WESTERN ENERGY ALLIANCE

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Submitted via eplanning.blm.gov

Patricia Deibert
National Sage-grouse Coordinator (Acting)
440 W 200 S Suite 500
Salt Lake City, Utah 84101

Re: Notice of Intent To Amend Land Use Plans Regarding Greater Sage-Grouse Conservation and Prepare Associated Environmental Impact Statements

Dear Ms. Deibert:

Western Energy Alliance appreciates that the Bureau of Land Management (BLM) has initiated the process to amend the Greater Sage-Grouse (GrSG) Land Use Plans (LUP). The Alliance supports BLM's goal of managing the GrSG and its habitat on public lands; the existing LUPs in many cases do not balance conservation of the species with responsible energy development. They are based upon invalid and incomplete information and do not comply with applicable laws, regulations, and planning procedures. The Alliance submits this single comment letter for the scoping phase of the planning effort and will submit individual comments for each state's LUP as they are amended.

Western Energy Alliance represents 200 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West. The Alliance represents independents, the majority of which are small businesses with an average of fourteen employees.

BLM's notice of intent to revise the GrSG LUPs initiates a third round of amendments to these plans in the past decade alone. The two previous efforts in 2015 and 2019 were subject to several rounds of litigation which have led to this point, and we recognize BLM's need to reinitiate this planning process yet again. Given the scope of these plans, their impacts across the West, and the numerous legal deficiencies that have been identified with the previous plans, it is incumbent upon BLM to make appropriate amendments that will result in legally defensible LUPs. BLM must also strike the proper balance between GrSG protections and the multiple uses of federal lands that coexist with the sage grouse and other species across the West.

Because the 2019 plan amendments were enjoined in federal court, BLM is currently managing sage grouse habitat according to the 2015 LUPs. The Alliance provided comments and formal protests dated December 2nd, 2013 and June 29th, 2015, respectively, as BLM drafted and finalized those LUPs. Our concerns identified in those letters remain, and the Alliance incorporates by reference our previous letters in full here.

During the comment period for the 2015 LUPs, the Alliance identified numerous procedural, legal and scientific shortcomings with the plans, as well as overly burdensome restrictions that have resulted in severe limitations on resource development in the West. The following issues are of great concern to the Alliance as BLM moves forward with the LUP amendments:

- Designations of priority and general habitat management areas (PHMA/GHMA)
- Areas of Critical Environmental Concern (ACEC)
- Lek buffers and disturbance and density caps
- Compensatory mitigation and net conservation gain requirements
- Leasing prioritization
- Waivers, exceptions, and modifications
- Underlying science justifying the plans

Furthermore, BLM should defer to the greatest possible extent to state management plans as it develops these LUP amendments. Western states and local governments with significant GrSG populations have worked for years on conservation programs to protect the species. They engaged broad groups of stakeholders and devoted significant resources to protecting the sage grouse. Unfortunately, when BLM finalized the 2015 LUPs, it failed to make them clearly consistent with some state conservation plans; in other cases, state and local government plans were generally ignored in favor of a one-size-fits-all approach at the federal level.

Each state with GrSG habitat presents unique on-the-ground circumstances that require different management prescriptions. For instance, in Utah the state has undertaken habitat restoration through the removal of pinyon juniper. New habitat is being created on a large scale throughout the Utah habitat, and these amendments should recognize those actions.

It is especially critical that BLM defer to the State of Wyoming's management plan, given the large population of the species in the State and the extensive work that has been done on the State's plan in conjunction with a broad group of stakeholders over the years. Specifically, priority and general habitat designations in the revised plans should match up acre-for-acre with the State's core and non-core designations. Further, any BLM mitigation framework should defer to the State's, which was also a product of years of hard work invested by myriad stakeholders. Finally, lek buffers and density and disturbance caps in the LUPs should directly reflect the State's.

BLM should ensure that these revisions to the LUPs serve to align the federal plans with the executive orders and conservation plans that have been in place at the state level for years. We urge BLM to work with state agencies and local stakeholder groups in amending each LUPA. While BLM might evaluate wholesale changes to the federal plans as an alternative in order to satisfy National Environmental Policy Act (NEPA) requirements, it

should ultimately not implement final plans that diverge significantly from state and local conservation plans.

