mandate requires BLM and the USFS to work diligently to find ways to remain flexible and ensure that resources can be developed in a manner that has minimal impacts to GRSG.

4. The National Forest Management Act (NFMA)

The National Forest Management Act of 1976 (NFMA) sets forth the statutory framework and specifies the procedural and substantive requirements under which the USFS is to manage National Forest System lands. The NFMA specifically directs the USFS, to develop and maintain Land and Resource Management Plans (Forest Plans) for the National Forest System. 16 U.S.C. § 1604(a).

In developing and maintaining each plan, the USFS is required to use "a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences" (*Id.* § 1604(b)) and the agency must take both environmental and commercial

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9. None of the DEIS documents identify the Mining and Minerals Policy Act in the list of planning criteria.

goals into account. *See, e g.,* 16 U.S.C. § 1604(g); 36 C.F.R. § 219.1(a). Accordingly, like FLPMA's directives, the NFMA also requires the USFS and BLM to recognize multiple uses within their LUP's.

5. The Endangered Species Act (ESA) and its Implication in this Land Use Planning Amendment Process

Under the ESA, the GRSG presently has no formal legal status. The GRSG is neither formally proposed for listing, and nor is it actually listed. Thus, the Federal government is not, at this time, enjoined from "irreversibly and irretrievably" committing resources antithetical to the conservation of the GRSG[10] and is similarly not subject to the "takings" regulations.[11] At present, the GRSG is simply a "candidate" species with a ranking of "8" by the USFWS as to its current threat level.[12] This means the GRSG can be hunted and its breeding territory, or "leks," can be destroyed or adversely modified subject to existing regulatory conditions. The first petition to list the GRSG was presented to the USFWS in 2002,[13] yet various Federal agencies have, since then, determinedly deployed conservation measures that have been, as will be discussed below, simply unaccounted for or wholly ignored.

The LUPA process described in the DEIS document was triggered by the USFWS's 2010 Determination that listing the GRSG was "warranted but precluded" under the ESA, 75 Fed. Reg. 13,910 (Mar. 23, 2010). With unquestioned acceptance of the information underlying that 2010 "warranted" finding, BLM is unleashing a breathtaking, *massive,* and unprecedented LUPA process to advance the laudable goal of addressing perceived deficiencies in Factors A and D of the ESA's listing criteria.[14] However, BLM mischaracterizes the USFWS's WBP determination by stating the USFWS concluded that BLM lacks adequate regulatory tools to conserve GRSG, thereby requiring wholesale new regulatory mechanisms.

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10. 16 U.S.C. § 1536(d).

11. *See* 16 U.S.C. § 1532 (13). *See also* 50 C.F.R. § 17.31 (wildlife) and 50 C.F.R. §§ 17.73-17.78 (plants).

12. A candidate species is one for which the USFWS has sufficient information on their biological status and threats to propose them for listing as endangered or threatened species under the ESA, but for which the development of a listing regulation has been precluded to date by other higher priority listings. See 78 Fed. Reg. 70104 (Nov. 22, 2013). Additionally, USFWS has developed a ranking system from 1-12 that assigns a listing priority number (LPN) to each candidate species. An LPN of 1 is highest priority; and LPN of 12 is lowest priority. *See* 16 U.S.C. § 1533(h)(3); 48 Fed. Reg. 43098 (Sept. 21, 1983) (USFWS published guidance explaining how the agency may assign an LPN for each candidate species).

13. *See* 75 Fed. Reg. at 13,910 (describing serial listing petitions beginning in 2002).

14. Section 4(a)(1) of the Endangered Species Act, 16 U.S.C. § 1533(a)(1), sets forth the criteria by which the United States Fish and Wildlife Service will determine to list the GRSG:

> The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:
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> (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
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> (B) overutilization for commercial, recreational, scientific, or educational purposes;
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> (C) disease or predation;
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> (D) the inadequacy of existing regulatory mechanisms; or
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> (E) other natural or manmade factors affecting its continued existence.

Rather, what the Service *actually* found was, among others that "the information provided to us by BLM did not specify what requirements, direction, measures or guidance has been included in the newly revised RMPs to address threats to sage-grouse and sagebrush habitat. Therefore, we cannot assess their value or rely on them as regulatory mechanisms for the conservation of sage-grouse." 75 Fed. Reg. at 13976. Further, "[a]lthough [Resource Management Plans], [Allotment Management Plans], and the permit renewal process provide an adequate regulatory framework, whether or not these regulatory mechanisms are being implemented in a manner that conserves sage-grouse is unclear." *Id.* at 13977. Accordingly, instead of simply supplementing the requested information,[15] BLM chose to respond with a wholesale reordering of Federal land priorities across 40 million acres of the Western United States.

The authority under the Endangered Species Act, however, is not boundless and only applies to "discretionary" Federal "actions" potentially affecting listed species or species proposed for listing.[16] The United States Supreme Court, in *National Association of Home Builders v. Def. of Wildlife*, 551 U.S. 644 (2007), has instructed the Federal government that the ESA does not interrupt obligations under other "categorical statutory commands" such as the General Mining Law.

a. The Requirement that the "Best Available Science" Support ESA and NEPA Decision-Making

The ESA requires that decisions be grounded in the "best commercial and scientific data available."[17] This is because the ESA cannot improperly result in "needless economic dislocation." *See Bennett v. Spear*, 520 U.S. 154, 176 (1997) (stating "the obvious purpose of the requirement that each agency 'use the best scientific and commercial data available' is to ensure that the ESA not be implemented haphazardly on the basis of speculation or surmise"). In the NEPA context, the Council on Environmental Quality's regulations require agencies to use the "best available science" when preparing EIS documents. 40 C.F.R. § 1502.24.

b. The BLM National Technical Team (NTT) Report

A Report on National Greater Sage-Grouse Conservation Measures, National Technical Team (December 21, 2011) (NTT Report) was BLM's initial response to the 2010 Determination. The agency sought to develop and integrate GRSG specific directives into 88 Resource Management Plans (RMP), in eleven Western states, all of which resulted in the NTT Report.

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15. However, in justifying the monitoring program for its future GRSG planning strategy, BLM points to the USFWS characterization of the dysfunction of the information flow in the original 2010 WBP conclusion. In the DEIS at Volume II, at 2-12, BLM refers to the USFWS finding that "there was a lack of consistency across the range and how questions were interpreted and answered for the [listing decision] data call, which limited our ability to use the results to understand habitat conditions for Sage Grouse on BLM lands." *See supra* note 13, 75 Fed. Reg. at 13,976. Accordingly, BLM concedes, through the voice of the USFWS, that the 2010 WBP listing decision may not have been grounded on a complete understanding of GRSG habitat conditions.

16. 50 C.F.R. § 402.03.

17. In order to lawfully list a species, "The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him," 16 U.S.C. § 1533 (b)(1)(A). In fulfilling ESA Section 7(a)(2) consultation, Federal agencies "shall use the best scientific and commercial data available." *Id.* § 1536 (a)(2).

The NTT Report creates policies that assume GRSG conservation is the highest and best use of the land, while subordinating other interests, like energy and mineral exploration and development. The NTT Report evolved without adequate science, analysis of its legal adequacy, or analysis of the economic impacts these policies will have on local communities and the Nation's economy. This fundamental flaw was recognized by Department of Interior employees involved with developing the NTT Report. Their concerns are evidenced in a series of emails included below.

i. The Instruction Memorandum Requiring Consideration of the NTT Report has Expired

In addition to having been overcome by subsequent scientific review and assessment of GRSG science, the use of the NTT Report to inform any "NTT-Only" Alternative or "Adjusted" Alternative is inappropriate because Instruction Memorandum (IM) 2012-044, directing consideration of the NTT Report, has expired. The IM expired September 9, 2013, well ahead of the publication date of the LUPA/DEIS reviewed here.

However, there is no acknowledgment in the DEIS documents of the expiration of the IM or explanation of any continuing authority to include any NTT Report recommendation for GRSG conservation into any proposed Alternative. This IM has apparently failed to continue as a policy directive for the agency. Additionally, the Purpose and Need Statement does not disclose that one of the main purposes of the DEIS to respond to Instruction Memorandum 2012-044, *see* discussion below.

ii. The Development of the NTT Report

In an effort to instigate transparency and gain a better understanding of the evolution of the NTT Report, Idaho Governor C.L. "Butch" Otter filed a Freedom of Information Act ("FOIA") request to the Department of the Interior. In response, the Department of Interior produced numerous documents disclosing that career BLM staff, sensitive to programs produced by "categorical statutory commands," expressed concern over the legality of the report being packaged as "science."

