June 29, 2015

Via email protest@blm.gov

Via Federal Express
BLM Director (210)
Attention: Protest Coordinator
20 M Street SE, Room 2134 LM
Washington, D.C. 20003

Via United States Certified Mail
Return Receipt Requested
BLM Director (210)
Attention: Protest Coordinator
P.O. Box 71383
Washington, D.C. 20024

Re: Protest of Bighorn Basin Resource Management Plan Project Revision Proposed Resource Management Plan and Final Environmental Impact Statement.

Pursuant to 43 C.F.R. § 1610.5-2(a), The Petroleum Association of Wyoming (PAW), Western Energy Alliance (the Alliance) and the American Petroleum Institute (API), collectively referred to as "the Trades," hereby protest Bighorn Basin Resource Management Plan Project Revision Proposed Resource Management Plan and Final Environmental Impact Statement (Proposed RMP).

INTRODUCTION AND PROTESTING PARTY

This protest is filed by PAW, which has an address of 951 Werner Court, Suite 100, Casper, Wyoming and a phone number of (307) 234-5333. This Protest is also filed by API, which has an address of 1220 L Street NW, Washington, D.C. 20005-4070 and a phone number of (202) 682-8000. This Protest is also filed by the Alliance, which has an address of 1775 Sherman Street, Suite, 2700, Denver, Colorado 80203 and a phone number of (303) 623-0987. For specific questions about this Protest, please contact Esther Wagner at (307) 234-5333.

Both the Bureau of Land Management's (BLM) and Environmental Protection Agency's (EPA) Notices of Availability for the Proposed RMP were published in the Federal Register on

May 29, 2015. 80 Fed. Reg. 30,709 (May 29, 2015) (BLM Notice of Availability); 80 Fed. Reg. 30,676 (May 29, 2015) (EPA Notice of Availability). As such, this Protest is timely.\

With the Federal Land Policy and Management Act (FLPMA), Congress declared that the nation's public lands must be managed on the basis of multiple use in a manner that both recognizes the need for domestic sources of minerals and will provide food and habitat for fish and wildlife, among other uses. U.S.C. § 1701(a)(6), (8), (12). The Trades and their members continuously strive to responsibly develop oil and natural gas resources in a manner compatible with wildlife conservation. Oil and natural gas development leaves a small and temporary impact on the land and coexists with wildlife protection. Western operators often partner with sportsmen and conservation groups to provide hunting, fishing, and other recreational opportunities on their leases. To minimize the potential impacts of their activities, the Trades and their members work closely with state wildlife management agencies, which have the local expertise to best manage wildlife resources, to minimize potential impacts of oil and natural gas exploration and development on the greater sage-grouse and other wildlife. The Trades and their members also commit to conservation measures to protect the greater sage-grouse in BLM and Forest Service decisions approving development identified through environmental analysis performed under the National Environmental Policy Act of 1969 (NEPA).[1] These efforts balance multiple use in the manner in which Congress intended.

The Trades support BLM's goal of managing the greater sage-grouse and its habitat on public lands to demonstrate to the U.S. Fish and Wildlife Service (FWS) that the species does not warrant listing as threatened or endangered under the Endangered Species Act. The Proposed RMP, however, does not balance conservation of the greater sage-grouse and responsible oil and natural gas development. The Proposed RMP will severely restrict oil and natural gas development on existing federal leases. These restrictions elevate conservation of the greater sage-grouse above all other land uses in a manner wholly inconsistent with multiple use management.

Not only is the Proposed RMP inconsistent with FLPMA's multiple-use mandate, it suffers from a variety of substantive and procedural deficiencies. These deficiencies form the basis of this Protest. The Trades protest the Proposed LUPA for the following reasons:

- The Proposed RMP is inconsistent with Wyoming Executive Order 2011-5 in violation of FLPMA.

- The Proposed RMP inappropriately attempts to modify existing oil and gas leases, to unilaterally modify existing contract rights, to impose restrictions on existing leases that deny development or render development uneconomic, and to impose uniform conditions on existing leases that are not based on site-specific development.

[1] The Alliance has detailed these measures in its report, *Evaluation of the NEPA Process as an Adequate Regulatory Mechanism to Eliminate or Minimize Threats to Greater Sage-Grouse Associated with Oil and Natural Gas Development Activities* (2014), available at http://www.westernenergyalliance.org/sites/default/files/images/WesternEnergyAlliance_GRSG_NEPA_Final_071414.pdf.

- The Proposed RMP violates NEPA. The Agencies must prepare a supplemental EIS and respond to the Trades' comments on the Draft RMP/Draft EIS before they may finalize the Proposed RMP. Additionally, the analysis in the Final EIS is deficient.

- The Proposed RMP violates FLPMA because BLM has not afforded the public a meaningful opportunity to comment on the new components of the Proposed RMP and because the requirement that mitigation achieve a "net conservation benefit" is inconsistent with FLPMA

- The Proposed RMP's goal of a "net conservation gain" is vaguely defined and may lead to takings under the Fifth Amendment of the U.S. Constitution.

- The Administrative Procedure Act (APA) requires the Agencies to undertake formal rulemaking procedures before implementing many of the requirements in the Proposed LUPA.

- The science on which the Agencies base the restrictions in the Proposed RMP is flawed.

STATEMENT OF STANDING

The Trades satisfy the requirements set forth at 43 C.F.R. § 1610.5-2(a) to file this Protest regarding the Proposed RMP because the Trades have interests that may be adversely affected by the adoption of the Proposed RMP and because the Trades actively participated in the planning process for the Proposed RMP. 43 C.F.R. § 1610.5-2(a).

Interests that May be Affected

PAW is Wyoming's largest and oldest petroleum industry trade association dedicated to the betterment of the State of Wyoming's oil and gas industry and public welfare. PAW members, ranging from independent operators to integrated companies, account for approximately ninety percent of the natural gas and eighty percent of the crude oil produced in Wyoming. API is a national trade association representing over 600 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. The Alliance represents more than 450 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 fifteen employees.

Many of the Trades' member companies have a direct interest in how BLM plans to manage lands in the Bighorn Basin Planning Area (Planning Area). These companies hold valid existing leases and are interested in future oil and natural gas leasing, exploration, and production activities in areas that will be directly affected by the agencies' management decisions. These companies are also dedicated to meeting environmental requirements, while economically developing and supplying affordable energy for consumers. The management

restrictions and closures in the Proposed RMP will have a direct impact on the future viability of oil and natural gas development in the Planning Area and beyond.

Participation in the Planning Process

PAW and the Alliance also submitted detailed comments regarding the Bighorn Basin Resource Management Plan Project Revision Proposed Resource Management Plan and Draft Environmental Impact Statement (Draft Bighorn RMP). *See* 76 Fed. Reg. 22,721 (April 22, 2011) (BLM Notice of Availability for the Draft Bighorn RMP); 76 Fed. Reg. 22,699 (April 22, 2011) (EPA Notice of Availability for the Draft Bighorn RMP). A copy of PAW and the Alliance's comments are attached hereto as Attachment 1. BLM later submitted a Supplement to the Draft Bighorn RMP. 78 Fed. Reg. 41,947 (BLM Notice of Availability for the Supplemental Bighorn RMP); 78 Fed. Reg. 41,927 (July 12, 2013) (EPA Notice of Availability for the Supplemental Bighorn RMP). PAW and the Alliance submitted additional comments regarding the Supplemental Bighorn RMP in October of 2013 attached hereto as Attachment 2. API, among others, met with BLM Director Neil Kornze on August 13, 2014, in Washington, D.C. to discuss amendments to the RMP; API also participated via teleconference in a follow-up meeting, at which PAW and the Alliance were present, with Mr. Kornze on September 12, 2014, in Denver, Colorado. BLM Land Use Planning Handbook H-1601-1, Appd. E, pg. 4 (Rel. 1-1693 03/11/05) (noting that attendance of meetings satisfies the standing requirements to file a Protest).

STATEMENT OF PROTESTED ISSUES AND PROTESTED PARTS OF PLAN

I. The Proposed RMP Must be Consistent with the State of Wyoming Sage-Grouse Conservation Plan.

The Trades protest several inconsistencies between the Proposed RMP and the Wyoming Sage-Grouse Core Area Strategy. These inconsistencies appear to be the result of BLM's choice to impose certain sage-grouse conservation measures in violation of the FLPMA's requirement for BLM to coordinate land use planning with state and local governments. The Proposed RMP diverges from the Wyoming Sage-Grouse Core Area Strategy in many important respects:

- Timing restrictions that are not consistent with those contained in Wyoming Executive Order 2011-5. Proposed RMP, Appd. G, pgs. G-18 – G-20.

- Noise limitations that are not consistent with those contained in Wyoming Executive Order 2011-5. Proposed RMP, Record No. 4121, pgs. 2-157 – 2-158.

- The identification of winter concentration areas that have not been reviewed and approved by the Sage-Grouse Implementation Team and the Governor of Wyoming. Proposed RMP, Record No. 4119, pg. 2-155, Map 42.

- BLM's requirement to impose compensatory mitigation. Proposed RMP, Appd. Y, pg. Y-15.

- BLM's requirement for net conservation gain. Proposed RMP, Appd. Y

BLM's failure to identify and reconcile these inconsistencies violates FLPMA's requirement for BLM to ensure that federal land use plans are, "to the maximum extent" consistent with federal law, consistent with state and local land use programs. 43 U.S.C. § 1712(c)(9). The Trades commented on the need to be consistent with the State of Wyoming Executive Order regarding sage-grouse in their comments. Trade Comments, pgs. 7 – 9.

Since its passage in 1976, one of FLPMA's guiding land use planning principles has been that BLM must coordinate with state and local governments and seriously consider state and local interests in the land use planning process. 43 U.S.C. § 1712(c)(9). To implement this principle, FLPMA requires BLM to ensure that federal land use plans are consistent with applicable state and local land use plans and policies "to the maximum extent" consistent with federal law and the purposes of FLPMA. 43 U.S.C. § 1712(c)(9). BLM's regulations similarly provide that federal land use plans "shall, to the maximum extent practical," be consistent with state and local land use plans and policies. 43 C.F.R. § 1610.3-2. Further, under BLM's Land Use Planning Handbook, "BLM's plans shall be consistent with other Federal agency, state, and local plans to the maximum extent consistent with Federal law." BLM Manual H-1601-1 – Land Use Planning Handbook, I.E.1 (Rel. 1-1693, 03/01/05). These provisions were "designed to protect the interests of local governments whenever federal agencies develop or implement federal land use plans." *Yount v. Salazar*, 2013 WL 93372, at *14 (D. Ariz. Jan. 8, 2013). BLM is required under FLPMA and its own regulations and policies to reconcile inconsistencies between federal and state land use programs "to the maximum extent practical." 43 C.F.R. §1610.3-2; *see* 43 U.S.C. § 1712(c)(9); BLM Manual H-1601-1 – Land Use Planning Handbook, I.E.1 (Rel. 1-1693, 03/01/05).

