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Re: Idaho and Southwestern Montana Draft Land Use Plan Amendment and Environmental Impact Statement

The National Mining Association (NMA), the American Exploration & Mining Association (AEMA), and the Industrial Minerals Association – North America (IMA-NA) (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 (DEIS) 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. 65,703 (Nov. 1, 2013) (Idaho and Southwestern Montana).[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) (each attached as Exhibits 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 we use 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.

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]

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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.)

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's 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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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 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.

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]

The Commenters support Alternative E, the Governor's Alternative, as the Preferred Alternative. The Governor's Alternative was the product of a collaborative process put into motion by the Governor of the State of Idaho, it has been vetted by the USFWS for ESA consistency, it is based on the best available science and is responsive to the on-the-ground conservation needs of the GRSG in Idaho, it directly confronts and manages the primary threats to the GRSG, and it is certain to be implemented. No other Alternative achieves these goals.

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

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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.

mining rights or impairing mineral exploration and development through the proposed LUPAs. 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.").

In the context of the DEIS and LUPs for GRSG, Commenters believe that this consistency mandate requires BLM to adopt the Idaho State plan as the Preferred Alternative, *unless* it can make a clear finding that this plan would be inconsistent with federal law. In effect, FLPMA's Section 202(c) creates a presumption that incorporation of the State plans is preferred, with the burden on BLM to demonstrate otherwise. This would require an affirmative demonstration that applicable provisions of the plans, if incorporated into the BLM plans, would not conserve GRSG to the extent necessary to avoid listing. None of the DEISs make that case, nor do the Commenters think they can.

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. *See*, e.g., DEIS at 4-192 ("Withdrawal of areas larger than 5,000 acres would require Congressional approval.") 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

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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.

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.

Alternatives B, C, D and F 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, D and F 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, D and F is called into question.

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.

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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.

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 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

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

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.

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

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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:
> (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
> (B) overutilization for commercial, recreational, scientific, or educational purposes;
> (C) disease or predation;
> (D) the inadequacy of existing regulatory mechanisms; or
> (E) other natural or manmade factors affecting its continued existence.

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.

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.

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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).

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, Raul 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 Fielder
To: 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. (Hereinafter 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 report is attached hereto as Exhibit 5 and incorporated herein by reference. (Hereinafter "Maxwell Testimony"). *See 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. (Hereinafter "Ramey 2013'.) A copy of this report is attached hereto as Exhibit 6

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

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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.

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 speaks 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.

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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."

See also id. 4-275 (emphasis added):

In addition to the assumptions in Section 4.1.1 [above], this analysis includes the following assumptions:

- Restrictions on locatable mineral development could only occur through existing legal avenues such as the BLM's mandate to prevent unnecessary or undue degradation (43 CFR 3809) and the Forest Service's requirements for environmental protection (36 C.F.R. § 228.8). The management actions analyzed for this LUPA would not interfere with *valid existing rights*.

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 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

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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.

> ***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 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.

Manual 6840 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. [Hereinafter "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 F in the Idaho DEISs 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. DEIS SPECIFIC COMMENTS

A. Alternatives Eliminated from Detailed Analysis: Hunting

The most lethal action to the GRSG, hunting, is excluded from the LUPA NEPA analysis. The BLM and the Forest Service baldly assert that "recreational hunting of GRSG, including hunting seasons, is directed by the relevant state conservation plans for GRSG and criteria therein," and therefore, no material analysis of the impacts of hunting will be realized in this NEPA process.

The BLM's failure to address hunting as a threat is a gross exclusion to conservation efforts of the sage-grouse. A summary of population information found that sage-grouse lived longer, have higher winter survival rates, lower rates of reproduction, and are more migratory over greater distances than previously thought. As a result, ongoing hunting is likely a contributor to declines in sage-grouse populations.

