

**BEFORE THE UNITED STATES DEPARTMENT OF THE INTERIOR AND
U.S. GEOLOGICAL SURVEY INFORMATION QUALITY OFFICIALS**

GARFIELD COUNTY, COLORADO)
GRAND COUNTY, COLORADO)
JACKSON COUNTY, COLORADO)
MESA COUNTY, COLORADO)
MOFFAT COUNTY, COLORADO)
RIO BLANCO COUNTY, COLORADO)
CARTER COUNTY, MONTANA)
FALLON COUNTY, MONTANA)
FERGUS COUNTY, MONTANA)
MCCONE COUNTY, MONTANA)
MUSSELSHELL COUNTY, MONTANA)
PHILLIPS COUNTY, MONTANA)
PRAIRIE COUNTY, MONTANA)
RICHLAND COUNTY, MONTANA)
TOOLE COUNTY, MONTANA)
YELLOWSTONE COUNTY, MONTANA)
ELKO COUNTY, NEVADA)
EUREKA COUNTY, NEVADA)
UINTAH COUNTY, UTAH)
WESTERN ENERGY ALLIANCE)
AMERICAN EXPLORATION & MINING)
ASSOCIATION)
COLORADO MINING ASSOCIATION)
COLORADO WOOL GROWERS ASSOCIATION)
INDEPENDENT PETROLEUM ASSOCIATION)
OF AMERICA)
INTERNATIONAL ASSOCIATION OF)
DRILLING CONTRACTORS)
MONTANA ASSOCIATION OF OIL, GAS &)
COAL COUNTIES)
MONTANA PETROLEUM ASSOCIATION)
NEVADA MINING ASSOCIATION)
PETROLEUM ASSOCIATION OF WYOMING)
PUBLIC LANDS COUNCIL)
UTAH MULTIPLE USE COALITION)

**Appeal of the Response for
Correction of Information
Submitted under the USGS
Information Quality Guidelines**

August 12, 2015

Petitioners

v.

U.S. GEOLOGICAL SURVEY

**REQUEST FOR RECONSIDERATION OF PETITIONERS' CHALLENGE FOR
CORRECTION OF INFORMATION PURSUANT TO THE DATA QUALITY ACT**

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On March 18, 2015, the Petitioners submitted their Data Quality Act Challenge to the U.S. Department of the Interior Dissemination of Information Presented in the U.S. Geological Survey Greater Sage-Grouse Monograph (“Monograph”).¹ The Monograph is a highly influential report that was prepared by the Cooper Ornithological Society (“COS”) as *Comprehensive Review of Ecology and Conservation of the Greater Sage Grouse: A Landscape Species and its Habitats* as published in *Studies in Avian Biology* (the “Monograph”).²

On July 24, 2015, Anne E. Kinsinger, USGS Associate Director for Ecosystems; Amy Lueders, BLM Active Assistant Director for Resources and Planning; and Gary Frazer, USGS Assistant Director for Ecological Services, provided a combined response (“Response”) to this Challenge and two other challenges submitted by the Petitioners, purportedly addressing the

¹ Available at: <http://www.westernenergyalliance.org/knowledge-center/wildlife/greater-sage-grouse/DQA-Challenge>.

² USGS, *Ecology and Conservation of Greater Sage-Grouse: a Landscape Species and Its Habitats*, A Release of a Scientific Monograph with Permission of the Authors, the Cooper Ornithological Society, and the University of California Press, (<http://web.archive.org/web/20100527124712/http://sagemap.wr.usgs.gov/monograph.aspx>)

Petitioners' concerns about peer review, but completely failing to address the substance of the Challenge and the multitude of other serious issues raised in the nearly 200-page Challenge with exhibits.

The counties and organizations listed above (the "Petitioners") hereby submit this Request for Reconsideration of Petitioners' Challenge for Correction of Information ("Challenge") against the U.S. Geological Survey ("USGS") pursuant to the Federal Information Quality Act, (44 U.S.C. § 3516) ("Data Quality Act" or "DQA") and the "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information disseminated by Federal Agencies" issued by the Office of Management and Budget (67 Fed. Reg. 8452 (Feb. 22, 2002) ("OMB Guidelines")), as well as the "Information Quality Guidelines" of the U.S. Department of the Interior (67 Fed. Reg. 50687 (Aug. 5, 2002) ("DOI Guidelines")) and USGS Guidelines ("USGS Guidelines")³ collectively known as (the "Guidelines") as well as presidential memoranda and secretarial orders on scientific integrity and transparency as discussed below.