FLPMA's coordination and consistency requirements apply with even greater force in Wyoming, particularly with respect to management of the greater sage-grouse. For years, Wyoming has been a national leader in conservation of greater sage-grouse and has taken unprecedented steps to ensure the conservation of the species. In 2008, Governor Dave Freudenthal signed Executive Order 2008-2 to implement the "Core Population Area" strategy (Wyoming Plan) developed by the Governor's Sage Grouse Implementation Team (SGIT). *See* Wyoming Executive Order 2008-2, Aug. 1, 2008. Governor Freudenthal renewed the State's commitment to the Wyoming Plan in 2010, and Governor Matt Mead again affirmed the policy in 2011. Wyoming Executive Order 2011-5, June 2, 2011; Wyoming Executive Order 2010-4, Aug. 18, 2010. The U.S. Fish and Wildlife Service specifically endorsed the Wyoming Plan as a "long-term, science-based vision" for sage-grouse conservation, and an "excellent model" for conserving the species. Wyoming Executive Order 2011-5, June 2, 2011; see also 75 Fed. Reg. 13910, 13974 (Mar. 23, 2010) (noting that Wyoming's Executive Order/Core Area Strategy "would provide adequate protection for sage-grouse and their habitat in that State [Wyoming]"). Given FLPMA's clear directives, Wyoming's determined effort to conserve the greater sage-grouse through its Core Plan, and the U.S. Fish and Wildlife's endorsement of the Wyoming Sage-Grouse Core Area Strategy, BLM is obligated to ensure that the Proposed Wyoming RMP is consistent with Wyoming's existing greater sage-grouse management program.

Nevertheless, BLM has chosen to disregard portions of Wyoming Executive Order 2011-5 and impose land use requirements in Wyoming that are inconsistent with Wyoming Executive Order 2011-5. BLM's plan fails to take into account state and local needs and requirements and diverges from Wyoming Executive Order 2011-5 in important respects.

First, several of the timing restrictions identified in the proposed oil and gas stipulations are not only inconsistent with Wyoming Executive Order 2011-5, they also appear to be inconsistent with BLM management actions contained in Chapter Two of the Proposed RMP. Proposed Record No. 4118 indicates that surface use should be restricted within primary habitat management areas (PHMA) from March 15 to June 30 each year. Proposed RMP, pg. 2-154 – 2-155. BLM's proposed stipulation in Appendix G, however, states that surface use should be restricted from March 1 to June 30. Proposed RMP, Appd. G, pgs. G-18 – G19. Executive Order 2011-5 only limits activities from March 15 to June 30. BLM's timing restriction is thus inconsistent with not only the Wyoming Executive Order, but even the text of the Proposed RMP itself. BLM must correct this inconsistency. Similarly, with respect to timing limitations within general habitat management areas (GHMA) surface use will be limited from March 15 to June 30 within two miles of an active lek. Proposed RMP, pg. 2-154 – 2-155. Nonetheless, the stipulation attributable to this Management Action indicates that surface use will be limited from March 1 to June 30. Proposed RMP, Appd. G, pg. G-20. Again, this timeline is inconsistent both with Wyoming Executive Order 2011-5 and BLM's proposed Management Action in Chapter 2. This inconsistency must be resolved by applying only the timing limitations found in the Wyoming Executive Order.

Second, BLM must eliminate the incredibly low and unreasonable noise limitations that are inconsistent with those contained in the Wyoming Executive Order 2011-5. Proposed RMP, pgs. 2-157 – 2-158. BLM's intent to limit noise to only 10 dBA is inconsistent with the Wyoming Executive Order for several reasons. The limitation appears to apply both to PHMA and GMHA. As discussed earlier, one of the primary impetuses of the Wyoming Executive Order was to encourage development outside PHMA. Imposing such an unreasonable limit outside of PHMA is completely contrary to the Wyoming Executive Order that only imposes noise restrictions inside Core Areas. BLM has unreasonably expanded the limitation to both PHMA and GMHA. Further, the Wyoming Executive Order makes it clear that the limitation only applies from 6:00 p.m. to 8:00 a.m. and only from March 1 to May 15 when sage-grouse are lekking. The Proposed RMP contains no such limitations. Further, the language of the Executive Order only applies when the thresholds set forth in the order have been reached. The current proposed language for the Executive Order states:

> For any new (O&G pads) projects that exceed an SGEO standard, new project noise levels, either individual or cumulative, should not exceed 10 decibels (as measured by L_{50}) above baseline noise at the perimeter of a lek from 6:00 pm to 8:00 am during the breeding season (March 1 to May 15). Specific protocols for measurement are being developed by the SGIT. As additional research and information emerges, specific new limitations appropriate to the type of projects being considered will be evaluated and appropriate limitations will be implemented where necessary to minimize potential for noise impacts on core greater sage-grouse population behavioral cycles.

BLM's use of a noise limitation is not only inconsistent with the Wyoming Executive Order, it is not based on peer-reviewed data. This ambient noise range was determined from <u>average</u> noise readings of studies conducted in national parks and wilderness areas outside Wyoming (EPA. 1971 Community Noise (ed. EPA); Lynch, E., Joyce, D. & Fristrup, K. 2011 An assessment of noise audibility and sound levels in U.S. National Parks. *Landscape Ecology*

26, 1297-1309), as well as the minimum noise readings taken in the Pinedale area in Wyoming (Harvey, K. 2009 Pinedale Anticline Project Area Sage Grouse Monitoring: Noise Monitoring Report (ed. P. A. P. Office)). This ambient noise level is not scientifically supported and has not been proven to be representative of average ambient noise on multiple use lands in Wyoming. As such, any reference to 20 to 24 dBA as an ambient noise level must be disregarded and removed and revised to reflect the EO which limits noise to 10 dBA above ambient in core areas and directs that ambient noise be determined by measurements taken at the perimeter of a lek at sunrise during active lek season (March 1 to May 15).

BLM has simply not analyzed or justified why noise restrictions would be required outside of the lekking period. Additionally, BLM has not developed a protocol or other mechanisms that would allow either BLM or operators to determine if they are complying with the standard. The restriction is simply impractical and cannot be implemented as currently drafted. BLM must modify this unreasonable restriction.

Third, BLM Worland Field Office appears to have mapped and identified several sage-grouse winter concentration areas. Proposed RMP, Record No. 4119, pg. 2-155, Map 42. As noted above, the identification of these areas in the Final EIS and Proposed RMP is inappropriate as they were identified for the very first time in the Final EIS in violation of NEPA. Second, they are inconsistent with the guidance and direction from the Wyoming Executive Order that indicates that all proposed winter concentration areas must be presented to the SGIT and then presented to the Governor for approval through a modification to the Wyoming Executive Order. It is inappropriate for a single BLM field office to identify winter concentration areas without the review and consent of the Wyoming Game and Fish Department, the SGIT, and the Governor of Wyoming.

Fourth, the Proposed RMP requires compensatory mitigation for any development inside of PHMA and possibly whenever development occurs within sagebrush habitat. Proposed RMP, Appd. Y, Y-15. Mandatory compensatory mitigation is not a component of the current Wyoming Executive Order. In fact, the Wyoming Executive Order specifically allows some level of development within Core Areas. BLM's imposition of mandatory compensatory mitigation in all PHMA is inconsistent with the Wyoming Executive Order and must be reconsidered.

Finally, the Proposed RMP does not seem to recognize that the Wyoming Executive Order itself is a mitigation plan and the goal of "net conservation gain" is inconsistent with the Executive Order's standard of "no net loss." The Executive Order states that "3. New development or land uses within Core Population Areas should be authorized or conducted only when it can be demonstrated that the activity will not cause declines in Greater Sage-Grouse populations." Wyoming Executive Order 2011-5, Page 3. Further, Executive Order 2011-5 provides that "[d]evelopment consistent with the stipulations set forth in Attachment B shall be deemed sufficient to demonstrate that the activity will not cause declines in Greater Sage-Grouse populations." WY Executive Order 2011-5, Page 3. Given these provisions, the BLM must modify the Proposed RMP to be consistent with the State of Wyoming's conservation goals.

In addition to BLM's legal obligation to ensure consistency, conforming BLM's plan to the Wyoming Executive Order also makes practical sense, particularly with respect to greater

sage-grouse land use restrictions. Unlike the top-down approach imposed by the Proposed RMP, the Executive Order is the result of collaborative efforts between the state, landowners, industry, and other interested parties. These state and local stakeholders are better situated than BLM to strike a balance between conservation of the greater sage-grouse and promotion of economic development across the state, and Executive Order 2011-5 represents the most appropriate balance of these two goals. Accordingly, the Trades encourage BLM Director to remand the Proposed RMP with instructions that the provisions of Executive Order 2011-5 be adopted and incorporated into the Final Record of Decision (ROD). Prior to signing the Final ROD and Approved Resource Management Plan, BLM must reconcile these differences and conform the Proposed RMP to Wyoming Executive Order 2011-5 "to the maximum extent practical." 43 C.F.R. §1610.3-2; see 43 U.S.C. § 1712(c)(9); BLM Manual H-1601-1 – Land Use Planning Handbook I.E.1 (Rel. 1-1693, 03/01/05).