Finally, the revised plans should enable sound decision-making based on the best available science; conserve high-quality habitat where it makes the greatest ecological difference, while balancing economic activity and recognizing valid existing rights; foster transparency, accountability, and credibility; and provide adaptability to improve the efficiency and effectiveness of BLM management.

Habitat Designations

The habitat designations adopted in the 2015 LUPs were based on mapping exercises built around leks and expansive buffers, premised upon inaccurate and flawed mapping, and resulted in overly broad and inaccurate habitat designations.

Each state, and each resource management area within each state, has varying ecosystems, topography, landscapes, surface and mineral ownership patterns, variance in local GrSG populations, existing surface disturbance and habitat fragmentation, geologic conditions for producing formations, and locations of valid existing rights. The one-size-fits-all approach imposed in the 2015 LUPs is not viable, and BLM should not seek to designate additional lands to habitat management areas through these revisions.

Not all lands within designated habitats actually contain viable habitat for the GrSG. Past practice has shown through a variety of wildlife and other mapping exercises that reliance on Geographic Information System (GIS) mapping layers leads to inaccurate landscape and habitat assumptions and the arbitrary imposition of restrictions on valid existing rights.

BLM should expressly allow for adaptation of designated habitat based upon local conditions and data upon state and local recommendations. State and local governments have up to date lek and habitat data that should be relied on instead of inaccurate and flawed mapping and GIS data. Where mapping has been developed by local governments at a finer scale or with greater accuracy than state mapping, BLM should explicitly rely upon and incorporate the local mapping as the best available information.

BLM should also expressly acknowledge and account for existing development and landscape conditions as part of the baseline for GrSG habitat, and existing development should be excluded from habitat designations. The 2015 plans should be revised to provide states with primacy in designating habitat and expressly allow for adaptation of designated habitat based upon local conditions and data from State recommendations. The revised plans should also include an express provision that affords site-specific ground-truthing of habitat areas on a project-specific basis.

Areas of Critical Environmental Concern

BLM's notice of intent to amend the GrSG plans invites the public to recommend new ACECs in the planning area. The Alliance strongly opposes the designation of any ACECs through this planning process and urges BLM to reject any nominated lands. Lands designated as PHMA and GHMA are already encumbered with restrictions on development, and any lands that have not been previously identified as PHMA or GHMA certainly should not qualify for an ACEC designation. Areas that do not meet the standard for GHMA would not meet any definition of "critical" to GrSG populations and habitat.

Adding new ACECs on top of current habitat management areas will add either unnecessarily duplicative or conflicting restrictions on the uses of those lands. BLM developed the PHMA/GHMA structure in order to provide the appropriate level of restrictions in the areas that will most benefit the species; ACECs would upset the balance that was achieved by that structure, provide little or no additional benefit to GrSG, and merely act to further limit productive uses of those lands. BLM should reject any nominated ACECs and not move forward with new designations.

Lek Buffers

The 2015 LUPs imposed specific lek buffer distances based on disturbance type and generally set a 3.1-mile buffer for energy development and related infrastructure. BLM arbitrarily imposed this 3.1-mile buffer everywhere except within the Wyoming and Montana plans, which allow for a 0.6-mile buffer.

BLM provided no explanation for this significant difference or any explanation for why a uniform lek buffer is required in GHMAs. BLM also did not analyze a reasonable range of alternatives to the buffers. The standardized, range-wide lek buffers, and the U.S. Geological Survey Lek Buffer Study on which they were based, were not presented for public review and comment or analyzed in the final 2015 plans.

Lek buffers of this size are unsupported by scientific evidence. They are based upon the subjective opinion of select authors that the majority of GrSG nests are located within four miles of a lek. There is no data that lek buffers address any specific threat or that such buffers would result in any quantifiable benefits to the species. These buffers do nothing to mitigate specific cause-and-effect threats to GRSG. Further, lek buffers do not allow for tailoring to local conditions.

BLM should analyze alternatives to the 3.1-mile buffer in these amendments, only require buffers that are based on the best available science, and not expand buffers in states where current federal buffers match those of states, including Wyoming and Montana.

Disturbance and Density Caps

The surface disturbance and density caps in the 2015 LUPs create operational and legal issues for oil and natural gas operators. Disturbance and density caps create an ultra-competitive environment for companies to obtain the first permits to drill in an area to get under the cap, and they create legal issues and litigation risk for companies. By using a cap, BLM may be required to uphold the valid existing rights of one leaseholder at the expense of another.