I. Petitioners' Challenge

As outlined in their Challenge, Petitioners reviewed the Monograph and found it lacks the scientific quality, integrity, objectivity and utility required by the DQA, the Guidelines and additional authority. Petitioners requested USGS retract the Monograph and all reliance thereon in agency decisions on permits, authorizations and the listed status of the greater sage-grouse ("GRSG") under the ESA or issue an amended Monograph that uses sound analytical methods and the best data available, including specifically the information omitted in the current Monograph and referenced in the Challenge, ensuring transparency and objectivity in the information disseminated. The Monograph should be withdrawn from the public domain and

³ USGS, Information Quality Guidelines, http://www.usgs.gov/info_qual/.

should not be used in any Departmental, bureau or office decision-making process until it is corrected.⁴

This Request for Reconsideration addresses the USGS' inadequate response and failure to retract or amend the Monograph. The Petitioners renew their concerns that the Monograph: (1) violates the quality, objectivity, utility, and integrity standards of the DQA and its Guidelines; (2) misrepresents several key issues; (3) is subject to application of the DQA; and (4) does not comply with myriad other federal requirements and standards.

II. Disagreements with the USGS Response

Here, the USGS Response improperly and unlawfully side-steps the requirements of the DQA as well as Obama Administration policies, guidelines, directives and orders cited by Petitioners by failing to address the Challenge. Rather, USGS suggests the Challenge will be addressed in the 2015 listing determination for GRSG. The listing determination will be issued by an entirely separate agency: the U.S. Fish and Wildlife Service ("FWS"). Under what authority does USGS purport to delegate its duty to respond under the DQA?

Petitioners have numerous issues with the Monograph that have serious implications for the West. Among many other serious flaws, the Monograph: fails to recognize that states, local governments and private entities have undertaken significant and successful efforts to conserve GRSG; ignores substantive threats to GRSG (such as raven predation) in favor of pre-conceived notions of human impacts; and fails to recognize that populations of any given species naturally fluctuate given weather patterns.

In its Response, USGS contends the Monograph received rigorous, independent peer review by its publisher yet wholly fails to address the examples of bias, conflicts and other peer

⁴ Department of the Interior DQA Guidelines at III.

review issues detailed in some 16 pages of Petitioners' Challenge and exhibits.⁵ Among other significant issues, a small number of specialist-advocates have had a disproportionate influence on formulating federal policy. This insular group is selectively using its own research while ignoring contrary information and the full body of GRSG scientific literature.

Selective use of science creates a narrative that assumes GRSG populations are in decline despite contrary evidence. The Reports ignore natural population fluctuations; blame human activities such as energy development, mining and ranching for alleged declines; ignore actual threats to GRSG such as predation; and then seek to impose unfounded regulatory restrictions on human activities. More diverse expertise and viewpoints are clearly needed.

Moreover, USGS failed to address in its Response that its guidelines conflict with the DQA as well as DOI and Office of Management and Budget guidelines with respect to transparency of peer review and disclosure of underlying data.⁶ That the agency which claims to be the Department of the Interior's ("DOI") "science arm" is the most secretive when it comes to disclosure of scientific data and peer reviews is unacceptable and unlawful.

The Petitioners request reconsideration of their Challenge, including but not limited to:

1. The Response Fails to Address Transparency

The Response fails to address the issue of the USGS' lack of transparency. The Monograph fails to meet quality and utility standards of the DQA and the Guidelines. OMB Guidelines require a high degree of transparency for influential information such as the Monograph. USGS failed to provide basic information to the public about the Monograph, despite the heavy reliance on it in agency decision-making.

⁵ See, e.g. pp 19-35 of Petitioners' Challenge.

⁶ USGS actually directs peer reviewers not to disclose their results or conclusions.

2. The Response Fails to Address Reproducibility

The Response fails to address the lack of reproducibility. The Monograph fails to meet DQA standards for reproducibility. OMB Guidelines provide a higher standard than even peer review applies to influential information, namely a “substantial reproducibility standard.”⁷ The Monograph fails to meet the substantially reproducible standard required under the DQA and the Guidelines. The Response failed to address this concern at all.

3. The Response Fails to Address Required Robustness Checks

The Response fails to address the issue of required robustness checks. The Monograph failed to undergo adequate robustness checks to meet the DQA standards of quality, objectivity, utility and integrity. For example, there are substantial technical errors in the Monograph including misleading use of authority. Robustness checks are required for ensuring compliance with the DQA because the public will not be afforded any other mechanism for determining the objectivity, utility, and reproducibility of this non-disclosed information. In fact, “agencies shall apply especially rigorous robustness checks to analytic results and document what checks were undertaken.”⁸ DOI and USGS Guidelines mirror this requirement.⁹ The Monograph underwent no such rigorous checks.