II. BLM Cannot Impose New Restrictions on Valid Existing Rights and Operations.

The Trades protest BLM's decisions to impose new restrictions on existing federal oil and gas leases. The Proposed RMP attempts to impose numerous restrictions on existing oil and gas leases. *See* Proposed RMP, Table 2-9, Record 4123, pgs. 2-159 – 2-160 (raptor buffers); Table 2-9, Record 4121, pgs. 2-157 – 2-158 (noise); Table 2-9, Record 2008, pg. 2-102 (required design features); Record Nos. 5020 through 5023, pgs. 2-171 to 2-172 (cultural sites); Record Nos. 7298 through 7300, pgs. 2-345 to 2-346 (National Historic Trails); Record Nos. 7302 through 7304, pgs. 2-347 to 2-348 (Other Trails); Appd. L, pgs. L-1 – L-7 (required design features). Although BLM assures the public that new stipulations from the RMP will not apply to existing leases, it then claims the ability to apply these same stipulations to existing leases through Conditions of Approval (COAs). Proposed RMP, pg. 4-84. The Trades are concerned, for example, that BLM will attempt to impose raptor buffers, sage-grouse noise restrictions, and required design features on existing leases inconsistent with lease rights granted. These conditions are new and were not attached as stipulations on oil and gas leases issued within the Planning Area. The Trades commented on BLM's imposition of new restrictions on valid existing rights. Trade Comments, pg. 3.

Federal oil and gas leases constitute valid existing rights. *Sierra Club v. Peterson*, 717 F.2d 1409, 1411 (D.C. Cir. 1983); Solicitor's Opinion M-36910, 88 I.D. 909, 912 (1981). As development operations are proposed in the future, BLM cannot attempt to impose stipulations or COAs on existing leases that are inconsistent with the contractual rights they grant. 43 C.F.R. § 3101.1-2. The Trades protest BLM's imposition of new restrictions that are inconsistent with existing leases for two primary reasons. First, BLM does not have the authority to impose new restrictions on valid existing leases under the FLPMA. Second, BLM cannot unilaterally modify federal leases, which are valid existing contracts. Finally, BLM cannot impose new restrictions on existing leases that render development uneconomic or impossible. The Trades encourage BLM to revise the Proposed RMP to recognize that they may not impose new development restrictions on existing leases.

A. BLM Lacks Authority to Modify Valid Existing Lease Rights Through a Resource Management Plan Revision.

The proposed addition of new restrictions to existing leases exceeds BLM's legal authority under FLPMA. BLM may not modify existing lease rights through its land use planning process because FLPMA expressly states that all BLM actions, including authorization of RMPs, are "subject to valid existing rights." 43 U.S.C. § 1701 note (h); *see also* 43 C.F.R. § 1610.5-3(b) (BLM is required to recognize valid existing lease rights). Thus, pursuant to federal law, BLM cannot terminate, modify, or alter any valid or existing rights.

When it enacted FLPMA, Congress made it clear that nothing within the statute, or in the land use plans developed under FLPMA, was intended to terminate, modify, or alter any valid or existing property rights. *See* 43 U.S.C. § 1701. Thus, a RMP prepared pursuant to FLPMA, after lease execution, is likewise subject to existing rights. *See Colo. Envt'l Coal., et al.*, 165 IBLA 221, 228 (2005). The Proposed RMP cannot defeat or materially restrain a federal lessee's valid and existing rights to develop its leases through unreasonable COAs or other means. *See id.* (citing *Colo. Envt'l Coal., et al.*, 135 IBLA 356, 360 (1996), *aff'd, Colo. Envt'l Coal. v. Bureau of Land Mgmt.*, 932 F. Supp. 1247 (D. Colo. 1996)); *Mitchell Energy Corp.*, 68 IBLA 219, 224 (1982) (citing Solicitor's Opinion, M-36910, 88 I.D. 908, 913 (1981)).

BLM's Land Use Planning Manual reinforces that RMPs must respect existing lease rights. "All decisions made in land use plans, and subsequent implementation decisions, will be subject to valid existing rights. This includes, but is not limited to, valid existing rights associated with oil and gas leases . . . ." *See* BLM Manual 1601 – Land Use Planning, 1601.06.G (Rel. 1-1666 11/22/00). BLM must comply with the provisions of its planning manual and recognize existing rights. Any attempts to modify a federal lessee's existing rights would violate the terms of its leases with BLM and BLM's own policies.

B. BLM Cannot Unilaterally Modify Existing Contract Rights.

The imposition of new restrictions on existing leases is also inconsistent with the contractual rights conveyed to a federal oil and gas lessee. Oil and gas leases are real property rights. *Winkler v. Andrus*, 614 F.2d 707, 712 (10th Cir. 1980); *Union Oil v. Morton*, 512 F.2d 743, 747 (9th Cir. 1975). Further, leases are contracts that BLM cannot unilaterally modify. *See Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 620 (2000) (recognizing that federal oil and gas leases are contracts and that the federal government's breach of lessee's right to explore for and develop oil and gas entitles lessee to refund); *Oxy USA, Inc. v. Babbitt*, 268 F.3d 1001, 1006-7 (10th Cir. 2001) (noting that the Tenth Circuit has long held that federal oil and gas leases are contracts), *rev'd on other grounds, BP America Production Co. v. Burton*, 549 U.S. 84 (2006). Under well-established precedent, after BLM accepts a lease bid, the lessee fully pays for the lease, and a lease is issued, a contract exists between the lessee and BLM. This contract consists solely of those terms and conditions identified in the notice of competitive lease sale and the lease itself. *See, e.g., Coastal States Energy Co*., 80 IBLA 274, 279 (1984). BLM may not later amend the lease with terms not identified in the sale notice and not part of the contract subject to the bidding process. A retroactive amendment of lease terms by BLM would be a unilateral breach of the lease contract and would "violate the equal

opportunity for all bidders to compete on a common basis for leases." *Anadarko Prod. Co.*, 66 IBLA 174, 176 (1982), *aff'd*, Civ. No. 82-1278C (D.N.M. 1983).

Moreover, the imposition of additional restrictions infringes on the lessee's right to conduct operations under the lease. A federal lease conveys the right to occupy the surface to explore for, produce, and develop oil and gas resources. *See Pennaco Energy v. United States Dep't of the Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004); 43 C.F.R. § 3162.1(a) (requiring a federal lessee to maximize production). Courts have recognized that once BLM has issued an oil and gas lease conveying the right to access and develop the leasehold, BLM cannot later impose unreasonable mitigation measures that take away those rights. *See Conner v. Burford*, 836 F.2d 1441, 1449-50 (9th Cir. 1988).

BLM Instruction Memorandum 92-67 reinforces the contractual rights conferred by an oil and gas lease. This Instruction Memorandum states that "[t]he lease contract conveys certain rights which must be honored through its term, regardless of the age of the lease, a change in surface management conditions, or the availability of new data or information. The contract was validly entered based upon the environmental standards and information current at the time of the lease issuance." Thus, judicial and administrative authorities recognize that a federal oil and gas lease constitutes a contract between the federal government and the lessee, which cannot be unilaterally altered or modified by the United States.

Because an oil and gas lease is a contract that the United States may not unilaterally modify, BLM's authority to impose restrictions on existing leases is particularly circumscribed when it has already imposed protective stipulations on an existing lease. Section 3101.1-2, 43 C.F.R., states that BLM may impose "reasonable mitigation measures . . . to minimize adverse impacts . . . to the extent consistent with lease rights granted." BLM, however, has expressly recognized that this regulation does not allow BLM to expand the scope of stipulations attached to leases upon issuance. In the Federal Register preamble to the rule finalizing 43 C.F.R. § 3101.1-2, BLM unequivocally stated that this regulation "will not be used to increase the level of protection of resource values that are addressed in lease stipulations." 53 Fed. Reg. 17,340, 17,341-42 (May 16, 1988). BLM further explained that "the intent of the proposed rulemaking" was not to impose measures that, for example, "might result in an unstipulated additional buffer around an area already stipulated to have a buffer." *Id.* (emphasis added). Any attempt by BLM to impose measures that expand express stipulations attached to leases are inconsistent with the leases' contractual terms. The Proposed RMP attempts to impermissibly alter the contractual rights granted under oil and gas leases by imposing a variety of measures on existing leases. Proposed RMP, Table 2-9, Record 4123, pgs. 2-159 – 2-160 (raptor buffers); Table 2-9, Record 4121, pgs. 2-157 – 2-158 (noise); Table 2-9, Record 2008, pg. 2-102 (required design features); Appd. L, pgs. L-1 – L-7 (required design features).

Additionally, the requirement to provide compensatory mitigation is a fundamental change to lease terms that improperly alters the contract between the United States and lessors. Although the Proposed RMP does not clearly identify when compensatory mitigation is required, the Proposed RMP suggests it may be required whenever development will impact the greater sage-grouse. Proposed RMP, Appd. Y, pg. Y-15.

The terms of federal leases do not authorize BLM to require compensatory mitigation. Existing federal leases do not contain any express requirement to provide compensatory mitigation. *See, e.g.*, BLM Form 3110-11, Offer to Lease and Lease for Oil and Gas (Oct. 2008). Although lease rights are subject to "applicable laws, the terms, conditions, and attached stipulations of [the] lease, the Secretary of the Interior's regulations and formal orders in effect as of lease issuance," *see* BLM Form 3110-11, neither BLM's planning regulations nor leasing regulations contain any requirement to provide compensatory mitigation and do not authorize BLM to require compensatory mitigation.[2] *See* 43 C.F.R. pts. 1600, 3100. Moreover, no BLM or Department of the Interior (DOI) order requires compensatory mitigation of oil and gas lessees. In fact, for nearly two decades, BLM has consistently taken the position that it would not require compensatory mitigation of lessees. *See* BLM Instruction Memorandum No. 2008-204, Offsite Mitigation (Oct. 3, 2008); BLM Instruction Memorandum No. 2005-069, Interim Offsite Compensatory Mitigation for Oil, Gas, Geothermal, and Energy Rights-of-Way Authorizations (Feb. 20, 2005); Wyoming BLM Instruction Memorandum No. WY-96–21, Statement of Policy Regarding Compensation Mitigation (Dec. 14, 1995). Moreover, the requirement that compensatory mitigation result in an improvement to greater sage-grouse or its habitat by producing a "net conservation gain" is not contemplated in any regulations or formal departmental policy. Accordingly, the terms of federal oil and gas leases do not contemplate the Proposed RMP's requirement that lessees provide compensatory mitigation to provide a net conservation gain.