Additionally, new data and research published by Gibson et al. (2011) have refuted the frequently repeated belief that there is a no additive demographic effect of hunting on sage-grouse populations. Thus, the hunting of populations within Idaho will have an effect not only on those populations but also on nearby populations that are not hunted (but are genetically and demographically linked by dispersal) throughout the range of the GRSG in the Western United States.

Restricting the discovery and development of minerals, with the concomitant loss of economic benefit from such discovery and development, all while failing to analyze the impacts of hunting, an action with limited economic benefit to society and no benefit to sage-grouse, cannot be rationalized with a mere justification that BLM and Forest Service do not have jurisdiction over hunting.

B. The Governor's GRSG Conservation Plan Should be the Alternative Selected by BLM

1. Alternative E, the Governor's Alternative, is the Result of a State Collaborative Process and has been Vetted by the Fish and Wildlife Service for Its Consistency with What is Required under the ESA for GRSG Conservation

In December 2011, Secretary of the Interior Ken Salazar invited Governors in the Western states to develop their own alternatives to be included in the BLM's multi-state NEPA Land Use Plan Amendment process. Through a BLM policy directive, the Secretary committed that if these plans were favorably reviewed by the USFWS, the state plans could be used as Interim Management while BLM worked through the EIS process.[27] Idaho Governor C.L. "Butch" Otter thus began leading collaborative effort to gather Idaho's key natural-resource dependent constituencies around the negotiating table and begin developing an Idaho-based GRSG conservation strategy.

In March 2012, Governor Otter, via Executive Order, created a Sage Grouse Task Force to formulate recommendations for an Idaho-specific alternative. The recommendations of the Task Force allowed Idaho to develop what is now Alternative E, the "Governor's Alternative" in the Idaho Montana EIS/LUPA. As a product of eight public meetings, held across the state over the course of three months, the Task Force sent its recommendations to the Governor in June 2012. These recommendations were the product of applied technical expertise of the Idaho Department of Fish and Game, the USFWS, and other key state and Federal agencies. The first draft was submitted to the BLM on September 5, 2012.

The Governor continued to work with the BLM and the USFWS to refine the conservation strategy that could be used as Interim Management and, pursuant to authority in Instruction Memorandum 2012-043, on March 2013, the Governor submitted a "Concurrence Request" (Exhibit 10) to the USFWS.

In May 2013, BLM requested further clarification and refinement of the Governor's Alternative, to ensure that the Alternative was adequately captured and analyzed in the forthcoming DEIS. On July 1, 2013, the Governor submitted his response, further clarifying the adaptive triggers, infrastructure, mitigation, and wildfire measures.

Idaho's management approach is grounded to be clear and measurable over varying spatial and temporal scales. The management objectives directly address key decision points in the 2010 Determination and include implementation of regulatory mechanisms to support the overall management, conservation objectives of the species and stabilization of habitats and populations,

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27. *See* Bureau of Land Management, Instruction Memorandum, 2012-043 (December 22, 2011), "The BLM field offices do not need to apply the conservation policies and procedures described in this IM in areas in which (1) a state and/or local regulatory mechanism has been developed for the conservation of the Greater Sage-Grouse in coordination and concurrence with the FWS (including the Wyoming Governor's Executive Order 2011-5, Greater Sage-Grouse Core Area Protection); and (2) the state sage-grouse plan has subsequently been adopted by the BLM through the issuance of a state-level BLM IM."

including a systematic review of habitat and population status, and development of adaptive regulatory triggers to address sudden and unanticipated changes.

In *Jayne v. Sherman,* 706 F.3d 994 (9th Cir. 2013), the United States Court of Appeals for the Ninth Circuit reviewed the lawfulness of a state-developed Roadless Rule. In upholding the decision by the Idaho District Court, upholding Idaho's Roadless Rule, the Ninth Circuit noted that "the inclusive, thorough, and transparent process resulting in the challenged rule conformed to the demands of the law and is free of legal error." *See* 706 F.3d at 996. The Governor's Alternative should be viewed in a similar light as the process by which Idaho's Roadless Rule was developed.