In an agency document titled, "*How the NTT Report Changes the way BLM Operates*," attached as (Exhibit 4), the NTT Report was predicted, if implemented, to completely restructure the BLM fluid minerals program: "BLM would *preclude* fluid mineral development within designated priority sage-grouse habitat. Where the BLM cannot preclude development due to valid existing rights, the BLM *would attach* moderate to major restrictions to the development...."

Even as the NTT Report was nearly completed, an email exchange between Dwight Fielder (BLM Washington Office, Chief of Fish and Wildlife Conservation) and Pat Deibert (USFWS; National Sage-Grouse Coordinator) illustrates agency concern that some of the measures in the NTT Report were legally flawed. *See* email exchange below, discussing concern of Jim Perry (BLM Washington Office, Senior Natural Resource Specialist), that the NTT Report, as configured, is unlawful:

From: Dwight Fielder
Sent: 12/21/2011 08:55 AM MST
To: Raul Morales; Dave Naugle; Jim Perry; Jonathan Goodman; Joseph Stout; Pat Diebert
Subject: RE: Follow up to Today's NPT call on the NTT report

To address concerns raised by Jim [Perry] that some of the NTT recommendations may not be possible under existing law, we are proposing to add the following verbiage (or variation thereof) to the NTT Report introduction, the Memo from Raul to the NPT [National Policy Team] and, possibly, the IM:

"The recommendations in this report have not undergone a full legal review to ensure they are consistent with the variety of statutes and regulations with which the BLM must comply. Where inconsistencies arise, it is the hope of the NTT that the recommendation(s) may be considered to the fullest extent consistent with the law."

Do you think the NTT would be comfortable with this addition?

From: Pat Diebert
Sent: Wednesday, December 21, 2011 11:59 AM
To: Dwight Fielder, Raoul Morales, Dave Naugle, Jim Perry, Jonathan Goodman, Joseph Stout,
Subject: Re: Follow up to Today's NPT call on the NTT report

I would only consider adding this to a cover memo. The report is a science document.

From: Dwight Fielder
Sent: 12/21/2011 10:15 AM MST
To: Pat Diebert; Raul Morales; Dave Naugle; Jim Perry; Jonathan Goodman; Joe Stout
Subject: RE: Follow up to Today's NPT call on the NTT report

But, does the NTT really want to recommend something that is blatantly illegal? It seems to me that the caveat provided makes it clear that the NTT document IS a technical document that has not undergone a policy or legal review. [Emphasis in original.]

From: Pat Diebert
Sent: Wednesday, December 21, 2011 1:56 PM
To: Dwight Fielder, Raul Morales, Dave Naugle, Jim Perry, Jonathan Goodman,
Subject: Re: Follow up to Today's NPT call on the NTT report

The NTT is providing the science. That does not change with the laws that BLM works under.

From: Dwight FielderTo: Raul Morales
Subject: FW: Follow up to Today's NPT call on the NTT report
Date: December 21, 2011 11:01:35 AM

I don't know how to respond to this and am thinking that I shouldn't.

The concerns expressed by career BLM staff above, with a clear understanding of the agency's mission, were a harbinger of what appeared in the final NTT Report.

iii. The Flawed Assumptions of the NTT Report

The primary objective of the NTT Report is "to protect sage-grouse habitats from anthropogenic disturbances that will reduce distribution or abundance of sage-grouse". NTT Report at 7.

To achieve the primary objective the NTT Report sets forth sub-objectives. Two of the four sub-objectives assert that 70% of the range within priority habitat needs to provide "adequate" sagebrush habitat to meet sage-grouse needs, and that discrete anthropogenic disturbances in priority habitat be limited to less than 3% of the total sage-grouse habitat regardless of ownership. NTT Report at 7. These objectives are not supported by the literature.

The DLUPA/DEIS incorporates the NTT Report's habitat management recommendations for GRSG priority habitat, including prescriptive restrictions and categorical prohibitions on access and use of lands within priority habitat including, among others: 1) 3% limit on surface disturbance; 2) 50-70% sagebrush cover threshold; 3) four-mile No Surface Occupancy (NSO); 4) Right-of-Way (ROW) exclusion and avoidance areas; 5) one disturbance per 640 acres; and 6) mineral withdrawals.

The DLUPA/DEIS proposes arbitrary conservation measures based on unproven assumptions that: 1) a minimum range of 50 -70% of the acreage in sagebrush cover is required for long-term persistence of sage-grouse; 2) that discrete anthropogenic disturbances must be limited to less than 3% of the total sage-grouse habitat regardless of ownership, (NTT Report at 6-7); and 3) a 15-25% minimum canopy cover is necessary in all sage-grouse seasonal habitats.

These arbitrary measures conflict with studies that indicate sagebrush cover preference differs between seasons. Thus, using a single percent cover is inappropriate and is not supported by the literature. A one-size-fits-all limit on disturbance to less than 3% of the total habitat is arbitrary, which is discussed in detail below. The United States Geological Survey (USGS) Report indicates that habitat fragmentation "generally begins to have significant effects on wildlife when suitable habitat becomes less than 30 to 50 percent of the landscape", which directly contradicts the threshold stating that 70% of the landscape must be suitable habitat in order for the sage-grouse to persist.[18]

Other deficiencies present in the NTT Report and associated studies include lack of independent authorship, methodological issues, and data quality issues such as failure to identify limiting factors, inadequate sampling, and use of inferior equipment.[19] Accordingly, any element of an Alternative chosen by BLM that relies on NTT will be legally flawed. In addition:

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18. USGS, *Summary of Science, Activities, Programs, and Policies That Influence the Rangewide Conservation of Greater Sage-Grouse (Centrocercus urophasianus)*, June 2013 at 26. [Hereafter "USGS Report"].

19. *See* Megan Maxwell, Testimony Before the Committee on Resources, U.S. House of Representatives 113th Congress, Oversight Hearing on "ESA Decisions by Closed-Door Settlement: Short Changing Science, Transparency, Private Property, and State & Local Economies" (Dec. 12, 2013). A copy of this testimony is attached hereto as Exhibit 5 and incorporated herein by reference. [Hereafter, "Maxwell Testimony"]. *See*

- The conservation measures proposed by the Sage-grouse NTT Report are draconian and will have severe negative impacts on Commenters, other multiple-users of Federal lands, and numerous resource-dependent communities in the Western United States;

- The limit in the NTT Report on the percent of land that can be disturbed is unsupported, arbitrary, and will have a dramatic adverse impact on multiple-use activities; and

- The draconian conservation measures proposed in the NTT Report will further stifle investment in the Country's mining industry and exacerbate the Nation's mineral import dependency.

Reliance on the NTT Report is particularly problematic in light of the Western Association of Fish & Wildlife Agencies' (WAFWA) concerns with the management approach advocated in the NTT Report. As stated in WAFWA's letter to Secretary Jewell, dated May 16, 2013, they were concerned with the NTT Report:

Simply put, we believe it would represent a setback to sage-grouse conservation... Applying a "one-size-fits-all" approach focusing solely on the NTT report is not appropriate for management of the variations that occur across the sage-grouse range . . . . Our concern is that using the NTT, in vacuum, would undermine sage-grouse conservation range-wide.[20]

iv. The NTT Conservation Recommendations May Harm, Rather Than Conserve, the Greater Sage-Grouse

The "NTT-Only" Alternative, as well as the "Adjusted Sub-Regional" Alternative, propose specific habitat prescriptions or goals which would apply to *all* GRSG seasonal habitats. As a matter of conservation science, this is completely inappropriate for the GRSG because of variations in population traits and characteristics as well as the variability in habitat conditions and threats within the Planning Area. These variations make managing GRSG and their habitat a complex task that require consideration of site-specific conditions and variables.