4. The Response Fails to Address Conflicts of Interest

The Response fails to address conflicts of interest. A number of the relevant regulations and guidance stress the importance of independence¹⁰ and the need to avoid conflicts of

⁷ 67 Fed. Reg. 8452, 8457 (Feb. 22, 2002).

⁸ OMB Guidelines V3.b.ii.B.ii (emphasis added).

⁹ USGS Guidelines IV-3.

¹⁰ Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities 59 Fed. Reg. 34270 (Jul. 1, 1994); OMB Peer Review Bulletin; Memorandum for the Heads of Executive Departments and Agencies. 74 Fed. Reg. 10671 (Mar. 11, 2009), available at: <http://www.gpo.gov/fdsys/pkg/FR-2009-03-11/pdf/E9-5443.pdf> (<http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf>); Performance Work Statement for Scientific, Technical and Advisory Services (http://www.USGS.gov/informationquality/peer_review/IDIQ_Performance_Work_Statement_17Nov2011.pdf);

interest.¹¹ In this case, a small number of GRSG specialist-advocates have had a disproportionate influence on formulating federal policy including their overlapping participation in preparation of the NTT and COT Reports as well as the Monograph and peer reviews thereon. The conflicts of interest that permeate the Monograph violate numerous sources of authority, including the DQA, its implementing Guidelines, the DOI Manual, NAS policy and various secretarial orders and presidential memoranda discussed herein.

5. The Response Fails to Address Peer Review

The Response failed to address the individual areas of concern with peer reviews. The Monograph failed to undergo adequate peer review as required by the DQA, the Guidelines and the presidential and secretarial orders and memoranda. The Challenge detailed numerous areas in which the peer review was inadequate, including peer review standards, conflicts of interest of reviewers, failure of the peer review to undergo public comment, lack of peer review transparency, and the lack of objectivity.

6. The Response Fails to Address Best Available Science

The Response failed to address that the Monograph was not based on best available science. The Monograph and the studies cited therein fail to meet the best available science standards. The information disseminated fails to meet DQA standards for quality, objectivity, integrity and utility. Significant uncertainties are ignored and conjecture and opinion are presented as facts.¹²

Information Quality Guidelines and Peer Review

(http://www.USGS.gov/informationquality/topics/InformationQualityGuidelinesrevised6_6_12.pdf).

¹¹ Policy on Committee Composition and Balance and Conflicts of Interest for Committees Used in the Development of Reports (<http://nationalacademies.org/coi/>); Final Information Quality Bulletin for Peer Review 70 Fed. Reg. 2664 (Jan. 14, 2005); Memorandum for the Heads of Executive Departments and Agencies (<http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf>); Department Manual, Part 305, Chapter 3 (<http://www.USGS.gov/science/pdf/DOIScientificIntegrityPolicyManual.pdf>).

¹² *Id.*

7. The Response Fails to Address Bias and Lack of Objectivity

The Response failed to address bias and lack of objectivity in the Monograph. The Monograph failed to meet DQA standards for quality and integrity. It is biased by the use of policy-driven assumptions, inferences, and uncertainties that are not supported by scientific data. The Monograph inadequately treats uncertainties through presumptive interpretations of data, inaccurate portrayal of threats and differential treatment of environmental factors. USGS clearly failed to address these fundamental shortcomings with the Monograph and failed to adequately explain assumptions, limitations and bias in the information disseminated.

8. The Response Fails to Address Unfounded Restrictions on Human Activities

The Response failed to address unfounded restrictions on human activities. Despite the lack of scientific support, the Monograph proscribes land management actions such as: prevent fire in GRSG habitat; manage for sagebrush; manage land uses; improve grazing “systems,” and close rangelands that are highly susceptible to fire due to OHV use during the fire season.¹³ The USGS would have these measures implemented without any tracking and testing of the effectiveness of the multitudes of currently required conservation efforts.

9. The Response Fails to Address Misrepresentations

The Response failed to address misrepresentations. The Petitioners’ Challenge detailed the Monograph’s misrepresentation of several key issues including: GRSG populations; natural population fluctuations; predation and predator control; hunting; West Nile Virus; existing regulatory mechanisms; livestock grazing; state, local, and private conservation efforts; and multiple-use mandates.

¹³ Monograph at 41.

10. The Response Fails to Address other Federal Standards and Requirements

In addition to the failure of the Monograph to comply with the DQA and Guidelines, it also fails to comply with Presidential direction on scientific integrity and transparency, DOI scientific integrity standards, and possibly the Paperwork Reduction Act. The Response wholly fails to recognize and address these concerns.