2. The Conservation Objectives and Implementation of the Governor's Alternative

The Governor's Alternative developed two management objectives to ensure that the requirements outlined in the 2010 Determination are met.

First, the Governor's Alternative implements regulatory mechanisms and resolves the USFWS's uncertainty over the "adequacy" of BLM's existing programs to manage the primary threats to sage-grouse as set forth in the 2010 Determination. The objective of the Governor's Alternative is to implement regulatory mechanisms to maintain and enhance sage-grouse habitats, populations and connectivity in areas within highly productive habitat buffered by strategic areas dominated by sage-brush. This will allow the state to conserve at least 65% of current known leks within Idaho.

The second management objective is to ensure the effectiveness of the first objective. This is done through monitoring the stability of habitat and population trends over time. The Governor's Alternative will regularly analyze the effectiveness of the regulatory measures as well as to discern whether active conservation and restoration efforts, including conifer control, wildfire suppression, and more passive habitat protection techniques such as fuel breaks are effective strategies. As discussed below, the adaptive triggers of Governor's Alternative were the result of developing this objective.

The result of these two objectives is that the Alternative responds to threats in real time instead of implementing top down restrictions or trying to make management decisions based on predictions and assumptions of future habitat and population growth or decline.

3. The Construct of the Governor's Alternative is Derived from the Best Available Science and its Functioning Addresses 16 U.S.C. § 1533(a)(1)(A) and (D)

a. The Sage-Grouse Management Areas (SGMAs)

The Governor's Alternative adopts the Sage-Grouse Management Area (SGMA) framework with three distinct management zones: Core Habitat (CHZ), Important Habitat (IHZ) and General Habitat (GHZ). These management zones outline a suite of basic management activities that may or may not occur in a given area.

The management zones represent an administrative conservation continuum providing a high level of protection to the GRSG within CHZ and a more flexible approach for GHZ, allowing for more multiple use activities. The IHZ acts as a "buffer zone" for CHZ, providing more restrictions than GHZ, but more flexibility than CHZ, and its management construct has the potential to operate as CHZ if necessary. These three management zones are based upon modeling of sage-grouse breeding bird density, habitat connectivity and persistence, scientific knowledge based on surveys and radio telemetry studies, and the recommendations of the Task Force.

b. The Governor's Alternative has been Favorably Reviewed by the United States Fish and Wildlife Service under the Lens of ESA Sufficiency

In April 2013, in response to the Governor's March 2013 concurrence request, the USFWS reviewed the strengths and weaknesses of the Governor's Alternative.

The Service determined that the four foundational elements of Governor's Alternative were consistent with the General Conservation Objectives and Specific Conservation Objectives related to Priority Areas for Conservation (PAC) in the USFWS COT report. Additionally, the Governor's Alternative Core Habitat Zone (CHZ), which contains 73% of the male sage-grouse population, captures the COT Report intent of avoiding development in PACs. Further, the Service commended the Governor for ensuring that any exceptions to the prohibition of infrastructure in CHZ must meet the conservation standard in the Important Habitat Zone (IHZ).

The USFWS also confirmed the Governor's decision to include the IHZ buffer zone, which comprises 22% of the male sage-grouse population. The inclusion of this zone captures the COT report intent of stopping population decline and does so through a means that still permits some infrastructure development. The IHZ also serves an important role as a buffer for loss of habitat due to fire. The letter from the USFWS to Governor Otter is incorporated herein by reference and is attached as Exhibit 11.

c. The Governor's Alternative Directly Confronts and Manages the Primary Threats to the GRSG

i. Loss of Habitat under Factor A

Lek attendance by males has been used as an indicator of a population trend in some areas since the early 1950s. However, male lek attendance can be influenced by severity of the previous winter, weather, timing of counts during the spring, and other factors.[28] Lek data provide a powerful data set for assessing population trends over time, but counts for a single year may not reflect trends accurately.