Simplifying GRSG management by proposing "one-size-fits-all" habitat prescriptions or percent disturbance thresholds fails to target the specific sub-regional and population scale factors, as well as seasonal habitat preferences. The simplistic "one-size-fits-all" approach advanced in the NTT Report and adopted into the DLUPA/DEIS completely fails to recognize this variation and complexity which is a critical flaw. Consequently, the habitat management recommendations proposed under NTT-weighted Alternatives not only fail to protect GRSG and GRSG habitat range-wide, but they could harm, rather that conserve the GRSG and will result in adverse

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also, R.R. Ramey Ph.D., *Review of Data Quality Issues in A Report on National Greater Sage-Grouse Conservation Measures Produced by the BLM Sage-Grouse National Technical Team (NTT),* unpublished report, September 19, 2013. [Hereafter "Ramey 2013"]. A copy of this report is attached hereto as Exhibit 6 and incorporated by reference); *see also* R.M. Zink Ph.D; *Conservation Genetics of the Greater Sage-Grouse*, PowerPoint Presentation; available at: https://docs.google.com/file/d/0Bz7lCAfLNDKBdjVMblJjb0ZIblU/edit?pli=1

20. The WAFWA letter is attached hereto and incorporated by reference as Exhibit 7.

consequences, such as increased risk of catastrophic fire and habitat destruction, and unnecessary and overly burdensome management of the regulated community.

c. The USFWS Conservation Objectives Team (COT) Report

Subsequent to the issuance of the BLM NTT Report, the USFWS provided their views for appropriate conservation of the GRSG in the Conservation Objectives Team (COT) Report, which was aimed at more precisely defining the parameters of science-based GRSG conservation. United States Fish and Wildlife Service, *Greater Sage-grouse (Centrocercus urophasianus) Conservation Objectives: Final Report* (Feb. 2013).

The fundamental design of the COT Report was to accommodate regional differences to GRSG conservation, because, according to the Service, "[d]ue to the variability in ecological conditions and the nature of the threats across the range of the sage-grouse, developing detailed, prescriptive species or habitat actions is not possible at the range-wide scale. Specific strategies or actions necessary to achieve ... conservation objectives must be developed and implemented at the state or local level, with the involvement of all stakeholders." COT Report at 31. Rather than dictate a one-size-fits-all regulatory model, the COT Report invited states to package best management practices with monitoring and implementation tailored to address state-specific issues.

The USFWS is the agency principally responsible for administering the ESA, and the COT Report represents the agency's "special expertise" in this area. Under the COT Report, the USFWS has provided the framework by which Federal land management agencies can move forward with a GRSG conservation strategy designed to avoid the listing.

While the NTT Report may have some experimental value, it must be narrowly considered in the context in which it was derived. Notably, at the time the NTT Report was prepared there was no USFWS directive to the states and Federal land management agencies. However, the landscape was fundamentally changed when the USFWS issued the COT Report. The COT Report was designed to "serve as guidance to Federal land management agencies, state sage-grouse teams, and others in focusing efforts to achieve effective conservation for this species."

6. The National Environmental Policy Act (NEPA)

The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, is the procedural mechanism for assessing the environmental impact s of the LUPAs and must consider these effects in determining whether to amend their LUPs under FLPMA.

Materially distinct from the prospective decision by the USFWS to determine if listing the GRSG under the ESA is warranted,[21] under NEPA, the Agencies must account for the potential environmental, social and economic impacts of the proposed action, on the operators and the individuals whose economic livelihood depend on access to public lands and to local communities, counties and States where these lands are located. As the Commenters have

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21. *See* 16 U.S.C. § 1533(b)(1)(A) ("The Secretary shall make determinations . . . solely on the basis of the best scientific and commercial data available . . . .").

already established in previous comments, mining is an essential contributor to the economic engine of the United States.[22]

IV. GENERAL COMMENTS

A. The Economic Impact of Mining in the GRSG Range

1. Mining's Economic Impact Nationally

Mining in the United States directly and indirectly generated just over 2.11 million full-time and part-time jobs in 2011, including employees and the self-employed. *See* National Mining Association, *The Economic Contributions of U.S. Mining (2011)* (Sept. 2013) at 3 (hereinafter NMA Economic Report).

Additionally:

- U.S. mines accounted for more than 637,000 direct jobs.
- Jobs in other industries attributable to or induced by U.S. mining totaled more than 1.47 million.

U.S. labor income associated with U.S. mining exceeded $138 billion in 2011, which includes wages and salaries, other employee benefits and proprietors' income.

The contribution to GDP attributable to U.S. mining in 2011 from direct, indirect and induced activity was $232 billion. U.S. mining directly and indirectly generated nearly $51 billion in tax payments to federal, state and local governments.

The metal ore mining segment of U.S. mining accounted for 380,970 direct and indirect jobs, $27.2 billion in labor compensation and $49.6 billion of GDP. Annual wages and salaries in the metal ore mining sector averaged $85,410. Metal ore mining accounted for 18 percent of total mining employment, 20 percent of labor income and 21 percent of mining's contribution to GDP.

The non-metallic mineral mining segment of U.S. mining accounted for 924,580 direct and indirect jobs, $57.6 billion in labor compensation and $85 billion of U.S. GDP. Annual wages and salaries in the non-metallic mining sector averaged $54,047. Non-metallic mineral mining

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22. *See* NMA Comments on BLM Notice of Intent to Prepare an EIS on Incorporation of Conservation Measures to Protect the Greater Sage Grouse (March 23, 2012) at 2.

> As BLM moves forward with the EIS, BLM should strive to avoid or minimize disruption of mineral development as minerals are the building blocks of our society, playing a vital role in innovation, national security and economic growth. ... The 1.8 million jobs supported by U.S. mining generate billions of dollars in economic activity. According to government statistics, the value added from industries consuming the $64 billion in raw materials from U.S. minerals mining translates into $2.1 trillion, or 14 percent, of our GDP ... . BLM must ensure that the nation's need for minerals and affordable energy is properly reflected in the EIS.

represented 44 percent of mining employment, 42 percent of labor income and 37 percent of its contribution to GDP. *Id.*

2. Mining's Economic Impact Across Idaho, Nevada and Utah

In just the tri-State area of Idaho, Nevada and Utah alone, mining accounts for over $11 billion in contributions to the GDP and generates $3.4 billion in tax contributions. In 2011, the mining industry accounted for close to 60,000 jobs in each of the three states, a figure that represents close to 15% of the total number of mining jobs in the United States.

The significant economic engine that is metal, non-metallic and all mining throughout the range of the GRSG in Idaho, Utah and Nevada is described and attached hereto as Exhibit 8 for each state. The economic calculus for the proposed LUPA must be accounted for not only across the tri-State area but in all of the Agency plans in the GRSG range in the context of the Statement of Purpose and Need, if the conservation measures proposed are aimed at avoiding the ESA listing of the GRSG range-wide.

B. Mining as a "Threat" to the GRSG

The Agencies have a legal obligation to comply with the General Mining Law, Mining and Minerals Policy Act, and FLPMA to recognize the Nation's need for domestic sources of minerals and the right to explore. It is at best careless, and at worst remarkably disingenuous, to identify locatable minerals as a "principle use" and then fail to identify the applicable laws for managing them and then propose management actions that are contrary to the General Mining Law and outside BLM's discretion as described above. That stated, this LUPA effort is simply asking too much of the mining industry based on the uncertain threats mining practices pose to the GRSG.

The USGS Report indicates that wildfire and invasive species are a primary threat across the range of the GRSG. The USGS Report also states:

> [t]he magnitude of the impacts of mining activities on sage-grouse and sagebrush habitats is largely unknown, but mining of various Federal mineral resources (locatable and saleable) currently affects approximately 3.6 percent of potential sage-grouse habitat directly (across all MZs) with indirect effects potentially affecting large portions (5–32 percent) of some MZs.

USGS Report at 71 (internal citation omitted). While the impacts to GRSG from mining are uncertain, the habitat loss due to mining range-wide are minor and temporary because lands are reclaimed after mining, and therefore can be mitigated with appropriate conservation measures including off-site mitigation for such impacts. It should be noted that BLM reports that GRSG populations can adapt to some habitat fragmentation and that GRSG are able to bypass unsuitable habitats during migration from one seasonal habitat to another (USGS Report at 26); and that GRSG can adapt to some level of habitat fragmentation. *Id.* at 25.