Furthermore, an attempt by BLM to require compensatory mitigation would be patently inconsistent with the terms of its oil and gas leases.[3] Section 6 contemplates that lessees must minimize the impacts of their actions:

> Lessee must 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 uses or users. Lessee must take reasonable measures deemed necessary by lessor to accomplish the intent of this section. To the extent consistent with lease rights granted, such measures may include, but are not limited to,

[2] The Council on Environmental Quality (CEQ) regulations at 40 C.F.R. part 1500 provide that agencies must consider mitigation in an EIS. *See* 40 C.F.R. § 1502.14(f). The U.S. Supreme Court has held, however, that these regulations do not require agencies to incorporate mitigation into the selected alternative in a ROD. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). Furthermore, the CEQ regulations do not provide agencies to require mitigation measures that are outside of their existing regulatory authority. Finally, the CEQ regulations do not contemplate that mitigation provide a "net conservation gain." Rather, the CEQ regulations only contemplate that mitigation may include providing substitute resources that compensates for the impact, *see id.* § 1508.20(e)—not mitigation that goes beyond offsetting the impact and produces an "actual benefit or gain above baseline conditions," *see* Proposed RMP at 1753.

[3] Even if compensatory mitigation could be considered consistent with the terms of BLM's leases—which it is not—BLM cannot require compensatory mitigation of existing lessees without issuing a regulation or formal order. BLM's lease form states that rights granted are subject to "regulations and formal orders promulgated hereafter when not inconsistent with lease rights granted." BLM Form 3110-11 (emphasis added). Neither BLM nor the Secretary has issued regulations or an order requiring compensatory mitigation. Secretarial Order No. 3330 does not obligate lessees to provide compensatory mitigation but only obligates the DOI to "seek ways to offset or compensate" for "for impacts that cannot be avoided or effectively minimized." *See* Secretarial Order No. 3330 (Oct. 31, 2013) (emphasis added).

> modification to siting or design of facilities, timing of operations, and specification of interim and final reclamation measures.

BLM Form 3110-11, Offer to Lease and Lease for Oil and Gas § 6 (Oct. 2008) (emphasis added). Section 6, however, does not require that lessees mitigate impacts that cannot be minimized. Given that the RMP states that lessees must first minimize their impacts and then mitigate impacts that cannot be minimized, Appd. B, pg. 1781, the requirement to provide compensatory mitigation after impacts have been minimized is clearly a new requirement for which neither the United States nor lessees bargained. Moreover, the requirement that compensatory mitigation result in an improvement to greater sage-grouse or its habitat by producing a "net conservation gain" is not contemplated anywhere within a federal oil and gas lease. Because compensatory mitigation that yields a net conservation gain is inconsistent with the terms of existing oil and gas leases, BLM cannot require such mitigation without breaching or repudiating its oil and gas leases. *See Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604 (2000); *Amber Res. Co v. United States*, 538 F.3d 1358 (Fed. Cir. 2008).

The Trades emphasize that oil and gas lessees are frequently willing to provide compensatory mitigation to offset the impacts of their actions. Oil and gas operators often work with local BLM offices during the project planning process to identify appropriate compensatory mitigation and voluntarily commit to the mitigation. Compensatory mitigation, however, must remain a voluntary commitment by lessees. BLM must revise the Proposed RMP to state that it will not require compensatory mitigation of existing lessees.

C. BLM Cannot Impose Restrictions that Deny Development or Render Development Uneconomic.

Because of BLM's obligations to recognize valid existing rights, BLM cannot directly or indirectly deprive lessees of their valid and existing lease rights. Once BLM has issued a federal oil and gas lease without no surface occupancy (NSO) stipulations, and in the absence of a nondiscretionary statutory prohibition against development, BLM cannot completely deny development on the leasehold. *See, e.g., Nat'l Wildlife Fed'n, et al.*, 150 IBLA 385, 403 (1999). Only Congress has the right to completely prohibit development once a lease has been issued. *W. Colo. Cong.*, 130 IBLA 244, 248 (1994).

Furthermore, the Secretary of the Interior and the federal courts have interpreted the phrase "valid existing rights" to mean that BLM cannot impose stipulations or COAs that make development on existing leases either uneconomic or unprofitable. *See Utah v. Andrus*, 486 F. Supp. 995, 1011 (D. Utah 1979); *see also Conner v. Burford*, 84 F.2d 1441, 1449-50 (9th Cir. 1988); 43 C.F.R. § 3101.1-2 (2012) (BLM can impose only "reasonable mitigation measures . . . to minimize adverse impacts . . . to the extent consistent with lease rights granted"). BLM cannot prohibit a lessee from developing its leases. *Nat'l Wildlife Fed'n, et al.*, 150 IBLA 385, 403 (1999). Similarly, BLM cannot impose COAs that are inconsistent with federal lessee's existing, contractual lease rights or restrict operations to the point that economic development on a lease is precluded. *Sierra Club v. Hodel*, 848 F.2d 1068, 1087-88 (10th Cir. 1988); *Colo. Envt'l Coal.*, 165 IBLA 221, 228 (2005) (determining that an RMP may not constrain restrictions on the exercise of existing oil and gas leases that defeat or materially restrain existing rights."); *Colo. Open Space Council*, 73 IBLA 226, 229 (1983) (holding that regulation of existing oil and

gas leases may not "unreasonably interfere" with the rights previously conveyed in an oil and gas lease).

The Proposed RMP will impose a variety of restrictions on development of existing leases. *See* Proposed RMP, Table 2-9, Record 4123, pgs. 2-159 – 2-160 (raptor buffers); Table 2-9, Record 4121, pgs. 2-157 – 2-158 (noise); Table 2-9, Record 2008, pg. 2-102 (required design features); Appd. L, pgs. L-1 – L-7 (required design features). The cumulative burden of these restrictions could render development uneconomic. Collectively, these restrictions will either make development on existing leases impossible or so uneconomic that they effectively prohibit development. BLM, however, cannot impose COAs or management measures that make development on existing leases either uneconomic or unprofitable. *See Utah v. Andrus*, 486 F. Supp. 995, 1011 (D. Utah 1979); *see also Conner v. Burford*, 84 F.2d 1441, 1449-50 (9th Cir. 1988); *Sierra Club v. Hodel*, 848 F.2d 1068, 1087-88 (10th Cir. 1988); *Colo. Envt'l Coal.*, 165 IBLA 221, 228 (2005); *Colo. Open Space Council*, 73 IBLA 226, 229 (1983). Accordingly, BLM must revise the Proposed RMP to reduce the restrictions imposed on existing leases.

Finally, the Required Design Features in Appendix L are onerous and will adversely impact virtually every aspect of oil and gas development. The Trades commented on the Required Design Features. Trade Comments on the Supplement Draft, pgs. 29 - 32. Attached hereto is Attachment 3 describing in detail the reasons several of the Required Design Features are inappropriate. Among other things, the requirements impose leaseholders to have their development plans delayed in order to facilitate phased development, require altered drilling practices and procedures including the use of mats instead of normal operations, require closed-loop drilling practices, modify reclamation techniques, limit road construction and maintenance, require noise shields and countless other mitigation measures regardless of their feasibility, practicality, or cost. The imposition of many of the "Required Design Features" will absolutely and unequivocally render economic development of the Trades' members' leases improbable.

D. The Restrictions on Existing Leases Are Not Based on Site-Specific Information.

Not only are the measures that apply to existing leases inconsistent with valid existing rights, they are beyond BLM's authority because they are not based on site-specific information. BLM may only impose new protective measures on existing leases that are consistent with valid existing rights if site-specific information demonstrates the additional measure is warranted.

BLM's Handbook on Planning for Fluid Mineral Resources, H-1624-1, explains that protective measures imposed on APDs, rather than stipulations attached upon lease issuance, are COAs. BLM Handbook H-1624- 1 – Planning for Fluid Mineral Resources § IV(C)(2), pg. IV-2 (Rel. 1-1580 5/7/90). The Handbook defines COAs as "site specific requirements or measures imposed to protect resources or resource values." *Id.* at § IV(C)(2), pg. IV-2, and Glossary, pg. V-10. This definition contemplates that site-specific resource information must be used to justify COAs.

The Interior Board of Land Appeals (IBLA) has reached a similar conclusion in *Yates Petroleum Corporation*, 176 IBLA 144, 155 (2008). In *Yates*, the IBLA upheld BLM's imposition of a seasonal limitation within three miles of active sage-grouse leks as a condition of approval on an existing oil and gas lease as within BLM's authority under 43 C.F.R. § 3101.1-2.

BLM had based the COAs at issue on site-specific information pertaining to the location of proposed activity on the lease. *See Yates*, 176 IBLA at 157 ("The specific mitigation adopted by the [BLM] and update in [State Director Review] Decisions was recommended by BLM's technical experts following submission of detailed [Plans of Development], on the basis of environmental analysis unrefuted with any specificity [by the operator]."). The IBLA upheld the COAs as within BLM's authority under 43 C.F.R. § 3101.1-2 and its Planning for Fluid Minerals Handbook. *See Yates*, 176 IBLA at 157 n.14; *see also William P. Maycock*, 177 IBLA 1, 16-17 (2009).

BLM cannot simply impose COAs that are inconsistent with existing lease rights. BLM's suggestion that it can simply impose COAs inconsistent with existing lease rights is simply unsupportable. Proposed RMP, pg. 4-84. BLM regulations and Planning for Fluid Minerals Handbook do not allow BLM to categorically impose COAs through the Proposed RMP.

E. BLM Unreasonably Limits Development in the Oregon Basin Field

The Trades are particularly opposed to BLM's proposed management action effectively eliminating all future oil and gas development in the Oregon Basin Field. Proposed RMP, Record No. 2029, pg. 2-106. BLM proposes to preclude all future development in the Oregon Basin Field if it results in a net gain in surface disturbing activities. Such a position by BLM is not only inconsistent with operator's like Marathon's valid existing rights, it is also inconsistent with the Wyoming Executive Order. Further, BLM's position was presented for the very first time in the Final EIS in violation of FLPMA and NEPA. As described in detail in Part III of this Protest, BLM cannot impose new restrictions valid existing rights, such as the lease rights owned by Marathon and other operators in the Oregon Basin Field, through the land use planning process. See BLM Manual 1601 – Land Use Planning, 1601.06.G (Rel. 1-1666 11/22/00).