Since these populations vary from year to year, it was important to determine at what point a drop in lek attendance meant a population decline. Published information suggests that a change in maximum number of males counted on leks of 10-15% cannot confidently be considered a

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28. Emmons and Braun (1984), Hupp (1987), Baumgart (2011).

reflection of population status. However, a 20% decline would likely not be related to lek attendance patterns but would instead reflect a population decline. This is why Governor's Alternative sets its hard population trigger at 20%.

ii. Fire

Greater sage-grouse populations are affected by habitat loss, which is why the primary threat to sage-grouse is wildfire. Thus, in the Governor's Alternative, it was necessary to pair the population trigger to a habitat trigger and evaluate both types of loss to determine whether management changes should be made.

The Governor's Alternative has a comprehensive approach to wildfire management. It is the only Alternative that provides certainty of implementation for its measures. The amended July 1 fire table, on page D-157 of Appendix X, is divided into three categories-prevention, suppression, and restoration. This table identifies specific actions, where they will be implemented, how they will be implemented, how much of a specific action is necessary, when it will be implemented, and what mechanism will be used to implement the action. Strategies to develop these specific actions will be completed at the most local level of management, thus giving local fire mangers a framework under which to operate while still providing flexibility for them to make appropriate decisions for their area.

The employment of specific, more aggressive wildlife and invasive species management practices to prevent further encroachment into the CHZ and IHZ should be driven by local planning efforts at the field office and ranger district level. To legally reinforce this framework, Idaho Code Chapter 1, Title 38 was recently amended to allow for the creation of Rural Fire Protections Associations (RFPAs). Additionally, this spring the Idaho Legislature authorized funding to help cover start-up costs for 4 RFPAs in southwest Idaho. The creation of RFPAs throughout the SGMAs is a regulatory mechanism that will ensure better and faster initial attack on wildfires threatening the CHZ and IHZ through the employment of additional trained firefighters and resources in rural parts of the SGMA.

The emphasis for fuel break prioritization should be in areas within the Wildland-Urban Interface (WUI) where human life and safety are at risk. For instance, the Boise District BLM is currently in the planning phase of a fuel-break project within the Interstate-84 corridor between Boise and Mountain Home, Idaho referred to as the "Paradigm Project." The idea behind the project is to strategically place and improve upon fuel breaks within this corridor, therefore keeping wildfires to more manageable sizes thus requiring fewer firefighting resources. After securing the WUI, prioritization of fuel breaks should go to areas of high human ignition based upon ignition data and maps produced by BLM districts and field offices.

iii. West Nile Virus

The Governor's Alternative anticipates the potential for unexpected and catastrophic events as the result of West Nile Virus. Thus, Alternative E includes an adaptive regulatory trigger to ensure the populations and habitats within CHZ and IHZ are maintained and enhanced. These regulatory triggers, discussed below, were intended to provide a reliable contingency, thus regulatory backstop, for navigating unanticipated and harmful impacts to the species. If these

measures prove necessary, the State would still be well positioned to conserve the species and its habitat, while maintaining predictable levels of land use.

d. Certainty of Implementation under 16 U.S.C. § 1533(a)(1)(D)

i. Action Triggers

The adaptive triggers in the Governor's Alternative are intended to improve sage-grouse population trends, protect the overall baseline population, preserve a buffer population, and conserve habitat. The triggers have both population and habitat components. Population components consider population growth and change in lek size. The rationale and justification for the triggers in the Governor's Alternative, along with the studies and data relied on is on page D-178 of the DEIS.

Landscapes with less than 30% area in sagebrush within 6.4 km of lek center have the lowest probability of lek persistence. In response to this data, Governor's Alternative takes a conservative approach to allow for quicker reaction time. A "soft" trigger is set at a 10% loss of breeding or wintering habitat in CHZ or IHZ within a Conservation Area. A "hard" trigger is set at a 20% loss of breeding or winter habitat in CHZ within a Conservation Area.

(A) Population Trigger

The habitat component considers loss of breeding and/or winter habitat. The population trigger is measured in this way because numerous studies show that lek size is related to population change.[29] Additionally, several researchers have shown that loss of winter or breeding habitats resulted in decreased GRSG populations.[30] Both population and habitat triggers are tripped at 20% loss within a conservation area.