C. The Purpose and Need Statement is Fatally Flawed

The Purpose and Need Statement does not disclose that one of the main purposes of the DEIS is to respond to Instruction Memorandum (IM) 2012-044 (which expired prior to issuance of the DEIS) to analyze the impacts associated with implementing the conservation measures in the NTT) Report. Specifically, IM 2012-044 states:

> **Policy/Action:** The BLM must consider all applicable conservation measures when revising or amending its RMPs in Greater Sage Grouse habitat. The conservation measures developed by the NTT and contained in Attachment 1 must be considered and analyzed, as appropriate, through the land use planning process by all BLM State and Field Offices that contain occupied Greater Sage-Grouse habitat. While these conservation measures are range-wide in scale, it is expected that at the regional and sub-regional planning scales there may be some adjustments of these conservation measures in order to address local ecological site variability. Regardless, these conservation measures must be subjected to a hard look analysis as part of the planning and NEPA processes. This means that a reasonable range of conservation measures must be considered in the land use planning alternatives. As appropriate, the conservation measures must be considered and incorporated into at least one alternative in the land use planning process. Records of Decision (ROD) are expected to be completed for all such plans by the end of FY 2014. This is necessary to ensure the BLM has adequate regulatory mechanisms in its land use plans for consideration by FWS as part of its anticipated 2015 listing decision.
>
> When considering the conservation measures in Attachment 1 through the land use planning process, BLM offices should ensure that implementation of any of the measures is consistent with applicable statute and regulation. Where inconsistencies arise, BLM offices should consider the conservation measure(s) to the fullest extent consistent with such statute and regulation.

IM 2012-044. Although the DEIS complies with the IM directive to include at least one alternative based on the conservation measures in the NTT Report, the DEIS fails to respond to the second directive as stated in the second paragraph above: "BLM offices should ensure that implementation of any of the measures is consistent with applicable statute and regulation." The "NTT-Only" Alternative contains many land use restrictions and prohibitions inconsistent with the multiple use mandates in FLPMA and NFMA and rights under the General Mining Law.

Additionally, the DEIS does not disclose the Alternatives that include measures that are do not comply with FLPMA, NFMA or the General Mining Law. Thus, the DEIS fails to respond to the third directive in IM 2012 – 044: "Where inconsistencies arise, BLM offices should consider the conservation measure(s) to the fullest extent consistent with such statute and regulation."

D. The DEIS Has Failed to Evaluate the Cumulative Impacts of Land Withdrawals Range-Wide for the GRSG

A discussion of the cumulative environmental effects of a proposed action is an essential part of the environmental review process under NEPA. Otherwise, the combined environmental effects of related actions will not be evaluated. This DEIS is one of multiple documents under public review prepared by BLM touching upon activity in several states, including, for purposes of this review, Idaho, Nevada and Utah.

A "cumulative impact" is 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. . . . Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7.

In the Ninth Circuit, cases reviewing the application of the CEQ regulation have held that "all reasonably foreseeable" actions that have potential cumulative impacts must be addressed in an EIS. *See Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998). Here, the cover of the DEIS documents speak volumes as to the reasonable foreseeability of GRSG range-wide land withdrawals of the LUPA process under review. The DEIS documents are part of several related NEPA documents, including the DEISs for Oregon, Idaho and southwestern Montana, Nevada and northeastern California, and Utah. The total potential acreage withdrawn and the contribution in this DEIS to a broader total number of acres proposed to be withdrawn from future public use is not discussed. This is a fatal NEPA analytical gap.

A discussion of the range-wide withdrawal for the GRSG is important, as the purpose and need of each DEIS is aimed at shoring up a perceived inadequacy under the ESA and focused on avoiding a range-wide listing for the GRSG. Accordingly, it is important to gain a better understanding of the total number of acres proposed for withdrawal by the Agencies in order to determine whether there is a possibility of avoiding the listing – an essential element of the Purpose and Need of this LUPA process - because the boundaries for purposes of the ESA are not confined by state borders. *See Defenders of Wildlife et al. v. Salazar*, 729 F. Supp 1207 (D. Montana 2010) (rejecting a USFWS proposal to delist gray wolf populations in Idaho and Montana)

Here, the Agencies are considering major withdrawals in the States of Idaho, Nevada, and Utah in separate DEIS documents. However, there is no review or analysis of the cumulative withdrawals throughout these three states. In fact, not only has BLM failed to consider the total withdrawals in all three plans, but has likewise failed to consider the cumulative effects of these withdrawals in all 11 Western states in sage grouse habitat. Accordingly, until BLM does so, it is in clear violation of NEPA and its implementing regulations that require the agency evaluate cumulative impacts.

E. The Development of the Alternatives

1. The No-Action Alternative

It is understood that CEQ regulations require discussion of a no-action alternative, 40 C.F.R. § 1502.14(d), which provides a baseline against which action alternatives are evaluated. Courts

may hold an EIS inadequate if a baseline is not properly selected. *See Center for Biological Diversity v. United States Bureau of Land Management*, 746 F. Supp. 2d 1055 (N.D. Cal. 2009), vacated in part, 2011 WL 337364 (N.D. Cal. 2011) (LUPAs for the California Desert Conservation Area).

The Agencies have artificially deflated Alternative A, the "No Action" Alternative because it fails to quantify the impacts associated with ongoing implementation of the many existing local, state and Federal conservation measures and the existing BLM policies designed to protect the GRSG and its habitat. The No Action Alternative must review the existing regulatory framework, including Federal, state, local and private efforts, including voluntary conservation measures, to determine what positive effects those measures will produce.

The "Tri-State" BLM GRSG DEIS documents (Idaho, Nevada and Utah) are sprinkled liberally with working assumptions that the proposed LUPAs will accommodate "*valid existing rights*," in addition to other proposed limitations to implementation of the proposed actions.[23]

Constitutional and statutory provisions, such as the Fifth Amendment prohibition against taking property without just compensation, constrain the Federal government's freedom to alter the manner in which it manages and disposes of public lands and resources. As Federal land management policies evolve in response to political trends and exigencies – here, conservation of the GRSG to avoid its listing under the ESA - the BLM and USFS must accommodate rights recognized via or created under prior policies.

It is well recognized that Federal mineral leases, once granted, qualify as "valid existing rights." In the context of leases, once the interest is granted, the holder has a valid existing right to the extent of the right granted. Some courts have gone so far as to term such interests 'vested' owing to their immunity to defeasance by subsequent laws. *See Union Oil Co. v. Morton*, 512 F.2d 743, 750 (9th Cir. 1975).

The description in the DEIS documents as to what precisely constitute the "valid existing rights" that will survive the proposed LUPA process is obscure. What is better-defined in the proposed LUPA process is that there is a working assumption by BLM and the USFS that future proposed mineral lease modifications will have restrictions on modifying existing leases without any underlying authority to insist on those modifications.

A lease modification is not a new lease and is subject to the exact same terms and conditions as the original lease. A Federal lessee, who is entitled to non-competitive lease of adjacent lands, has the sole discretion of whether to enter into a new lease of the fringe acreage or to modify the existing lease by adding adjacent acreage. *See e.g.*, 43 C.F.R. § 3510.12(b). Further, 43 C.F.R. § 3510.21 explicitly provides that "a fringe acreage lease is a *new* Federal lease" but that a lease

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23. *See, e.g.*, DEIS at 4-2 (emphasis added), discussing locatable minerals.

"The following general assumptions apply to all resource categories. Any specific resource assumptions are provided in the methods and assumptions section for that resource.

- Implementing actions from any of the LUPA alternatives would be in compliance with all *valid existing rights*, federal regulations, BLM and Forest Service policies, and other requirements."

modification is not a *new* Federal lease, but in fact is subject to *"the same terms and conditions as the original Federal lease."* (emphasis added).

This cited authority above clearly provides that when a lessee desires to create a new lease, the lessee can choose to do so by entering into a fringe acreage lease or he can choose to modify the existing lease. If the lessee chooses to modify its existing lease, the only modification to the terms and conditions of the lease is the description of the land covered by the lease. The modified lease terms and conditions are in every other respect identical, including rentals, royalties, bonus payments, and other financial terms, lease number, and readjustment period.[24] The regulations and lease modification documents clearly provide that the modification is not a new lease but merely a continuation of the original lease.[25]

Any selected alternative must recognize and validate the rights embodied in existing mining leases. The scope of these rights include road construction and other facilities necessary for development and underlying support of the lease, and the modification of that lease as provided for in existing rules. For mining companies, a lease is a contract authorizing it to conduct mining operations on that tract, and granting the right to utilize adjacent lands by executing a lease modification, and these rights cannot be undermined by the LUPA process proposed here by the Federal land management agencies.

a. BLM Lease Stipulations

The DEIS fails to fully account for Federal regulatory mechanisms that are currently in place and are not only adequate to address the threats to the species, but are extremely robust. An example of the type of stipulations on mining operations that presently protect non-listed species and their habitat (in this case Wyoming), every Federal coal lessee is required to sign a stipulation from the BLM which says that:

> **Special Stipulation 2. Threatened and Endangered Species (Wyoming BLM)**
> "The lease area may now or hereafter contain plants, animals, or their habitats determined to be threatened or endangered under the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*, or that have other special status. The Authorized Officer may recommend modifications to exploration and development proposals to further conservation and management objectives or to ***avoid activity that will contribute to a need to list such species or their habitat*** or to comply with any biological opinion issued by the Fish and Wildlife Service for the proposed action. The Authorized Officer ***will not approve any ground-disturbing activity that may affect any such species or critical habitat until it completes its obligations under applicable requirements of the Endangered***

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24. *See, e.g., Conda Partnership v. Archer Investment Co.*, 12 F.3d 1105 (9th Cir.1993) (Unpublished Opinion). The Ninth Circuit addressed whether an assignee had to pay royalties to the assignor on a tract that was added to the original lease by a lease modification after the assignment. The Circuit panel held that the rights to the tract added by the lease modification were created as a part of the original lease.