Rather than blanket surface disturbance and density caps, disturbance thresholds should be based on discrete areas of biological significance (e.g., the Wyoming Executive Order disturbance cap which applies only to actual suitable habitat disturbed within the analysis areas included in core areas), and clearly exclude non-occupied, non-critical habitat in the calculation.

Establishing the baseline and methodology for calculating any surface disturbance or density caps is critical, and needs to be explained in detail in these plans, including incorporating a sound monitoring framework. Furthermore, existing surface disturbance should be considered as the environmental baseline prior to calculation of caps, and these areas should be calculated with a sound, science-based equivalent to a habitat quantification tool.

BLM should also provide a mechanism to ground-truth habitat areas on a project-specific basis in order to effectively assess the quality of the habitat and potential impacts of management decisions.

The final LUPs should incorporate flexible provisions that allow opportunities for the disturbance caps to be exceeded when there is an opportunity for overall reduced disturbance on a greater scale. Companies already engage in pre-siting and screening for avoidance and minimization prior to submitting an application for permit to drill (APD). Pre-siting practices coupled with focused offsite mitigation elsewhere can provide conservation and protection of local populations and habitat.

Finally, while caps may be utilized in certain locations to preserve high priority habitat, caps are not appropriate in areas with existing development, GHMAs, where there are valid existing leases, or areas with marginal habitat or potential habitat. The use of any cap as a management tool for conservation needs to be limited, based on site-specific habitat areas critical for the survival of the species, based in science, thoughtfully considered, well defined, customized to local conditions, and fairly implemented.

Mitigation Requirements

The 2015 LUPs unilaterally amended BLM's regulations governing minimization of adverse impacts and imposed a significantly heightened and costly compensatory mitigation

requirement and "net conservation gain" standard. The net conservation gain standard was not presented for public review or analyzed in the draft LUP amendments, and was therefore unlawful.

Federal statutes and regulations require agencies to mitigate adverse impacts through avoidance and minimization measures. The Federal Land Policy and Management Act (FLPMA) mandates that the use of public lands may be subject to conditions to "minimize adverse impacts on…resources and values…" 43 U.S.C. § 1732(d)(2)(A). Pursuant to the Mineral Lease Act (MLA) implementing regulations, BLM may require reasonable measures "to minimize adverse impacts to other resource values…" 43 C.F.R. § 3101.1-2.

NEPA regulations also require agencies to identify alternatives to a project that avoid or minimize impacts. See 40 C.F.R. § 1502.1 (An Environmental Impact Statement must discuss significant impacts and inform of reasonable alternatives that avoid or minimize adverse impacts).

No statute or regulation requires more than avoidance or minimization. In fact, FLPMA and the MLA do not even mention the term "mitigation;" rather they only discuss avoidance and minimization of adverse impacts. BLM should therefore not seek to impose compensatory mitigation requirements on federal lands except under a framework that states have developed. BLM should also not allow for ad hoc mitigation requirements on individual projects that could be used to make those projects uneconomic.

The BLM NEPA Handbook defines mitigation as measures that can "reduce or avoid adverse effects to biological, physical, or socioeconomic resources." BLM Handbook H-1790-1 – NEPA at Glossary, pg.133 (Rel. 1-1710 01/30/2008). Similarly, BLM's standard oil and natural gas lease only requires that lessees "conduct operations in a manner that minimizes adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources, and to other land users." BLM Form 3100-11 – Offer to Lease and Lease for Oil and Gas § 6 (2008). These mitigation measures, combined with the layers of restrictions on leasing and development in general and priority habitat, are sufficient to ensure projects will not contribute to population and habitat loss but will instead avoid and minimize impacts.

Should BLM decide to move forward with a compensatory mitigation plan, however, it must allow for meaningful public review and participation via the draft plan revisions, unlike the process in 2015, and there are a few key principles that BLM should promote in any mitigation standard.

First, land users should have the flexibility to utilize whichever mitigation mechanism best suits their needs, is cost-efficient, and is readily available. BLM should not promote or discourage a particular mitigation mechanism (i.e., in lieu fee, permittee responsible, conservation banks, third party, etc.), nor should BLM impose requirements that make a particular form of mitigation too onerous to use. As previously stated, some states,

including Wyoming, currently have tested and viable compensatory mitigation frameworks to which BLM should defer in lieu of developing separate federal mitigation procedures.