The population trigger is measured by calculating a finite rate of change between successive years for sage-grouse population. The ratio of males counted in a pair of successive years estimates the finite rate of change at each lek site in that one year interval. These ratios can be combined across leks within a population for each year to estimate that finite rate of change for the entire population of a conservation zone.

The population is measured across successive years because small game populations typically fluctuate among years due to weather and other environmental variables. A finite rate of change for any given year is not very meaningful. However, a series of years where the finite rate of change remains at or above 1.0 indicates a stable to increasing population.

(B) Prevention Trigger

Governor's Alternative's prevention measures include fuel breaks, fuels reduction, and fire restrictions and closures. Governor's Alternative requires that strategy and associated NEPA for these prevention efforts should be completed within two years of signing the Record of Decision

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29. Connelly and Braun (1997); Connelly et al. (2004), Baumgart (2011), Garton et al. (2011).

30. Swensen et al.1987; Connelly et al (2000a), Miller et al. (2011).

for this current EIS. Fire suppression measures include creating additional Rural Fire Protection Associations (RFPAs), response time analysis, suppression capacity analysis, water capacity analysis and implementation, and firefighter education on the importance of protection CHZ and IHZ. These measures should be implemented within one year of the Record of Decision for this EIS.

(C) Restoration Trigger

Restoration efforts include reseeding, sagebrush seedlings, invasive annual grass expansion prevention, reseeding on State owned lands by federal contractors, and conifer removal on state owned lands by federal contractors. A reseeding strategy must be completed within one year of signing the Record of Decision and implementation of restoration to offset wildfire losses in CHZ and IHZ since 2011 must be completed within 2 years of signing the Record of Decision. Offset models of wildfire mosses in CHZ and IHZ should be completed 3 years after signing the Record of Decision. A sagebrush seedlings strategy should be completed within one year of the Record of Decision. Planting should be completed in CHZ within two years of signing the Record of Decision and within 3 years for IHZ.

(D) Invasive Species Trigger

For invasive annual grass prevention, modeling and strategy should be completed within 1 year of signing the Record of Decision. Techniques to prevent further spread in CHZ and IHZ should be implemented within 2 years of signing the record of decision. Offset of annual grass spread in CHZ and IHZ should occur within 3 years of signing the Record of Decision. A Memorandum of Understanding (MOU) for reseeding on state-owned lands should be signed within 1 year of the Record of Decision. State lands should be reseeded within one year of a wildfire. An MOU for conifer removal should be signed within 1 year of the Record of Decision. Conifer removal on state lands should occur within the timeframe of federal projects.

These measures will be permanent, in contrast to BLM's existing temporary IMs for fire management. No other Alternatives in the LUPA/DEIS include a time frame for implementation.

ii. The Implementation Commission

The Implementation Commission proposed in the Governor's Alternative makes recommendations on management actions after these triggers are tripped. This group will be similar to Idaho's Roadless Commission which has served as a successful model of local collaboration. Through a Memorandum of Understanding with BLM and the USFS, the Governor will become a cooperating agency. The Governor, through Executive Order, will establish the Implementation Commission to serve in an advisory capacity. The Commission will submit management recommendations to the Governor, who will then make management recommendations to BLM and the Forest Service. The group will be comprised of agency officials from the Governor's Office of Species Conservation, the Idaho Department of Fish and Game, the BLM, the US Forest Service, and the US Fish and Wildlife Service.

Bi-annually, the Commission will hear presentations from a technical team from the Idaho Department of Fish and Game and BLM on the population and habitat data collected. If the data

shows that a hard trigger is tripped, no action is needed by the Commission to make management changes. The IHZ automatically is treated as CHZ. However, the Commission may decide additional management changes are necessary to respond to that particular hard trigger. Additionally, if the data shows that a soft trigger has tripped, the Commission may decide whether any action should be taken, and make recommendations to the Governor. The Governor will use that information to make a recommendation to the BLM or Forest Service regarding any potential management changes.