25. For example, when an entity enters into a mineral lease that company obtains a right to a noncompetitive lease of the lease modification area, *see* 43 C.F.R. § 3510.11 (2002). This right is only subject to the lessee's compliance with the restrictions contained within 43 C.F.R. § 3510.15. If a lessee has complied fully with those restrictions, there is the right to modify the lease pursuant to its application.

> ***Species Act***. The Authorized Officer may ***require modifications to, or disapprove a proposed activity that is likely to result in jeopardy to the continuous existence of a proposed or listed threatened or endangered species, or result in the destruction or adverse modification of designated or proposed critical habitat.***
>
> The lessee shall comply with instructions from the Authorized Officer of the surface managing agency (BLM, if the surface is private) for ground disturbing activities associated with coal exploration on federal coal leases prior to approval of a mining and reclamation permit or outside an approved mining and reclamation permit area. The lessee shall comply with instructions from the Authorized Officer of the Office of Surface Mining Reclamation and Enforcement, or his designated representative, for all ground-disturbing activities taking place within an approved mining and reclamation permit area or associated with such a permit.

Since the GRSG is presently a special status species, this stipulation authorizes BLM to modify the lease to avoid activity that will harm the GRSG, and prohibits the agency from approving any activity that would adversely affect such species if it would violate the ESA. It even authorizes BLM to modify the lease after mining has begun if necessary. These are very powerful protections, and they refute the suggestion that there are inadequate regulatory mechanisms to protect the GRSG and its habitat. There are similar protections required for other industries as well, such as oil and gas leasing on BLM land.

b. Manual 6840

The No Action Alternative must discuss, in detail, BLM Manual 6840 and its detailed and effective policies that protect both listed and candidate species consistent with the Secretary's authority under the ESA and balance competing resource values as required by FLPMA.

The purpose of Manual 6840 is to establish policy for the management of species listed or proposed for listing under the ESA and for "sensitive species" on BLM lands. It contains guidance on how to designate and ensure for the conservation of "sensitive species" (i.e.; "special status species," like sage-grouse). One of the objectives of Manual 6840 is to "initiate proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of these species under the ESA" Manual 6840 at .02. In order to meet this objective the Manual seeks to ensure:

> [W]hen the BLM engages in the planning process, land use plans and subsequent implementation-level plans identify appropriate outcomes, strategies, restoration opportunities, use restrictions, and management actions *necessary to conserve and/or recover listed species*, as well as provisions for the conservation of Bureau sensitive species. In particular, such plans should address any approved recovery plans and conservation agreements.

Id. at .04D5 (emphasis added).

Section 1(3) of Manual 6840 pertaining to the administration of listed species authorizes BLM State Directors to exclude core habitat areas with resource conflicts from being designated as critical habitat: Where the State Director determines that adequate conservation measures are in place, and that the benefits, including economic benefits, of excluding BLM lands from critical habitat designation exceed the benefits of inclusion of BLM lands, the State Director shall request exclusion of BLM lands from the critical habitat designation pursuant to Section 4(b)(2) and/or Section 3(5)A of the ESA.

For proposals across multiple States, the Director will coordinate with the States and submit such information. BLM Manual 6840 at Section 1(3). If BLM does not believe the conservation measures prescribed in Manual 6840 are sufficient, then it must explain and quantify those deficiencies. Otherwise, the public cannot gauge and understand the need (if any) for land use management changes in BLM's Preferred Alternative.

The No Action Alternative fails to properly analyze the existing conservation measures and authorities the BLM is already using to conserve the GRSG and its habitat. The No-Action Alternative proffered by the Agencies must acknowledge Manual 6840 as the status quo, baseline policy governing present GRSG conservation. If BLM believes that such existing regulatory mechanisms are inadequate, then the burden is on the agency to explain how and why this is so.

c. Other Conservation Tools

The Federal government has several other pre-existing legal tools to address the purpose and need of the BLM LUPAs as stated the DEIS documents. The most important of these tools include, among others:

1. The USFWS has had a long-standing policy of working to conserve "candidate" species through several means, including a grants program funds conservation projects by private landowners, states and territories; and two voluntary programs - Candidate Conservation Agreements (CCAs) and Candidate Conservation Agreements with Assurances (CCAAs) - engage participants to implement specific actions that remove or reduce the threats to candidate species, which helps stabilize or restore the species and can preclude the need for ESA listing.

2. Additionally, the Service is directed by Congress "make prompt use" of emergency listing authority under Section 7 of the ESA if warranted for candidate species, 16 U.S.C. § (b)(3)(C)(iii). None of these presently existing important ESA tools are accounted for in this NEPA process.

3. Section 302(b) of FLPMA requires the Secretary of the Interior, in managing the public lands, to "take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b) [hereinafter the "Unnecessary or Undue Degradation" Standard]. For hard rock mining, this requirement is implemented through BLM's Surface Management Regulations, 43 C.F.R. Subpart 3809, which provide BLM with sufficient authority to consider and require mitigation for potential impacts to GRSG habitat.

These legal tools, in addition to the pre-existing conservation commitments that BLM has undertaken prior to now, remain wholly ignored in the No Action Alternative. The lack of consideration of these existing conservation measures, results in an inaccurate baseline account of the affected environment. This error is a fundamental flaw in the DEIS and invalidates BLM's entire analysis, given the No Action Alternative is supposed to set the floor and serve as a benchmark against which the management alternatives may be measured.

2. The "NTT-Only" Alternative

a. The NTT-Only Alternative is Not Founded on the Best Available Science

The science BLM relies upon in the DEIS documents, in particular to support Alternative B, the "NTT-only" Alternative, does not, in fact, represent the "best available science" standard. Rather, the NTT relies on studies that have been criticized for:

- Significant mischaracterization of previous research;
- Substantial errors and omissions;
- Lack of independent authorship and peer review;
- Methodological bias;
- A lack of reproducibility;
- Invalid assumptions and analysis; and
- Inadequate data.

As noted earlier, WAFWA raised these same concerns to the Department of the Interior and to date, there is no response either publicly or in the DEIS documentation.

BLM's reliance on the NTT Report as the "best available science" is particularly concerning given the fact that since that report was published, the USFWS has released the COT Report—a report from the agency responsible for implementing the ESA itself.

Moreover, the NTT Report has been superseded by the Nevada, Idaho, and Utah State Plans, which have been independently prepared with oversight from State and Federal wildlife officials, and reflect conservation plans that address unique state-specific issues.

Further, the NTT Report cannot represent the "best available science" when its assumptions are unsupported. For example, the Commenters contend that the habitat disturbance thresholds discussed in each of the DEIS documents are not scientifically supported.[26] The USGS Report

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26. *See* M. Maxwell, "BLM's NTT Report: Is It the Best Available Science or a Tool to Support a Pre-Determined Outcome", Northwest Mining Association (2013). A copy of this report is attached hereto as Exhibit 9 and incorporated herein by reference. [Hereafter "Maxwell Report"].

indicates that habitat fragmentation "generally begins to have significant effects on wildlife when suitable habitat becomes less than 30 to 50 percent of the landscape" (USGS Report at 26), which directly contradicts the NTT Report threshold stating that 70% of the landscape must be suitable habitat in order for the sage-grouse to persist. *See* Alternative B in the Utah, Nevada and Idaho Draft EIS documents. The USGS Report further undermines the NTT Report's broad assertion that disturbance negatively impacts GRSG and sagebrush habitats in all instances, and instead acknowledges that, ". . . maintenance of healthy sagebrush communities includes some localized disturbance in many regions."