BLM's position is also inconsistent with the Wyoming Executive Order. As described in Part I of this Protest, BLM has an obligation under FLPMA to manage the public lands in a manner consistent with existing state land use plans. The Wyoming Executive Order represents such a plan. As also described in Part I of this letter, it is particularly important for BLM to defer to the Wyoming Sage-Grouse Executive Order because it has been specifically endorsed and approved by the FWS as an exemplary model for sage-grouse protection and management. The Wyoming Executive Order specifically allows development in Core Areas. In particular, the Wyoming Executive Order exempts from the stipulations, thresholds, and conditions of approval associated with the Core Policy for oil and gas units, such as the Oregon Basin Unit, that were created prior to August of 2008. The Wyoming Executive Order recognizes that valid existing rights could not and should not be limited by the imposition of the Wyoming Executive Order when actual development plans, such as those associated with a federal unit have been, developed.

Finally, as described in Parts III and IV of this Protest, BLM's proposed management restrictions for the Oregon Basin Field were proposed in violation of NEPA and FLPMA because they were proposed for the very first time in the Final EIS for the Proposed RMP. The hallmarks of both NEPA and FLPMA are the opportunities to provide public comment and input into federal agency actions and the management of the public lands. BLM denied the Trades and

their members an opportunity to submit comments regarding how the proposed limitations in the Oregon Basin Field would impact their valid existing rights or comment on the feasibility and practicality of BLM's new management restriction. As there was no indication in either the Draft Bighorn RMP or the Supplement to the Draft Bighorn RMP, BLM cannot suggest the alternative was within the range of alternatives presented in those documents. Rather, the restriction is entirely new and must be eliminated from the final RMP or presented in a supplemental EIS for the public to comment. 40 C.F.R. § 1502.9(c); *see also Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011), cert. denied, 132 S. Ct. 2439 (U.S. 2012); BLM Land Use Planning Handbook H-1610-1, III.A.10, pg. 24 (Rel. 1-1693 03/11/05).

III. BLM Must Comply with the National Environmental Policy Act Prior to Finalizing the Proposed Land Use Plan.

The Trades protest the Proposed RMP because BLM has not yet complied with NEPA. As BLM is aware, NEPA is a procedural statute intended to produce informed decision making by federal agencies. *United States Dep't of Trans. v. Public Citizen*, 541 U.S. 752, 756-57 (2004); *Lee v. United States Air Force*, 354 F.3d 1229, 1237 (10th Cir. 2004). The preparation of a land use plan, such as Proposed RMP, requires BLM to prepare an EIS. 43 C.F.R. § 1601.0-6. "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b) (emphasis added). BLM has not yet complied with NEPA because they must release a second Supplemental Draft EIS for public review and comment before issuing a ROD. Additionally, BLM failed to analyze a reasonable range of alternatives. Finally BLM must respond to comments on the Draft EIS.

A. BLM Must Prepare a Second Supplemental Draft EIS.

1. BLM Must Prepare a Supplemental Draft EIS to Analyze New Components of the Proposed Land Use Plan Amendment.

The Trades protest substantial changes made between the Draft RMP, the Supplement to the Draft RMP (collectively the Draft EIS or Draft RMP), and Proposed RMP without notice and an opportunity for public comment. In particular, the Trades protest the adoption of a whole new sage-grouse implementation policy found in Appendix Y. Although BLM maintains that components of the sage-grouse implementation plan were analyzed in other alternatives, the vast majority of the information is completely new. The Proposed RMP contains a number of significant elements that were not included in any of the alternatives analyzed in the Draft EIS, including the requirement that mitigation produce a net conservation gain, the mitigation plan, and the monitoring plan. These proposed changes violate NEPA because they were not included in the Draft RMP, as the Supplement to the Draft RMP and because BLM did not allow the public an opportunity to meaningfully comment on these provisions.

The CEQ regulations implementing NEPA state that "[a]gencies . . . [s]hall prepare supplements to either draft or final environmental impact statements if . . . [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns. . . ." 40 C.F.R. § 1502.9(c); *see also Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037,

1045 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2439 (U.S. 2012) ("If the final action departs substantially from the alternatives described in the draft EIS, however, a supplemental draft EIS is required. . . ."). CEQ guidance states that no supplemental draft EIS is required where (1) the final proposed alternative is a "minor variation of one of the alternatives discussed in the draft EIS," or (2) the final proposed alternative is "qualitatively within the spectrum of alternatives that were discussed in the draft [EIS]." Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations [hereinafter "Forty Questions"], 46 Fed. Reg. 18,026, 18,035 (Mar. 23, 1981); *see also Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2439, 182 L. Ed. 2d 1063 (U.S. 2012); *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 705 & n. 25 (10th Cir. 2009); *In re Operation of Missouri River Sys. Litig.*, 516 F.3d 688, 693 (8th Cir. 2008*); Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1292 (1st Cir. 1996).

The Proposed RMP contains wholly new components. None of the alternatives presented in the Draft RMP included the requirements that mitigation produce a net conservation gain, the mitigation plan, and the monitoring plan. BLM first presented the public with these components when it released the Proposed RMP. BLM also identified three Master Leasing Plans (Absorka Front, Fifteenmile, Bighorn Front) that were not only not included in the draft or the supplemental draft EIS for the Bighorn Basin RMP, but were expressly rejected as unnecessary in the draft documents. Draft Bighorn RMP, Appd. Y, pg. Y-1. These proposed changes violate both NEPA and FLPMA because they were not included and were rejected in the Draft Bighorn RMP and because BLM did not allow the public an opportunity to meaningfully comment on these provisions. Further, BLM added new limitations on production operations and included the identification of sage-grouse winter concentration areas in the Worland Field Office for the first time in the Final EIS and Proposed RMP. Proposed Bighorn RMP, Record No. 4119, pg. 2-155, Map 42 (sage-grouse winter concentration areas); Record No. 4079, pg. 2-144 (production).

Most troubling is the fact that the net conservation gain requirement, mitigation plan, and monitoring plan were not incorporated into the Proposed RMP and Final EIS in response to public comment on the Draft RMP/Draft EIS or in response to environmental impacts disclosed in the Draft EIS. *See* Forty Questions, 46 Fed. Reg. at 18,035 (explaining that agencies may adjust the alternatives analyzed in response to comments). Rather, BLM appears to have incorporated the net conservation gain requirement, mitigation plan, and monitoring plan to respond to national policies by BLM and U.S. Fish and Wildlife Service that were released after the Draft RMP/Draft EIS was published and that were never formally offered for public comment. *See* U.S. Fish & Wildlife Serv., *Greater Sage-Grouse Mitigation Framework* (2014); BLM, *The Greater Sage-Grouse Monitoring Framework* (2014). The public never had the opportunity to review and comment on these new components.

The public must have the opportunity to review and respond to these new proposals through a supplemental EIS. "Failure to disclose a Proposed Action before the issuance of a final EIS can defeat this aim [to internalize opposing viewpoints into the decision-making process], at least when the Proposed Action differs radically from the alternatives mentioned in a draft EIS." *California v. Block*, 690 F.2d 753, 771 (9th Cir. 1982). Although "agencies must have some flexibility to modify alternatives canvassed in the draft EIS to reflect public input," an agency must supplement its draft environmental impact statement where the "public could [not] have reasonably anticipated" the action proposed in the Final EIS. *Id*. at 771, 772. The net

conservation gain requirement was not presented in the Draft RMP. Although the Draft RMP acknowledged that the Proposed RMP/Final EIS would include more details about the monitoring and mitigation plans, *see* Draft Bighorn RMP Appd. C and D, these "placeholders" did not allow the public a meaningful opportunity to comment on the substance of the monitoring and mitigation plans. The inclusion of the net conservation gain requirement, mitigation plan, and monitoring plan constitutes "substantial changes from the previously proposed actions that are relevant to environmental concerns" and should have been presented in a supplemental draft EIS for public comment. *Dubois v. U.S. Dept. of Agric.*, 102 F.3d 1273, 1293 (1st Cir. 1996). Prior to issuing its ROD and final approved RMP, BLM must provide a second supplemental draft EIS with notice and an opportunity for comment in compliance with its NEPA obligations.

B. BLM Did Not Analyze a Reasonable Range of Alternatives.

In an EIS, an agency must "[r]igorously explore and objectively evaluate all reasonable alternatives" to a proposed action. 42 U.S.C. § 4332(2)(C)(iii). The alternatives analysis is considered the "heart" of an EIS. 40 C.F.R. § 1502.14. An agency's purpose and need for the proposed action defines the range of reasonable alternatives. *See* 40 C.F.R. § 1502.13; *.e.g.*, *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999). Although an agency need not analyze every conceivable alternative, *see Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 551 (1978), it must analyze "a reasonable spectrum of policy choices that meet the goals of the action." *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 241 (D.D.C. 2005); 40 Questions, 46 Fed. Reg. at 18,207.

The Final EIS fails to analyze a reasonable range of alternatives to the Proposed RMP. First, the Final EIS does not analyze an alternative to the Proposed RMP's mitigation standard of a "net conservation gain" for the greater sage-grouse. Second, the Final EIS does not analyze any alternative to the Proposed RMP's monitoring framework, including alternatives that BLM has the resources to implement.

Importantly, all of these elements are new components of the Proposed RMP. BLM's last-minute addition of these elements without consideration of alternatives reinforces the need for BLM to prepare a second Supplemental Draft EIS that analyzes alternatives to these proposals and make it available for public review and comment.

1. Goal of Net Conservation Gain

The Final EIS does not analyze an alternative to the Proposed RMP's mitigation standard requiring a net conservation gain. Proposed RMP at page 2-31. The Final EIS should have considered alternative, lesser mitigation standards, such as no net loss of greater sage-grouse habitat.[4] A standard of "no net loss of habitat" would be less burdensome on land users.

[4] As explained elsewhere in these comments, BLM cannot require existing lessees to provide compensatory mitigation. Additionally, FLPMA may not allow BLM to require land users to mitigate so that "no net loss" of habitat occurs. By arguing that BLM should have considered an alternative to the "net conservation gain" standard, the Trades do not waive these arguments. Rather, if BLM maintains that they have the authority to require mitigation to achieve a "net conservation gain," then by their own logic they have the authority to require mitigation to achieve a lesser standard.

Furthermore, because the phrase "net conservation gain" is ambiguous and difficult to implement, an alternative mitigation standard such as no net loss would be easier for BLM to administer and would allow for easier compliance by land users.