Further, the concept of "additionality" must be reasonably applied to land users who are subject to layers of restrictions to protect the GrSG. This concept is relatively easy to apply when few if any regulatory measures exist to protect a species. However, this concept is more difficult to administer when numerous existing regulatory measures exist to avoid and minimize impacts to GrSG habitat, and is more burdensome on land users.

Finally, the requirement for mitigation prior to impacts is unnecessarily inflexible, could indefinitely delay commencement of development projects, and could ultimately result in leases expiring before mitigation measures are able to take effect. There are a number of circumstances that could delay the implementation of mitigation efforts, ranging from seasonal restrictions on wildlife to the lack of lands available for mitigation. We encourage flexibility in the timing of mitigation to account for various issues, and allow some resource development to proceed ahead of mitigation.

Taken together, these principles would establish an equitable and legally justifiable framework for mitigation of impacts on GrSG habitat.

Leasing Prioritization

FLPMA mandates that BLM manage public lands under the principles of multiple use and sustained yield, in accordance with applicable land use plans, to meet the needs of present and future generations. 43 U.S.C. §§ 1701(a)(7), (8) & (12); 43 U.S.C. §§ 1732 (a) & (b); 43 C.F.R. § 1610.5-3. FLPMA identifies "mineral exploration and production" as one of the "principle or major uses" of public lands. 43 U.S.C. § 1702(1).

Resource management plans designate which lands are open or closed to oil and natural gas leasing and development, and identify stipulations and mitigation measures that will be implemented to protect other resources. Thus, pursuant to FLPMA's mandate, BLM leases public lands identified as open to oil and natural gas leasing with stipulations to protect GrSG and other resources on those leases.

Since the 2015 plans were finalized, BLM has issued multiple instruction memoranda (IM) to provide guidance on the GrSG plans' objective to "[p]rioritize the leasing and development of fluid mineral resources outside GRSG habitat." These IMs, including most recently IM 2018-026, reiterated that leasing is still allowed in GrSG habitat with appropriate stipulations—an outcome consistent with FLPMA's multiple use mandate.

BLM's implementation of the GrSG plans' management decisions, including burdensome operational restrictions such as no surface occupancy (NSO), controlled surface use (CSU), required design features (RDF), and timing limitation (TL) stipulations, discourage leasing in GrSG habitat. Potential compensatory mitigation requirements from state frameworks

provide further disincentive to lease these lands and guide development to less-suitable GrSG habitat.

These restrictions act as a deterrent to development in priority habitat. Therefore, any requirement to lease lands in GrSG habitat identified as open to oil and natural gas leasing only after non-GrSG habitat has been leased, or to specifically preclude leasing in PHMA when general habitat parcels are available, would be inconsistent with FLPMA's multiple use mandate and the prioritization IMs.

The 2015 plans did not restrict BLM's discretion on how to prioritize leasing, yet nearly all lease sales held since 2015 have been subject to litigation regarding BLM's implementation of its own prioritization objective. The Alliance disputes the substance of those legal challenges and believes BLM has properly exercised its discretion to prioritize parcels since 2015 through the imposition of the management decisions discussed above and further outlined in the GrSG plans.

Nevertheless, In the latest environmental assessments for 2022 Q1 lease sales, BLM has attempted to address the lawsuits with a detailed and lengthy prioritization framework. Although BLM ultimately and erroneously ignored the determinations of that prioritization process and simply deferred all parcels in PHMA in the 2022 Q1 sale in Wyoming, we believe that prioritization framework is legally defensible and properly prioritizes the parcels.

BLM should adopt this framework in the LUP revisions, and in the future, it should actually honor the results of the process instead of blindly deferring all parcels in PHMA without regard to the other considerations in the priority framework, including proximity to existing development and potential for oil and natural gas development.

Waivers, Exceptions, and Modifications

The 2015 plans unlawfully ceded BLM's authority on waivers, exceptions, and modifications (WEM) of lease stipulations for NSO, CSU, and TL. The plans gave the U.S. Fish & Wildlife Service (FWS) and state wildlife agencies veto power over whether BLM should grant a lessee a WEM, even where site-specific conditions clearly justify such waiver, exception, or modification.