The Agencies should be compelled to provide evidence that supports the land use restrictions, and habitat thresholds proposed in the DEIS documents. In addition, it appears the Agencies have failed to acknowledge the existence of other methods of GRSG conservation, and continue to maintain that the NTT Report is the "best available science" despite other scientific points of view—including viewpoints by other Department of Interior agencies, *e.g.*, USFWS and USGS.

Finally, Alternatives B and C in the Utah DEIS, propose fire and fuels management within a key/core habitat with an emphasis on protecting existing sagebrush ecosystems, but do not take into account the quality, suitability or relative importance of the habitat to GRSG. It may not be appropriate to maintain 15% sagebrush canopy in all key/core habitat in an area where removal and creation of a fuel break would have net beneficial effects on GRSG.

V. UTAH DEIS SPECIFIC COMMENTS

A. Proposed Disturbance Caps in Alternatives B and C are Unfounded.

Alternatives B and C each provide a 3% disturbance cap in the Preliminary Priority Management Areas ("PPMAs") limiting anthropogenic disturbances to less than 3% of the total GRSG habitat regardless of land ownership. This 3% cap on disturbance accounts for both existing and any new disturbances in a PPMA.

The DEIS defines a disturbance to include, but not be limited to, paved highways, graded gravel roads, transmission lines, substations, wind turbines, oil and gas wells, geothermal wells, and associated facilities, pipelines, landfills, homes and mines. *See e.g.*, Table 2.1 at 2-21, Alternative B. This anthropogenic disturbance cap is flawed on numerous grounds. First, a 3% disturbance cap lacks a solid scientific basis and the DEIS similarly provides no basis for the arbitrary 3% cap. Not only does the science not support this 3% disturbance cap, a blanket condition such as this ignores important distinctions such as habitat quality or disturbance type and/or timing that likely play a much greater role in GRSG success.

In addition, the 3% cap proposed in Alternatives B and C is inconsistent with BLM's multiple use mandate as described in more detail in Section II.B, above. The DEIS evidences this contradiction when it provides that in areas where the 3% cap is met, no new activity will be allowed until sufficient GRSG habitat has been restored to maintain this arbitrary 3% threshold. Having a rigid disturbance cap that fails to account for habitat conditions and existing valid rights is arbitrary, unnecessarily harsh, and beyond BLM authority.

Third, nowhere in the DEIS does BLM explain exactly how the 3% cap will be assessed based on the actual PPMA delineations. Moreover, the maps included in the DEIS are on such a broad

scale that it is impossible to tell how a blanket prohibition of disturbance will be applied and how certain PPMAs will be disproportionately impacted. Additionally, and underscoring the lack of information included in the DEIS, is BLM's complete failure to quantify current conditions and existing disturbance thresholds in the PPMAs. The reader cannot determine, based on the DEIS and its illustrative maps, whether certain PPMAs have already met their 3% cap, thus immediately limiting further activity in those areas. This is a critical piece of missing information, depriving industry, the public and the decision-maker from understanding the impacts of these alternatives. It is a particularly significant failure in this context because it is information that BLM has readily available—such disturbance is accounted for in a number of site-specific environmental impact statements, leases, permits and other authorizations managed by BLM.

Finally, the arbitrary 3% cap is a blanket, one-size-fits-all approach that is not tailored to address many of the major threats identified in the DEIS which, in part, include wildfire, loss of native habitat to invasive species, and habitat fragmentation. *See also* the COT Report discussion in Section III.B.5.c. *supra*.

B. Fire Disturbance Should Not be Included in the Disturbance Cap Calculation.

Another significant concern with the disturbance caps in Alternatives C and E1 is the way that fire disturbance is treated. Unlike Alternatives B and D, Alternatives C and E1 include fire disturbance in the baseline calculations of anthropogenic disturbance. This is particularly concerning for Alternative C, which calculates disturbance as current and future conditions. In other words, certain PPMAs might have already met or exceeded the 3% disturbance limit before the EIS is even implemented depending on fire activity within a PPMA. While Alternative E prescribes a disturbance cap based on new permanent disturbance rather than accounting for current conditions, it also includes fire disturbance in its 5% cap.

Additionally, the DEIS and its treatment of fire disturbance in Alternatives C and E1 are problematic by failing to distinguish between prescribed fires versus natural burns; to account for the timing of the fire and how that may affect actual "disturbance"; and to account for the habitat value where the fire occurred, the seasonal timing of the fire, and the fire intervals for a certain region. All of these variables play a significant part in assessing the actual disturbance to sage grouse habitat experienced from a fire, as well as the recovery time for the ecological landscape. Rather than recognizing and quantifying these variables, BLM simply imposes a blanket assumption that any fire disturbance should be calculated within the disturbance cap. Again, this one-size fits all approach is not appropriate and must be replaced with data and assumptions that lead to a more reasonable approach to the calculation of fire disturbance area.

C. A 4-mile NSO Stipulation is Not Supported by the Science.

Throughout the DEIS, Alternatives B, C and D refer to a 4-mile NSO around leks in order to limit overall disturbances. *See, e.g.*, Table 2.1 at 2-141, providing a limited exception to the general prohibition of new surface occupancy on federal leases in PPMA's, such that if an entire lease is within a PPMA, new surface disturbance will be allowed but only with a 4-mile NSO condition. Alternative D similarly provides that activities associated with nonrenewable energy

development will also be subject to a 4-mile NSO of occupied leks. DEIS, Table 2.2 at 2-154. However, BLM's 4-mile NSO stipulation is a blanket condition that does not account for topographical or vegetative considerations or variations in activity-type, all of which may affect actual impacts to a lek. In addition, this 4-mile NSO has no scientific foundation.

For example, an occupied lek that abuts a ridge, butte or other topographic feature is unlikely to be impacted by certain activity that occurs on the other side of the feature, although the activity may be technically situated less than the 4-mile buffer now required. Another example of why this approach is unworkable is that it does not account for the disparate impacts (or potential lack of impact) based on the nature of the surface activity. For instance, a coal-mining vent on the surface within 4 miles of a lek cannot be said to have the same impacts, if any, as a drill pad or a rigging station. Yet, the DEIS does not account for these various types of activities or their attendant impacts. Similarly, the 4-mile NSO stipulation does not consider any timing condition, which could also significantly change the type of impact to a lek. In other words, not all 4-mile buffers are created equal and not all activity types result in the same level of impacts. But rather than tailor the NSO stipulation to suit its intended purpose, BLM imposes a blanket restriction that can severely and unnecessarily curtail or prevent uses (including existing and expanded uses) on these multiple use public lands.

Lastly, the BLM's 4-mile NSO stipulation ignores the fact that the major threat for the Great Basin Region, as identified by the BLM, is wildfire and loss of native habitat, rather than disturbance and human activity from resource development. (The latter was identified as the major threat in the Rocky Mountain Region.) For all these reasons, BLM should reject any alternative that includes a blanket 4-mile NSO stipulation that ignores the specific conditions of the terrain, activity and the habitat in which the activity or disturbance would occur.

D. Only Alternative E1 Includes a Robust and Sufficient Mitigation Program.

Commenters support Alternative E1's well-developed mitigation program, including the use of mitigation and compensation when disturbance cannot be reasonably avoided. Alternative E1's approach is a more flexible approach that takes into account BLMs multiple use mandates. Significantly, Alternative E1's robust mitigation program prescribes a clear regulatory path that ensures transparency and consistency. This approach is favored by Commenters because it lends predictability to the regulated community.

First, under Alternative E1, mitigation may occur locally in the disturbed area, elsewhere in the same population area, or in another population area if that offers greater potential for enhancing GRSG populations. This approach recognizes the need to balance currently permitted activities (including expansions) and, where appropriate, new activities with GRSG conservation without overly restricting the activity. Moreover, it accounts for habitat quality by recognizing that lands outside of the SGMA may be better suited for mitigation opportunities than areas within the SGMA itself. A flexible mitigation program that has quantifiable conservation objectives, thereby recognizing the benefits of mitigation whether occurring on federal, state or private lands, should be supported by the BLM.

Second, Alternative E1 includes a specific mitigation ratio, generally a 4:1 ratio (except for mitigating "other habitats" which employs a 1:1 ratio). While this mitigation ratio appears to be

at the high end, and may not be warranted in all circumstances, it is favored by the Commenters as compared to Alternative's B, C, and D which do not disclose any proposed mitigation ratio. The BLM's proposed ad-hoc mitigation that apparently would be determined on a case-by-case basis discourages development rather than encouraging a balanced, predictable approach.