Presumably, BLM incorporated the net conservation gain standard without considering alternatives because this standard was identified in the U.S. Fish and Wildlife Service's Greater Sage-Grouse Range-wide Mitigation Framework. In that document, the U.S. Fish and Wildlife Service stated it would evaluate programs with a "no net loss" standard less protective of species "because they are unlikely to positively influence the conservation status of the species." U.S. Fish and Wildlife Service, *Greater Sage-Grouse Range-wide Mitigation Framework* 4 (2014). The U.S. Fish and Wildlife Service, however, made this statement without any accompanying environmental analysis and without allowing the public the formal opportunity to review and comment on the document. BLM must analyze alternatives to this mitigation standard before they may adopt it in a ROD.

Additionally, the Proposed RMP does not seem to recognize that the Wyoming Executive Order itself is a mitigation plan and the goal of "net conservation gain" is inconsistent with the Executive Order's standard of "no net loss." The Executive Order states that "3. New development or land uses within Core Population Areas should be authorized or conducted only when it can be demonstrated that the activity will not cause declines in Greater Sage-Grouse populations." Wyoming Executive Order 2011-5, Page 3. Further, Executive Order 2011-5 provides that "[d]evelopment consistent with the stipulations set forth in Attachment B shall be deemed sufficient to demonstrate that the activity will not cause declines in Greater Sage-Grouse populations." WY Executive Order 2011-5, Page 3. Given these provisions, BLM must modify the Proposed RMP to be consistent with the State of Wyoming's conservation goals

2. Monitoring Framework

The Proposed RMP includes a detailed monitoring framework that calls for monitoring habitats and evaluating the implementation and effectiveness of the greater sage-grouse planning strategy and the conservation measures in the RMP. Proposed RMP at Y-23 – Y-59. The monitoring framework calls for monitoring to occur at broad and mid-scales and at fine and site-scales. *Id.* The details of the monitoring framework were first presented in the Proposed RMP; they appear to have been developed by BLM's Washington Office and integrated into all greater sage-grouse RMPs. *See* BLM, *The Greater Sage-Grouse Monitoring Framework* (2014).

BLM must analyze alternatives to the proposed monitoring framework because the monitoring components on their face cannot be implemented by BLM. In the Proposed RMP, BLM expressly recognizes that they will require "[a]dditional capacity or re-prioritization of ongoing monitoring work and budget realignment" to achieve the proposed monitoring commitments. Proposed RMP at Y-57. Specifically, BLM recognizes it lacks the capacity to monitor implementation of land use plan decisions, effectiveness of the planning strategy, and habitat at fine and site scales. *Id.*

The proposal to adopt a single monitoring strategy that BLM admits it lacks resources to implement is unreasonable. BLM need not even analyze alternatives that depend on speculative funding. *See City of Sausalito v. O'Neil*, 386 F.3d 1186, 1210 (9th Cir. 2004). In this era of

budget cuts and limited federal resources, BLM should have analyzed at least one alternative monitoring strategy that they have the resources to implement.

C. BLM Must Respond to Comments on the Draft EIS.

The CEQ regulations require that in final EISs, agencies respond to comments received on the draft EIS. 40 C.F.R. § 1503.4. The CEQ regulations direct that agencies "shall" respond to comments by one or more of the following means: 1) modifying alternatives including the proposed action; 2) developing and evaluating alternatives not previously given serious consideration by the agency; 3) supplementing, improving, or modifying its analyses; 4) making factual corrections; or 5) "[e]xplain[ing] why the comments do not warrant further response, citing the sources, authorities, or reason which support the agency's position and, if appropriate, indicat[ing] those circumstances which would trigger agency reappraisal or further response." 40 C.F.R. § 1503.4(a). *See also* CEQ, Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18,026 (Mar. 23, 1981) (Question 29a) ("agencies must respond to comments, however brief, which are specific in their criticism of agency methodology").

With respect to the Proposed RMP, the Trades submitted extensive and detailed comments on the Required Design Features listed in Appendix L. *See* Trade Comments on Supplement Draft, pgs. 29 - 32. BLM, however, did not make any substantive changes to the Required Design Features between draft and final, *Compare* Proposed RMP, Appd. L *with* Supplement Draft RMP, Appd. L. Additionally, BLM did not acknowledge the Trades' comments on the Required Design Features in Appendix L and did not "[e]xplain[ing] why the comments do not warrant further response." *See* 40 C.F.R. § 1503.4(a). BLM's only response to comments regarding the Required Design Features was a notation that Required Design Features "could not be revised." Proposed RMP, Appd. A, pg. A-77. BLM has not provided the response to comments to the extent required by the CEQ regulation.

The fact that BLM was responding to a large volume of comments does not excuse their failure to acknowledge the Trades' concerns. Given that the Proposed RMP addresses management of the entire Bighorn Planning Area and multiple field offices, BLM should have expected a large number of comments and anticipated the difficulty of responding to so many. As one court chided the USFS for failing to adequately respond to comments on its Roadless Area Review and Evaluation (RARE II) process: "The difficulty of considering each comment is a factor the USFS should have considered before it decided to determine three thousand allocations at once. The volume of response may well have been a message to the USFS that the scope of the RARE II process was too broad." *California v. Bergland*, 483 F. Supp. 465, 496-97 (E.D. Cal. 1980), *rev'd in part*, *California v. Block*, 690 F.2d 753 (9th Cir. 1982); *accord* BLM Handbook H-1790-1 – National Environmental Policy Act Handbook § 6.9.22 ("For proposals that may have a large number of comments, we recommend that you develop a systematic way to track substantive comments and BLM's response, such as in a searchable database."). BLM cannot justify its inadequate response to the Trades' comments. Accordingly, BLM cannot finalize the RMP until they respond to the Trades' comments on the environmental analysis as required by NEPA.

IV. The Proposed Land Use Plan Must Comply with FLPMA.

A. The Public Has Not Had a Meaningful Opportunity to Comment on New Elements of the Proposed Land Use Plan.

The Trades protest the inclusion of new components in the Proposed RMP not only as a violation of NEPA but also as a violation of FLPMA. BLM's introduction of new components in the Proposed RMP—including the requirement that mitigation produce a net conservation gain, the mitigation plan, and the monitoring plan—deprived the public of a meaningful opportunity to comment on these components as required by BLM's planning regulations. BLM additionally designated MLPs that were rejected in the Draft RMP developed new operational and timing restrictions, and identified new winter concentration areas. BLM regulations require the public to be provided an opportunity to meaningfully participate in and comment upon preparation of land use plans. 43 C.F.R. § 1610.2. BLM's own planning handbook unequivocally directs the agency to issue a supplement to a draft EIS when "substantial changes to the proposed action, or significant new information/circumstances collected during the comment period" are presented. BLM Land Use Planning Handbook H-1610-1, III.A.10, pg. 24 (Rel. 1-1693 03/11/05). Because the requirement that mitigation produce a net conservation gain, the mitigation plan, and the monitoring plan unquestionably are a "substantial change" when compared to the alternatives included in the Draft RMP, BLM should have prepared and released for comment a supplement to the Draft RMP. Similarly, the new MLPs, timing restrictions and production limitations were not included in the Draft RMP and must be analyzed in detail.

B. The Requirement that Mitigation Achieve a "Net Conservation Gain" is Inconsistent with FLPMA.

The Proposed RMP's requirement that impacts to greater sage-grouse be mitigated to achieve a "net conservation gain" is inconsistent with FLPMA. FLPMA does not authorize BLM to require land users to offset their impacts to achieve a net conservation gain. Rather, BLM may only condition land uses to avoid "unnecessary or undue degradation" to the public lands.

FLPMA directs that the public lands be managed "on the basis of multiple use and sustained yield" and "in a manner which recognizes the Nation's need for domestic sources of minerals . . . from the public lands . . . ." 43 U.S.C. § 1701(8), (12); *see also id.* § 1732(a). When managing the public lands, BLM must prevent "unnecessary or undue degradation" of the public lands—a directive described as the "heart" of FLPMA. 43 U.S.C. § 1732(b); *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of the Interior*, No. 3:08-CV-00616-LRH-WVG, 2012 WL 13780, at *6 (D. Nev. Jan. 4, 2012). "This standard allows the Secretary to impose reasonable mitigating measures to protect environmental values on activities necessary to the exercise of valid existing rights." *Colo. Envt'l Coal*, 165 IBLA 221, 227 (2005). "Unnecessary or undue degradation" has been interpreted as "undue or excessive" and "something more than the usual effects anticipated" from a given land use. *Mineral Policy Ctr. v. Norton*, 292 F. Supp.2d 30, 41 (D.D.C. 2003); *Biodiversity Conservation Alliance*, 174 IBLA 1, 5-6 (2008). This standard must be applied "in light of [FLPMA's] overarching mandate that

the [BLM] employ 'principles of multiple use and sustained yield.'" *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 76 (D.C. Cir. 2011).

FLPMA does not authorize BLM to require that land users such as oil and gas lessees provide mitigation to produce a "net conservation gain." FLPMA implicitly recognizes that, as part of the multiple-use mandate, some degradation to the public lands may occur. As one court succinctly stated, "FLPMA prohibits only unnecessary or undue degradation, not *all* degradation." *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 76 (emphasis in original). If the unnecessary and undue degradation standard "allows the Secretary to impose reasonable mitigating measures to protect environmental values on activities necessary to the exercise of valid existing rights," *Colo. Envt'l Coal*, 165 IBLA at 227, it does not allow BLM to go so far as to condition the exercise of valid existing rights on the demonstration of a "net conservation gain."

The Proposed RMP confirms that a "net conservation gain" is beyond BLM's authority under FLPMA. BLM does not assert that a "net conservation gain" is needed to avoid unnecessary or undue degradation. BLM must revise the Proposed RMP to require that land users avoid unnecessary or undue degradation to the greater sage-grouse and its habitat.

C. BLM Must Prepare an RMP Amendment Before It May Implement Adaptive Management Responses.

BLM must prepare a RMP amendment before it may implement the adaptive management responses identified in the Proposed RMP. The adaptive management strategy in the Proposed RMP calls for responses to "soft" and "hard" triggers based on information collected through monitoring.[5] Proposed RMP, Record No. 7287, pgs. 2-337 – 2-339, Y-60 – Y-62. The Proposed RMP does not, however, define specific responses to the triggers. Rather, the Proposed RMP calls for undefined changes in management. Depending on their nature and scope, BLM cannot implement the Proposed RMP's "responses" to soft and hard triggers without amending the plan. For example, if BLM were to adopt a more conservative management approach, such as that contained in Alternatives B, E, or F, more stringent lease standards, or difference surface disturbance caps, they would be required to amend the RMP.