According to 43 C.F.R. § 3101.1-4, BLM must grant waivers and modifications to stipulations in certain circumstances. This section of the MLA explains that BLM alone determines whether the appropriate circumstances exist to grant a WEM, stating that a stipulation may be modified or waived "only if the authorized officer determines that the factors leading to its inclusion in the lease have changed sufficiently to make the protection provided by stipulation no longer justified or if the proposed operation would not cause unacceptable impacts."

The "authorized officer" means any employee of the Bureau of Land Management authorized to perform the duties described; it does not include an employee of another agency and should not be so interpreted. BLM considers WEMs based on its congressional mandate to manage oil and natural gas development. Neither FWS nor state wildlife agencies have a similar mandate or understanding of the onshore oil and natural gas program.

As a general matter, companies only apply for WEMs – and BLM only approves them – if potential adverse effects are appropriately mitigated, or if local conditions at the time render the original lease stipulations or conditions of approval unnecessary. For example, a common waiver allows a company to begin development after a native bird has left its nest for the season. WEMs are applied for and approved when the conditions clearly warrant them, and BLM does not need a second opinion on whether a bird has left a nest for the season or where other habitat conditions have so changed to allow for a waiver, exception, or modification.

WEMs provide the regulatory flexibility needed by operators to invest in oil and natural gas leases on public lands. Approval of WEMs affords additional flexibility at the field office level, and can often result in less disturbance across the landscape. Decisions on WEMs should be made by the local field office, as they have the on-the-ground knowledge of the specific situation.

BLM should revise the plans to reflect its sole legal authority to grant WEMs.

Science

Following the issuance of the final 2015 plans, the Alliance joined a number of local governments and stakeholder groups in submitting legal challenges against three reports BLM relied on as the underlying science behind the LUPs. These documents were the Report on National Greater Sage-Grouse Conservation Measures (NTT Report); the Greater Sage-grouse Conservation Objectives Final Report (COT Report); and the USGS's Comprehensive Review of Ecology and Conservation of the Greater Sage Grouse: A Landscape Species and its Habitats (Monograph).

Our challenges were never adequately addressed by BLM. We urge BLM to reevaluate and remove these three reports from consideration in the land use plans due to the faulty conclusions each supplies.

The COT Report was prepared to develop range-wide conservation objectives for the GrSG. The Monograph was heavily relied upon by FWS in its 2010 listing decision, and BLM developed the NTT Report and relied upon it extensively in developing the LUPs. Each of these three reports failed to meet basic standards of science, resulting in severely misinformed policy decisions in the LUPs.

The reports were highly influential, but they advanced a one-sided narrative that is simply not supported by the full body of scientific literature and data. The agencies relied on an insular group of scientist-advocates who deviated from providing credible, accurate scientific data to advance policies they personally support.

The small group of scientists had interlocking relationships as authors of the reports, authors of the studies used in the reports, peer reviewers, editors, and policy advocates. Their conflicts of interest included receiving millions of dollars from the agencies while supposedly developing independent studies. When faced with conflicting science, they simply ignored studies that didn't fit their bias. Meanwhile, more diverse expertise and viewpoints were simply ignored when BLM was developing the LUPs.

The Reports were developed with unsound research methods resulting in a partial and biased presentation of information, and peer reviewers have found them to be inaccurate, unreliable, and biased. They contain substantial technical errors, including misleading use of authority and failure to address studies that do not support a federal, one-size-fits-all narrative. As a result, the reports reach conjectural conclusions that are not scientifically supported.

Driven by policy considerations rather than defensible biological criteria, the reports do not address specific cause and effect threats to the GrSG. Rather, they selectively present biased information while ignoring contrary information and the scientific method. BLM's review of the plan amendments should rely on unbiased and properly peer-reviewed science rather than incorporating the faulty conclusions reached in the NTT, COT, and Monograph reports.

Conclusion

Western Energy Alliance supports BLM's intent to revise the GrSG LUPs. We urge BLM to issue revised plans that strike a reasonable balance between protection of the species and resource development. Viable management strategies in the final plans should be based on sound science; designed to promote certainty, affordability, flexibility, simplicity, and accessibility; and operationally and legally viable.

We are encouraged that BLM is acknowledging the need for revisions, and we are more than willing to work with BLM staff as they proceed with the changes.

Sincerely,

Tripp Parks
Vice President of Government Affairs