Additionally, Alternatives B, C and D do not comply with Secretary Jewell's recent request for an agency comprehensive mitigation strategy for development projects on federal lands. *See* Order No. 3330 (Oct. 31, 2013), Improving Mitigation Policies and Practices of the Department of the Interior. A copy of this Order is attached hereto as Exhibit 10 and incorporated herein. This recently issued Order explains that early integration of mitigation considerations and transparency and consistency in mitigation decisions are a must. Thus, an Alternative that simply states mitigation would be required, without any indication as to how mitigation will be assessed; where mitigation efforts may be located; or incentives to promote early mitigation efforts belies Secretary Jewell's recent directive.

E. Alternative C's Proposed ACEC Designations are Unlawful.

Alternative C would designate 15 new areas as either ACECs, if on BLM land, or GRSG Zoological Areas, if designated on Forest Service land. These new designations would total 2,233,800 acres as sagebrush reserves to conserve GRSG. The management prescription for these areas include withdrawing these lands from mineral location, including withdrawal from locatable mineral entry, mineral material disposal, and nonenergy mineral leasing (*e.g.*, phosphate) (*see* DEIS, p. 2-169 Table 2.4); subjecting existing rights to validity patent examinations; requiring a plan of operations for any Notice level of locatable mineral development; and prioritizing the removal of unneeded infrastructure, including mining, ROW equipment, roads, range developments and fencing. Alternative C's approach is excessive and does not account for current authority to manage these lands for GRSG conservation. In addition, many of these proposed special land use designations, in particular the Diamond Mountain area, which effectively withdraws 139,500 acres from development, are in direct conflict with valid existing rights for mineral activities. Because there is no rational or scientific support to justify this extreme measure, BLM should reject these proposed special land use designations.

Moreover, the BLM's NEPA review and LUPA amendments are not the appropriate mechanisms by which to make these sorts of land use withdrawals. BLM's Surface Management Handbook explicitly provides that land use plans may not limit mining activity.

> In addition, land use plans must recognize the rights granted by the Mining Law to enter, explore, and develop mineral resources on the public lands. *A land use plan cannot change the law's authorization to use public lands that are open to location under the Mining Law.* Areas may only be removed from operation of the Mining Law by congressional withdrawal or in accordance with the withdrawal provisions of Section 204 of FLPMA. Restrictions in a particular land use plan have no force and effect on the right of entry until one of the two procedures stated above has occurred. Further, in areas open to mineral entry, or closed subject to valid

> existing rights, the land use plan cannot be used to preclude mining or restrict certain types of mining activities. For example, land use plans cannot be used to "zone" areas where open pit mining is not allowed, ban cyanide use, prohibit placer mining, or generally place limits on the type or size of an operation.

BLM Surface Management Handbook, H-3809-1, p. 8-14 (Sept. 17, 2012) (emphasis added). Therefore, BLM may not choose Alternative C's recommended ACEC and Zoological Area withdrawals without directly violating FLPMA and agency guidance.

F. The DEIS Lacks the Necessary Metrics to Determine Success and Effectively Compare Alternatives.

The BLM explains that the purpose and need for the LUPA's is to respond to the USFWS's March 2010 warranted but precluded finding regarding the listing of the GRSG. According to BLM, USFWS determined that inadequate regulatory mechanisms were a significant threat to the GRSG and that the principal regulatory mechanisms for the BLM and FS are conservation measures embedded in the LUPs. From this finding, BLM conducted a sweeping review of its LUPs and is now proposing to amend these documents, as the exclusive approach to address the USFWS's findings. This approach is flawed and BLM's over-reactive response violates other federal mandates.

First, as the DEIS explains, the FWS's warranted but precluded finding in 2010 prompted the LUP amendment process. In its review of the status of and threats to the GRSG, the FWS identified two of the ESA listing factors of concern: (1) Factor A, "the present or threatened destruction, modification, or curtailment of the habitat or range of the GRSG," and Factor D, "the inadequacy of existing regulatory mechanisms." *See* DEIS at ES-1. Based on this finding, BLM explained that "changes in management of GRSG habitats are necessary to avoid the continued decline of populations . . . ." *Id.* at 1-4. Therefore, to meet the stated goals BLM must identify the "highest conservation value" lands so that their proposed regulatory mechanisms will be sufficient and a listing will not warranted. However, the BLM will never be able to achieve this goal if the responsible state and federal agencies cannot even agree on the priority habitat areas that need protection. Yet this is exactly what the BLM has set out to do. *See* DEIS at 1-3. "To date, the BLM, Forest Service, USFWS, and State of Utah have not reached agreement on which lands have the highest conservation value, or which lands are necessary to maintain or increase GRSG populations in the Utah Sub-region planning area." This preliminary lack of agreement as to the key habitat areas undercuts the very premise of the DEIS; without knowing which lands provide the highest quality habitat, and which areas are essential for maintaining or increasing the GRSG populations, the BLM will never be able to assess whether its regulatory mechanisms are sufficient and the EIS will never be adequately informative.

Second, the DEIS is riddled with broad statements about the intent to prevent listing but the agency does not provide measureable or quantifiable objectives. The lack of actual metrics makes it impossible to develop goals and evaluate their effectiveness. Alternative E1 is the only alternative that provides quantifiable measures on which to determine success. For example, Alternative EI states that it seeks to enhance an average of 25,000 acres of GRSG annually;

increase GRSG habitat acreage within and adjacent to each of the SGMAs by an average of 50,000 acres per year, and sustain an average male lek count of 4,100 males; and increase the population of males to an average of 5,000. These objectives provide specific metrics by which the BLM may evaluate five, ten, fifteen years out whether their regulatory mechanisms achieved the desired outcome. Without these sorts of benchmarks, the BLM remains unable to meaningfully judge the effectiveness of its regulatory mechanisms to achieve the stated goal.

Third, this lack of measurable objectives is further problematic because it precludes any meaningful ability to compare the proposed management actions against one another, including against the No Action Alternative. How can the reader or BLM determine if one alternative is more likely to meet the intended goals without specific objectives against which to compare? This lack of information undermines BLM's ability to make an informed decision since there are no measurable goals against which to review if the proposed alternatives are capable of achieving the objectives. BLM's lack of detail permeates the entire DEIS and results in non-attainable conservation measures. This concern substantiates why, at least based on the current DEIS and alternatives, BLM must adopt Alternative E1 as the proposed alternative since it provides the necessary metrics to confirm that listing is not necessary. These concerns provide another reason why Alternatives B, C and D should not be selected, and why the information in the DEIS fails to satisfy NEPA.

G. Alternatives B and C's Proposals to Withdraw Additional Lands from Mineral Entry Are Not Allowed Through This Process.

Alternative B proposes to withdraw from mineral entry 3,650,900 acres of lands situated in PPMAs.[27] Alternative C is even more restrictive and proposes to withdraw 4,008,580 acres from mineral entry.[28] *See* DEIS at 2-123. Moreover, Alternative C explains that geophysical exploration would be prohibited on 4,008,580 acres. DEIS at 4-279.

These withdrawals are significant, especially considering that within the decision area the total acreage for high or moderate potential mineral occurrence totals 4,008,580 acres. *See* DEIS, Chapter 3, p. 3-206. This means that virtually all potentially significant lands suitable for locatable mineral activity would be withdrawn from mineral exploration and development. While the BLM indicates that valid existing claims (e.g., discovery of valuable minerals)[29] will be allowed to continue operations, other claims may be contested. This proposed restriction

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27. This exact figure is confusing as Table 2.1, p.2-123 represents 3,650,900 acres of land in PPMAs will be withdrawn from mineral entry; however, Chapter 4 provides that 3,153,700 acres will be recommended for withdrawal. DEIS, Table 4.40 at 4-277.

28. Both Alternative B and C propose to withdrawal all PPMA lands from mineral entry, including surface coal mining, locatable mineral entry, mineral material disposal and nonenergy mineral leasing (e.g., phosphate). *See* DEIS, Table 2.4 at 2-169.