III. The DQA Applies to the Monograph

The Response states that the consideration of and the response to the Challenge will be made available in the Response File for the USGS' determination regarding listing when their decision-making processes are complete. This is unacceptable, inappropriate and contrary to the DQA and implementing guidelines. The Petitioners' Challenge shows that the Monograph is subject to the DQA and Guidelines, as it is an "Information Dissemination Product",¹⁴ and although the USGS may consider the Monograph to be third-party information, it is still subject to the DQA and DQA correction. The DOI Guidelines expressly apply to non-departmental parties that develop scientific and technical information on its behalf.¹⁵ The Monograph qualifies as highly influential information¹⁶ and if uncorrected, the Monograph will cause substantial harm

IV. The Challenge was not Duplicative, Unnecessary or Unduly Burdensome

USGS may not abdicate its duties under the DQA or the other standards and requirements discussed at length in Petitioners' Request because the USGS intends to conduct a rulemaking on the listed status of GRSG at a future date. Accordingly, the USGS Response is unlawful pursuant to the DQA as well as arbitrary and capricious.

¹⁴ 67 Fed. Reg. 8452, 85460 (Feb. 22, 2002).

¹⁵ DOI Guidelines II.4; DOI Guidelines V.

¹⁶ 67 Fed. Reg. 8452, 8455 (Feb. 22, 2002).

V. The Response was Arbitrary and Capricious

The U.S. Supreme Court has held that an agency decision is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Also, an agency action is arbitrary and capricious if the agency fails to “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 158 (1962)).

Here, the USGS Response fails to articulate a rational explanation for the scant conclusions contained therein.

VI. USGS DQA Guidelines Conflict with Federal Law and Agency Guidelines

The USGS failed to address in its Response that its guidelines conflict with the DQA as well as DOI and Office of Management and Budget guidelines with respect to transparency of peer review and disclosure of underlying data.¹⁷ That the agency which claims to be the Department of the Interior’s (DOI) “science arm” is the most secretive when it comes to disclosure of scientific data and peer reviews is unacceptable and unlawful.

VII. The Petitioners and their Contact Information

Petitioners are affected persons or organizations¹⁸ as they may be harmed by the disseminated information with a material impact to their interests. Petitioners have a direct interest in the quality and integrity of agency science and decision making, including how the

¹⁷ USGS actually directs peer reviewers not to disclose their results or conclusions.

¹⁸ USGS Guidelines at IV.

Monograph affects GRSG and public lands management in the West. The Petitioners engage in ranching, grazing, mining, and energy development on multiple-use federal, state and private lands throughout the West, or are counties that rely on these activities for their economic and social viability. The management restrictions, regulatory measures and closures recommended in the Monograph will have a direct impact on the Petitioners, the economy and the future viability of scores of communities, local governments, small businesses, family farms and ranches, mining enterprises, electricity and oil and natural gas development in the West.

The Petitioners' primary representatives can be reached at the following addresses:

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VIII. Procedure

USGS DQA Guidelines provide that, upon receiving a request for reconsideration, the USGS may convene a panel of officials to perform the review function.¹⁹ Such a panel may include directorate-level personnel from the USGS and other Department of the Interior agencies. The panel or other review officials shall then make a recommendation to the Director of the USGS. The Director will then make a final decision on the appeal within 60 calendar days of receipt of the appeal.²⁰

IX. Conclusion

The Monograph is a highly influential document, as BLM and USFS are using it to make substantial land use decisions across nearly 60 million acres of public lands throughout eleven

¹⁹ USGS Guidelines IV-4.

²⁰ *Id.*

western states. As such, it must adhere to the standards of quality, integrity, objectivity and utility in the DQA as well as administration standards of scientific integrity and transparency. Unfortunately, the Monograph fails to meet these requirements. As detailed above, the Response failed to address the majority of issues raised in Petitioners' Challenge.

The Petitioners respectfully request the Appeals Panel reconsider the Response issued on their Challenge and call for the USGS to retract the Monograph and all reliance thereon in existing and subsequent Land Use Plans Amendments, as well as applicable decisions on listed status of GRSG and/or on permits and authorizations. Alternatively, USGS could, as required by the DQA and the Guidelines, issue an amended Monograph that uses sound analytical methods and the best data available while ensuring transparency and objectivity. Any amended Report should incorporate all reliable information, not just the data supporting false hypothesis. It should also identify the limitations of data used rather than stating assumptions as fact. Finally, any amended Report should use and include the best available data as discussed herein.

Respectfully submitted this 12th day of August, 2015.

Holsinger Law, LLC

A handwritten signature in black ink, appearing to read 'K. Holsinger', written in a cursive style.

Kent Holsinger
Attorney for Petitioners