First, BLM's regulations expressly direct the agency to initiate amendments in response to monitoring and evaluation findings. BLM's planning regulations promulgated under FLPMA direct that amendments "shall be initiated by the need to consider monitoring and evaluation findings . . . ." 43 C.F.R. § 1610.5-5. At least one court has interpreted this regulation to require an amendment "whenever there is a 'need to consider monitoring and evaluation findings . . . ." *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 556 (9th Cir. 2006). Similarly, BLM's Land Use Planning Handbook directs that "RMP revisions are necessary if monitoring and evaluation findings, new data, new or revised policy, or changes in circumstances indicate that decisions for an entire plan or a major portion of the plan no longer serve as a useful guide for resource management." BLM Land Use Planning Handbook, H-1601-1 § VII(C), pg. 46 (Rel. 1-1693 03/11/05). The fact that BLM is utilizing an adaptive management approach does not alter

[5] Notably, BLM has not adopted any policies related to the use of adaptive management in the land use planning process. *See* BLM Land Use Planning Handbook, H-1601-1 § V(C), pg. 37 (Rel. 1-1693 03/11/05).

its obligations under its regulations. *See Adaptive Management: The U.S. Department of the Interior Technical Guide* 39 (2009) ("[A]ll of the applicable laws, regulations, and policies continue to apply to agency actions whether or not adaptive management principles are used in a particular context.").

V. BLM Must Conduct a Formal Rulemaking under the Administrative Procedure Act.

The Trades protest BLM's adoption of several elements of the Proposed RMP—specifically, the compensatory mitigation requirement; the "net conservation gain" standard; and Required Design Features—because each constitutes a substantive rule that BLM cannot apply before they complete the formal rulemaking procedures required by the APA. *See* 5 U.S.C. § 553. These provisions of the Proposed RMP are void until BLM adopts these rules in accordance with APA rulemaking procedures.

A. The Proposed RMP Announces Substantive, Legislative Rules.

The compensatory mitigation requirement, "net conservation gain" standard, and Required Design Features set forth in the Proposed RMP are substantive rules as defined by the APA. The APA defines a rule as a "statement of general or particular applicability and future effect" that is "designed to implement, interpret, or prescribe law or policy" that "includes the approval or prescription for the future of . . . valuations, costs, or accounting, or practices bearing on any of the foregoing." 5 U.S.C. § 551(4). FLPMA directs that BLM "shall promulgate rules and regulations to carry out the purposes" of the Act and that "[t]he promulgation of such rules and regulations shall be governed by" the rulemaking procedures set forth in the Administrative Procedure Act.[6] 43 U.S.C. § 1740 (citing 5 U.S.C. § 553(a)). Until BLM promulgates such rules and regulations, "such lands shall be administered under existing rules and regulations concerning such lands to the extent practical." *Id.* The APA imposes notice and comment procedures on substantive rules but not interpretive rules. *See* 5 U.S.C. § 553.

To determine whether a rule is substantive or interpretive, courts have examined whether the rule explains an existing requirement or imposes an additional one. Rules that explain ambiguous statutory and regulatory terms or restate existing duties are interpretive rules. *United States v. Picciotto*, 875 F.2d 345, 347-48 (D.C. Cir. 1989). In contrast, rules that "affect[ ] individual rights and obligations" are substantive rules. *Coal. for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs*, 464 F.3d 1306, 1317 (Fed. Cir. 2006); *Picciotto*, 875 F.2d at 347-48.

Although it is difficult to draw a bright line to distinguish substantive rules from interpretive rules, courts have identified characteristics of substantive rules. Substantive rules grant rights, create new duties, or impose new obligations. *Coal. for Common Sense in Gov't Procurement v*, 464 F.3d at 1317; *Picciotto*, 875 F.2d at 347-48. Agencies announce substantive rules when they act legislatively by establishing limits or drawing lines—in other words, when agencies "make[ ] reasonable but arbitrary (not in the 'arbitrary or capricious' sense) rules that

[6] In FLPMA, Congress expressly stated that the public property exception in 5 U.S.C. § 553(a)(2) does not apply. 43 U.S.C. § 1740.

are consistent with the statute or regulation under which the rules are promulgated but not derived from it, because they represent an arbitrary choice among methods of implementation." *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010) (quoting *Hoctor v. USDA*, 82 F.3d 165, 170 (7th Cir. 1996) (internal quotations omitted). Additionally, a substantive rule "does not genuinely leave the agency free to exercise discretion." *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993).

1. The Requirement that Lessees Provide Compensatory Mitigation is a Legislative Rule.

The requirement that all lessees must provide compensatory mitigation for impacts to the greater sage-grouse and its habitat is a substantive rule. *See* Proposed RMP at Appd. Y, Y-15. First, this requirement seems to apply categorically to all land users in greater sage-grouse habitat, including on both new and existing leases. This requirement is not limited to the Proposed RMP but appears in all of the land use plans BLM and USFS are developing to protect the greater sage-grouse. Proposed RMP, Appd. Y at Y-15; Proposed Resource Management Plan and Final Environmental Impact Statement for the Billings and Pompeys Pillar Management Plan Revision, pg. 2-125 (June 2015) (Billings-Pompeys Pillar RMP); Proposed Resource Management Plan and Final Environmental Impact Statement for the Buffalo Resource Management Plan Revision at 188 (June 2015) (Buffalo RMP); Hiline District Office Proposed Resource Management Plan and Final Environmental Impact Statement, pg. 46, 192 (June 2015) (Hiline RMP); Idaho and Southwestern Montana Greater Sage-Grouse Proposed Land Use Plan Amendments and Final Environmental Impact Statement, pg. 2-34, MIT-3 (June 2015) (Idaho-SW Montana LUPA); Lewistown Field Office Proposed Resource Management Plan and Final Environmental Impact Statement, pg. 2-25 – 2-26, Action FM-1.2 (June 2015) (Lewiston RMP); Proposed Miles City Field Office Proposed Resource Management Plan and Final Environmental Impact Statement, Table 2-5, pg. 2-46 (June 2015) (Miles City RMP); Nevada and Northeastern California Greater Sage-Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement, pg. 2-89 (June 2015) (Nevada-NE California LUPA); Northwest Colorado Greater Sage-Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement, pg. 2-50 (June 2015) (NW Colorado LUPA); Proposed North Dakota Greater Sage-Grouse Resource Management Plan Amendment and Final Environmental Impact Statement, pg. 2-30 (June 2015) (North Dakota RMP); Oregon Sub-Regional Greater Sage-Grouse Proposed Resource Management Plan Amendment and Final Environmental Impact Statement, pg. 2-56 (June 2015) (Oregon RMP); South Dakota Proposed Resource Management Plan and Final Environmental Impact Statement, pg. 58 (June 2015) (South Dakota RMP); Utah Greater Sage-Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement, pg. 2-17, MA-GRSG-3; pg. 2-20, MA-GRSG-5 (June 2015) (Utah LUPA); Proposed LUPA, pg. 2-59; Appd. D, pg. D-15. Although BLM often characterizes its RMPs as policy statements, *see Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 70-71 (2004), BLM's regulations direct that resource management authorizations such as approvals of APDs conform to and be consistent with the requirements of the Proposed RMA. 36 C.F.R. § 219.15; 43 C.F.R. § 1610.5-3(b). In this respect, the requirement is one of general applicability and not based on site-specific determinations by the agency. *Cf. United States v. Picciotto*, 875 F.3d 345, 348 (D.C. Cir. 1989).

Second, the requirement that lessees provide compensatory mitigation alters the rights and obligations of existing oil and gas lessees and imposes new duties on them. Federal oil and

gas leases vest lessees with "the exclusive right to drill for, mine, extract, remove and dispose of all the oil and gas (except helium) [subject to the lease] . . . ." BLM Form 3110-11 – Offer to Lease and Lease for Oil and Gas (2008). Nothing in the lease form or BLM's regulations require compensatory mitigation. *See id.*; 43 C.F.R. § 3101.1-2; 36 C.F.R. pt. 219; 43 C.F.R. pt. 1600. The Proposed RMP's requirement to provide compensatory mitigation will alter the lessee's right to develop the oil and gas lease; the lessee's ability to exercise its contractual and property rights granted by the lease is now dependent upon it securing compensatory mitigation. Furthermore, the requirement to provide compensatory mitigation will create a new duty for lessees to provide resources—either monetary or in-kind—that they would not otherwise provide under the lease. Accordingly, the requirement that lessees provide compensatory mitigation directly alters the rights and obligations of existing oil and gas lessees and imposes a new duty on them.

Finally, with respect to BLM lands, the Proposed RMP's compensatory mitigation requirement does not derive from the language of FLPMA or BLM's implementing regulations and therefore cannot be characterized as an interpretation of existing law. Nothing in section 202 of FLPMA refers to BLM's ability to require, or land users' obligation to provide, compensatory mitigation or restoration of public lands. *See* 43 U.S.C. § 1712; *see also id.* §§ 1701, 1702. Unlike other provisions of FLPMA, section 202 does not use the terms "mitigate" or "restore." *Compare* 43 U.S.C. § 1712 *with id.* §§ 1783, 1785. Similarly, BLM land use planning regulations and oil and gas leasing regulations do not refer to any ability of BLM to require that lessees mitigate impacts to resources or any obligation of permittees to provide such mitigation. *See* 43 C.F.R. pts. 1600, 3100. The regulations only address BLM's ability to require lessees to minimize impacts to resources. *See* 43 C.F.R. § 3101.1-2 (allowing BLM to require reasonable measures "to minimize adverse impacts to other resource values" (emphasis added)). Likewise, the standard BLM oil and gas leases 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." *See* BLM Form 3110-11 – Offer to Lease and Lease for Oil and Gas § 6 (2008) (emphasis added). Minimization measures, however, differ from compensatory mitigation. The CEQ describes minimization of impacts as "limiting the degree or magnitude of the action at its implementation" and identifies "[c]compensating for the impact by replacing or providing substitute resources or environments" as a separate form of mitigation. *See* 40 C.F.R. § 1508.20(b), (e). Accordingly, the requirement to provide compensatory mitigation cannot be characterized as interpreting FLPMA or BLM regulations. For these reasons, the Proposed RMP's requirement that lessees provide compensatory mitigation is a rule requiring compliance with the APA, including notice and the opportunity for public comment.