29. *See also* Northwest Mining Association's comments submitted on the Big Horn Basin RMP and EIS, Oct. 12, 2013, page 30 (discussing 43 C.F.R. § 3809.100(b), which allows operations to proceed when BLM has not completed a validity exam; *see also* IM 37012, *Legal Requirements for Determining Mining Claim Validity Before Approving a Mining Plan of Operation* (Nov. 14, 2005), discussing the purpose of validity exams to confirm claim validity for mineral patenting purposes and not to be used to preclude discovery or any other purpose.) A copy of the AEMA's (formerly NMA) comments are attached hereto as Exhibit 11 and incorporated herein by reference.

under both Alternatives directly conflicts with FLPMA's requirement that the Secretary must manage public lands to respond to the Nation's needs for minerals and the Federal policy in the Mining and Minerals Policy Act of 1970. While finding the appropriate balance may be difficult, BLM cannot abandon its multiple use obligations. This may be even more important under today's political rubric given the need to reduce the Nation's reliance on foreign sources of minerals. Moreover, BLM fails to provide a rationale for its radical subordination of mining and energy interests when the DEIS identifies fire, not mineral activity, as the major threat to GRSG in this area. For these reasons, BLM should reject Alternatives B and C.

H. Nonenergy Mineral Leasing

Under the Pickett Act, Presidents Taft and Wilson withdrew approximately 10,500 square km in Idaho, Utah and Wyoming and formally created the Western Phosphate Reserve. The Mineral Leasing Act of 1920 ended the acquisition of phosphate through the Mining Law and rendered moot the need for phosphate withdrawal and classification actions. In the 1960's and 1980's, government investigations in the Western Phosphate Reserve resulted in the identification of Known Phosphate Leasing Areas (KPLA). KPLAs are areas where the phosphate resource is available only through the competitive leasing provisions of the Mineral Leasing Act.

Each of the Alternatives, except the No Action Alternative (Alternative A) will result in the significant loss of availability of phosphate minerals. Alternative C is the most restrictive, prohibiting new leases, modified leases, and closing more than 210,000 phosphate acres to surface mining. *See* EIS, Table 2.1 at p. 2-110-14. Moreover, Alternative C proposes to subject existing and pending leases to new, stringent operating conditions. Alternative B similarly includes no new leases or modified leases in PPMA, conservation conditions will be imposed on existing and pending leases, and nearly 186,000 phosphate acres would be closed to surface mining. Six hundred and twenty acres (2%) would be open subject to net surface occupancy stipulations. Alternative D, the Preferred Alternative, is nearly identical to Alternative B, but under Alternative D, approximately 151,300 phosphate acres will be closed to surface mining activity. Alternative E1 also precludes surface mining on nearly 4,100 phosphate acres. While Alternative E1 is preferred to the other action alternatives, it is still unacceptable to withdraw any phosphate acreage given the lack of scientific evidence that this activity harms GRSG habitat and/or individual birds.[30] Moreover, these mandatory withdrawals fail to consider demonstrated successful reclamation projects where phosphate operations have occurred. These reclamation activities evidence the potential for mitigating impacts rather than strictly prohibiting them.

There is no explanation or discussion for the authority to simply close public lands to non-energy leasable mineral prospecting and leasing under the LUPA process under Alternatives B, C, D and E. Importantly, there is no reconciliation of the multiple-use mandate under FLPMA and these withdrawals or why, under law, these KPLA-designated areas, important to the Nation's food security, must simply yield to severe restrictions from access to phosphate needed to make nutrients essential for American agriculture.

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30. The DEIS largely relies on research from oil and gas activities not phosphate operations, which are distinguishable in certain regards. For example, a disturbance area associated with phosphate activity is far more localized and isolated, as compared to oil and gas operations which are generally dispersed across a broader surface area.

I. The Economic Analysis Does not Address Locatable Minerals.

The DEIS completely brushes aside economic impacts attributable to restrictions on locatable mineral development. *See* DEIS at 4-296 ("although land use restriction could result in some impacts on locatable and salable minerals, the BLM and Forest Service do not expect their social and economic importance in the primary and secondary study areas to be altered by the choice of alternatives.").

The DEIS review of economic and social impacts is flawed in several important respects. First, the economic impact analysis of Chapter 4 considers economic impacts to the Oil and Gas Sector but remarkably discounts any analysis for the Locatable Mineral Sector, finding that those conclusions would not change by the choice of alternatives. Yet, in Chapter 3's review of economic conditions, the DEIS presents employment and earnings broken-down by business sectors, wherein it defines the Mining Sector to include the Oil and Gas industry, and these figures are not insignificant. BLM cannot treat the oil and gas industry under the Mining Sector in one chapter and then turn around and treat them disparately in another chapter. Doing so precludes the reader from assessing the actual impacts to the Mining Sector. For example, Chapter 3 states that in 2010 there were approximately 8,000 employees in the Mining Sector, including oil and gas employment. DEIS, Table 3.117 at 3-233. It also shows that in 2010 the Mining Sector represented a labor income of nearly $560 million. *Id.* Table 3.118 at 3-234. But the reader has no idea what percentage of these numbers is attributable to the oil and gas industry versus the locatable mineral industry (or the leasable solid mineral industry). Then, turning to Chapter 4 to assess impacts, the BLM simply states the economic effects on locatable minerals are not different amongst the action alternatives, and therefore, not considered. First, this response fails to assess impacts under the action alternatives versus the No Action Alternative, contrary to NEPA's requirements. Moreover, that BLM considers impacts of only a portion of the so called Mining Sector, e.g., oil and gas, makes any comparison between Chapter 3 and 4 impossible. How can the reader meaningful review Chapter 4's analysis when BLM defines sectors in different ways?

The analysis is further problematic because the economic figures in Chapter 4 include 2011 data, whereas Chapter 3 relies on 2010 data. By relying on data from different years, the DEIS precludes an "apples to apples" analysis. This undercuts the purpose of NEPA and the type of analysis that it requires. Moreover, the DEIS must consider the most recently available data, which presumably is from 2011, since Chapter 4 relies on a 2011 data set to inform that analysis. The DEIS's reliance in Chapter 3 on 2010 data- is especially problematic considering how fast the Mining Sector has been growing in the past few years. For example, Table 3.117 shows that the number of employees in the Mining Sector has increased by 68% between 2001 and 2010 years. Assuming this trend has remained steady, the 2010 information is nearly obsolete.

Additionally, to claim that economic impacts on the mining community will not differ across alternatives wholly ignores the fact that Alternatives B and C propose to withdraw millions of acres of land from mineral entry. How can BLM actually suggest that the mining industry will experience the same economic impacts under Alternative C, for instance, which will prohibit mining activity on 4 million acres, as it will under Alternative E1 where mining is permitted, albeit with certain restrictions? This conclusion is illogical. It is also directly at odds with BLM's analysis in similar circumstances in other locations. Specifically, BLM evaluated the

impacts of a smaller (one million acre) withdrawal of lands around the Grand Canyon in a Final EIS completed in 2011. That analysis found significant losses in employment in the mining sector with impacts spreading to almost every sector of the economy. At a minimum, BLM should prepare a similar analysis of the potential social and economic impacts associated with the withdrawals in the Proposed Alternative. *See* Final EIS, Northern Arizona Proposed Withdrawal, Oct. 26, 2011.

Finally, the lack of any economic analysis in the DEIS ignores readily available information that BLM should have considered. *See* NMA Economic Report. This Report considers the economic contributions of mining, including direct contributions, indirect contributions and induced contributions. According to this report, in Utah in 2011 approximately 50,000 people were employed in the mining sector; the industry represented nearly $2.9 million in labor income; and contributed a tax base of nearly $530 million to the economy. These figures suggest that real and severe economic consequences will flow from alternatives that significantly curtail mining activity. Consequently, BLM's wholesale disregard of these impacts violates NEPA.

VI. CONCLUSION

In conclusion, Commenters appreciate the Agencies' efforts to address the GRSG management issues and its efforts to include a range of alternatives in the LUPA/DEIS. However, as fully explained above, Commenters do not believe the DEIS meets the Agencies' NEPA obligations nor does it comport with a host of federal statutes that the Agencies were required to consider and integrate into these LUPAs. Commenters strongly reject Alternatives B, C, and D for the reasons set forth above. Primarily, each of these Alternatives ignores FLPMA's multiple use mandate and wrongfully impairs Commenters' valid existing rights. Finally, Commenters request the Agencies seriously consider Utah's State Plan, Alternative E1, in particular, with respect to its approach that calls for avoidance, minimization and mitigation rather than outright land use prohibitions, as well as its more robust mitigation plan. If you have any questions, please contact me at (202) 463-2643.

Sincerely

Bradford V. Frisby

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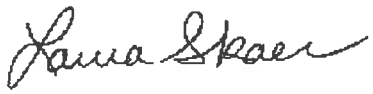	Signed, Mark G. Ellis
Executive Director American Exploration & Mining Association	President Industrial Minerals Association - North America