The other part of the Implementation Commission will focus on infrastructure projects. This group will be established in the same way, but will be comprised similarly to the Sage-Grouse Task Force. This group will review potential infrastructure projects and mitigation packages and will make recommendations in the same way. This group will meet as needed to review potential infrastructure projects.

e. The Governor's Alternative Appropriately Accounts for Known Phosphate Leasing Areas (KPLAs)

Under the Pickett Act, Presidents Taft and Wilson withdrew approximately 10,500 km^2 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.

The DLUPA/DEIS indicates that in the planning area, there are 34,000 acres of unleased KPLAs. DEIS Vol. II B at 4-314. Under the No-Action Alternative (Alternative A) and the Governor's Alternative (Alternative E), 11% of the unleased minerals in the planning area within KPLAs would be closed to non-energy solid mineral leasing. Six hundred and twenty acres (2%) would be open subject to net surface occupancy stipulations.

Under the BLM/USFS Preferred Alternative, Alternative D, 3,900 of unleased KPLA-designated acres in the planning area would be closed. This is in addition to an astonishing 10,882,600 of non KPLA-designated acres proposed to be closed for nonenergy solid mineral leasing in Alternative D. This is four times as many nonenergy solid mineral leasing acres subject to closure as the Governor's Alternative.

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 and D. Importantly, there is no reconciliation of the multiple-use mandate under FLPMA and the KPLA designation or why, under law, 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.

4. Alternative D, the BLM "Co-Preferred" Alternative, Fails to Appropriately Balance Resource Use and Resources under FLPMA

a. Alternative D is Fatally Tainted by the NTT Process and is Not Grounded in the Best Available Science

Alternative D, the Sub-regional "Adjusted" Alternative, would restrict large-scale infrastructure development across 8.3 million acres within Idaho and provides a laundry list of BMPs on the remainder of the identified threats. Alternative D also includes an additional 700,000 acres of habitat outside of what the USFWS called for in the Priority Area Conservation areas, or PACs, under the COT approach.

The failure of the BLM Adjusted Sub-Regional Alternative is that it is dependent on assumptions developed from the fatally-flawed NTT process. As described earlier, the NTT Report is based on stale science and otherwise fails to properly account for categorical statutory commands under the Mining Law and FLPMA. In short, if the "NTT-only" Alternative, (Alternative B) cannot meet the purpose and need of this LUPA process, Alternative D cannot meet the purpose and need either.

The NTT Report was published in December 2011. Nearly two years have passed since its publication. The last two years, both Governor's Alternative and the Service's final COT Report were published and reflect the current best available science. The WAFWA has agreed, stating in a letter that the NTT alone is not the best available science for sage-grouse. *See* Exhibit 7.

Further, the NTT Report has been used to support a four-mile buffer around active leks. This buffer size is far greater than necessary and relies upon suspect data, unfounded assumptions, and uncertain modeling. The presumed necessity of 4-mile radius NSO buffer around sage grouse leks is based upon the subjective opinion of the NTT and selected authors. The practical effect of such a restriction would be to "protect" vast areas of non-habitat and marginal habitat with no demonstrable benefit to sage grouse populations. The area of this 4-mile radius circle surrounding each lek is 50 square miles per breeding area. This scientifically unsupported land reservation element in the proposed Alternative is not supported. Further, 50 square miles is equivalent to about 32,000 acres per lek—a withdrawal of which far exceeds 5,000 acres and thus violates FLPMA's Congressional approval requirement.

b. Alternative D's Conservation Area Delineation is Not Workable for Idaho

Alternative D's Population Areas are an unrealistic method of categorizing sage-grouse habitat. Alternative D's Priority zone contains 7 million acres and the medial zone has 1.3 million acres. This is in contrast to a more balanced approach in the Governor's Alternative of 4.9 million acres in CHZ and 2.7 million acres in IHZ.

As Alternative D is written, its implementation is virtually irrelevant in tripping a trigger only extends protection to an additional 1.3 million acres. By contrast, the Governor's Alternative is able to protect twice the acreage so triggers will actually have an impact on habitat protection. The Governor's Alternative includes 95% of the sage-grouse population in Idaho within CHZ

and IHZ's 7.6 million acres. Thus, BLM's inclusion of an additional 700,000 acres equates to saving at best, a few more percentage points, without affecting a listing determination.

Alternative D delineates habitat outside of the COT Priority Areas of Conservation (PACs) into all three of its zones. This is unnecessary and inefficient. The Governor's Alternative's CHZ contains 73% of the male sage-grouse population, whereas GHZ contains 5%. However, through BLM's map, it would dedicate resources to areas outside of PACs because it has designated these areas as higher priority. It is unclear why it has done so, when both the USFWS and the State have not. The BLM should comply with the COT's directive and coordinate these designations with the State to ensure efficiency in both priorities and use of scarce public resources.

c. Alternative D's Approach to the "Threat" To Infrastructure is Overly Restrictive

Alternative D is unnecessarily restrictive for an additional 2.1 million acres in their Priority designated areas, and 700,000 additional total acres. In contrast to the Governor's Alternative, in CHZ, infrastructure is generally precluded except for valid existing rights, rights and/or incremental upgrade and/or capacity increase of existing subject to some limitations. Essentially, CHZ is as restrictive as is legally allowed.

The CHZ protects 73% of the male lek population. Infrastructure is generally permitted subject to certain criteria in IHZ. This is a practical approach, reflective of what sage-grouse actually need, in contrast to blanket restrictive policies across a large landscape. The CHZ and IHZ were the result of Dr. Jack Connelly's extensive study of sage-grouse and his determination of how resources could be prioritized to ensure maximum viability and long-term preservation. This is also a realistic approach to future economic development in Idaho, being flexible to accommodate the needs of Idaho as its population grows.

d. Alternative D's Mitigation Strategy is Unworkable

Alternative D's mitigation strategy is "no net unmitigated loss" which means at best, a 1:1 ratio of acres. However, Alternative D essentially excludes infrastructure in its most restrictive management zone, so the opportunity for mitigation is essentially illusory. The Governor's Alternative approaches this issue more practically, with a general exclusion in CHZ but with a limited exemption process that reflects the valid existing rights of potential permit applications.

5. The "No-Action" Alternative is Artificially Discounted and Fatally Skews the Environmental Baseline under NEPA.

As discussed earlier, although the "No-Action" Alternative is required by NEPA, it is nonetheless required to accurately portray the proposed environmental baseline to anchor the NEPA analysis. Notwithstanding that the GRSG has been in some state of official administrative status at the Department of the Interior since 2002, the No-Action Alternative fails to account for a key preexisting BLM tool: Manual 6840.

Additionally, Alternative A fails to catalog and calibrate the several voluntary candidate conservation agreements in existence in the proposed action area as they may be providing

momentum to GRSG conservation. The Final EIS documents should not be published without a full, detailed and accurate No-Action Alternative that incorporates and analyzes a full range of conservation measures, including existing strategies, and will provide future monitoring data that will satisfy USFWS' requirements. This will better fit the Purpose, Need, and Objectives of the LUPA DEIS and will be consistent with FLPMA, the Mining Law of 1872, the Mining, Minerals and Policy Act, and BLM's sage-grouse conservation goals and objectives.

VI. CONCLUSION

The Commenters support Alternative E, the Governor's Alternative, as the most worthy of the Proposed Alternatives for selection. It will efficiently conserve the GRSG because it is a program that is scientifically-based, will be implemented, and carefully balances the economic interests of the State of Idaho and Southwestern Montana.

Sincerely,

Executive Director
American Exploration &
Mining Association

President
Industrial Minerals
Association
- North America

Bradford V. Frisby
Associate General Counsel
National Mining Association