2. The Requirement that Oil and Gas Lessees Provide Mitigation that Yields a "Net Conservation Gain" is a Legislative Rule.

Just as the Proposed RMP's requirement to provide compensatory mitigation is a substantive rule, the requirement that mitigation achieve a "net conservation gain" is a substantive rule. Like the requirement to provide compensatory mitigation, this standard applies nationally to all land users in greater sage-grouse habitat because it appears in all of the land use plans BLM and USFS released on May 29, 2015 to protect the greater sage-grouse. Proposed RMP, pgs. 2-13, 2-31; Billings-Pompeys Pillar RMP, pg. 2-125; Buffalo RMP, pg. 78; Hiline RMP, pg. 46, 192; Idaho-SW Montana LUPA, pg. 2-34, MIT-3; Lewistown RMP, pgs. 2-25 – 2-

26, Action FM-1.2; Miles City RMP, Table 2-5, pg. 2-46; Nevada-NE California LUPA, pg. 2-22, Action SSS 2; pg. 2-23, Action SSS-3; North Dakota RMP, pg. 2-30; NW Colorado LUPA, pg. 2-50; Oregon RMP, pg. 2-56; South Dakota RMP, pg. 58; Utah LUPA, pg. 2-17, MA-GRSG-3; 2-20, MA-GRSG-5; Wyoming 9-Plan LUPA, pg. 2-2, 2-81. The "net conservation gain" standard also alters the rights and obligations of existing lessees by requiring that they provide mitigation to a standard not previously required. Additionally, the requirement that mitigation achieve a "net conservation gain" cannot be characterized as an interpretation of existing BLM law. Because FLPMA and BLM regulations do not require mitigation of oil and gas lessees, *see* 43 U.S.C. §§ 1701, 1702, 1712, these authorities cannot be construed to require that mitigation achieve a certain standard let alone a "net conservation gain."

The "net conservation gain" standard constitutes a substantive rule for other reasons as well. First, the requirement that land users provide resources to achieve "benefit[s] or gain[s] above baseline conditions" modifies commonly accepted definitions of mitigation. *See* Proposed RMP, Glossary at Glossary-24. Generally, "mitigation" is considered the restoration of conditions back to the baseline, not in excess of the baseline. Indeed, with respect to wetlands banking—one of the most prominent compensatory mitigation programs—the Army Corps of Engineers has stated that "[t]he fundamental objective of compensatory mitigation is to offset environmental losses." 33 C.F.R. § 332.3(a)(1) (emphasis added). Although the term "mitigation" does not appear in FLPMA or BLM's implementing regulations, and is not defined in the USFS's planning regulations, the CEQ has defined mitigation as "[c]ompensating for the impact by replacing or providing substitute resources." 40 C.F.R. § 1508.20(e) (emphasis added). BLM NEPA regulations do not offer an alternative definition. *See* 36 C.F.R. § 46.30; 43 C.F.R. §220.3. BLM NEPA Handbook similarly defines mitigation as measures that can "reduce or avoid adverse effects to biological, physical, or socioeconomic resources." BLM Handbook H-1790-1 – National Environmental Policy Act at Glossary, pg. `133 (Rel. 1-1710 01/30/208) (emphasis added). Even the Proposed RMP defines mitigation in the conventional sense as including measures that could reduce, avoid, or eliminate adverse impacts" and by "compensating for the impact by replacing or providing substitute resources or environments." Proposed RMP, Glossary at Glossary-21. None of these definitions suggests that mitigation measures should be used to improve conditions above baseline. Accordingly, the requirement introduces a wholly new concept into the definition of mitigation.

Second, the "net conservation gain" standard reflects that BLM acted in a classically legislative fashion. "Net conservation gain" is an example of legislative line-drawing because it represents "an arbitrary choice among methods of implementation." *See Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010) (quoting *Hoctor v. USDA*, 82 F.3d 165, 170 (7th Cir. 1996)). Setting aside the limits of their statutory authority, *see* Section IV, BLM could have selected alternative standards such as "no net loss." *See* 36 C.F.R. § 332.3. By settling on the net conservation gain standard, BLM acted as legislators. As a result, this rule is a formal rule requiring notice and comment under the APA.

3. The Required Design Features Set Forth in the Proposed RMP Are Substantive Rules.

Finally, the Required Design Features constitute substantive rules that must be subject to APA procedures including notice and the opportunity for public comment. First, like the

requirements for compensatory mitigation and net conservation gain standard, these measures uniformly apply either in all PHMAs in the Planning Area. Proposed RMP at Appd. Y. Furthermore, these same measures appear in all sage-grouse related land use plans nationally.[7] The fact that these measures apply categorically and are not based on site-specific information is significant. One commenter has observed that if "the Forest Service were to begin applying an automatic surface-use restriction as a condition to APD approvals on all lands having certain characteristics, such as old growth forests," arguably the "standard constitutes a new substantive rule which is void unless adopted pursuant to the APA rulemaking requirements." Charles L. Kaiser et al., *Surface-Use Regulation of Federal Oil and Gas Leases: Exploring the Limits of Administrative Decisions*, 38 Rocky Mtn. Min. L. Found. § 19.04(2)(a)(ii) (1992) (citing *United States v. Picciotto*, 875 F.2d 345 (D.C. Cir. 1989)). In contrast, "to the extent BLM and Forest Service attach conditions of approval solely on the basis of permit-by-permit fact-specific analyses, the APA rulemaking requirements are probably not implicated." *Id.* n.178.

B. The Land Use Planning Process Is Not Equivalent to the Formal Rulemaking Procedures under the APA.

BLM cannot finalize the provisions of the Proposed RMP requiring compensatory mitigation, requiring that mitigation achieve a "net conservation gain," until they follow formal rulemaking procedures, as required by the APA. *See* 5 U.S.C. § 553. The Proposed RMP does not constitute a formal rulemaking process. First, FLPMA specifically requires BLM to promulgate rules through the APA rulemaking process at 5 U.S.C. § 553(a)(2) but does not require land use plans to follow APA rulemaking procedures. *Compare* 43 U.S.C. § 1740 *with id.* § 1712.

Second, the public has not been afforded an adequate opportunity to comment on certain portions of the Proposed RMP that constitute legislative rules as required by 5 U.S.C. § 553(d). The APA allows for a comment period of "not less than" 30 days, *see* 5 U.S.C. § 553(d). In this case, because BLM introduced many rules in the Proposed RMP (rather than the Draft LUPA)—mitigation requirement and net conservation gain standard—the public only has the opportunity to protest these components during a fixed 30-day window. *See* 43 C.F.R. § 1610.5-2(a)(1).

Finally, the provisions of the Proposed RMP constituting legislative rules have not been subject to notice required by 5 U.S.C. § 553(b). Although notice of the Proposed RMP was published in the Federal Register, the notice only informed the public that BLM had revised its land use plans. The notice did not alert the public to the fact that BLM was establishing new legislative rules that would apply in all greater sage-grouse habitat nationwide. Likewise, the notice did not inform the public that BLM was altering its regulation at 43 C.F.R. § 3101.1-4. Accordingly, the public had every reason to believe BLM was only finalizing a land use plan, which is a statement of priorities to guide future actions, rather than a formal rule. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 70-71 (2004). Because the procedures associated with the Proposed RMP are not comparable to the formal rulemaking provisions of the APA, BLM

[7] Some variation may exist among the Required Design Features outlined in each individual LUPA but, on the whole, the Required Design Features set forth in the Proposed RMP are the same as those identified in the NTT Report. *See* NTT Report Appd. D.

may not implement the legislative rules set forth in the Proposed RMP until the complete the formal rulemaking process required by the APA.

VI. The Bureau of Land Management Improperly Attempts to Regulate Air Emissions

The Trades protest BLM's Goals and Objectives for air quality identified on Table 2-9, pg. 2-86 of the Proposed RMP because they are potentially illegal and are beyond BLM's jurisdiction and authority. Additionally, the Trades protest BLM's adoption of the Air Resources Management Plan, Proposed Bighorn RMP, Appd. J, because it exceeds BLM's authority to regulate air emissions. The Trades commented on the air quality portion of the Draft RMP. *See* Trade Comments, pgs. 15 – 18.

BLM improperly, and potentially illegally, attempts to regulate air quality and air emissions in the Proposed RMP. BLM's objectives in the Proposed RMP include maintaining concentrations of criteria pollutants, maintaining concentrations of prevention of significant deterioration (PSD) pollutants, reducing visibility-impairing pollutants, and reducing atmospheric deposition pollutants. Proposed RMP, Table 2-9, Objectives PR:1.1, PR:1.2, PR:2.1, PR:2.2, pg. 2-86. Although the Trades support BLM's laudable goal of protecting air quality, BLM does not, as a matter of clear and unequivocal Federal law, have the authority to impose air emissions standards, ensure that air quality standards are maintained, or protect visibility within the Cody or Worland Field Offices.

BLM does not have direct authority over air quality or air emissions under the Clean Air Act (CAA). 42 U.S.C. §§ 7401 – 7671q. Under the express terms of the CAA, the EPA has the authority to regulate air emissions. In Wyoming, the EPA has delegated its authority to the Wyoming Department of Environmental Quality (WDEQ). See 42 U.S.C. §§ 7401 - 7671q; 40 C.F.R. pts. 50 99; 40 C.F.R. § 52.2620 (Wyoming's State Implementation Plan); Wyo. Stat. Ann. §§ 35-11-201 to 214 (LexisNexis 2011); Wyo. Air Quality Stds. & Regs. (WAQSR) Chs. 1 14. The Secretary of the Interior, through the IBLA, has determined that, in Wyoming, the State of Wyoming and not BLM has authority over air emissions:

> In Wyoming, ensuring compliance with Federal and State air quality standards, setting maximum allowable limits (NAAQS and WAAQS) for six criteria pollutants CO (carbon monoxide), SO2 (sulfur dioxide), NO2, ozone and particulate matter (PM10 and PM2.5), and setting maximum allowable increases (PSD Increments) above legal baseline concentrations for three of these pollutants (SO2, NO2, and PM10) in Class I and Class II areas is the responsibility of WDEQ, subject to EPA oversight.

Wyoming Outdoor Council, et al., 176 IBLA 15, 26 (2008). Decisions of the IBLA are binding upon BLM and have the same force and effect of a Secretarial decision. 43 C.F.R. § 4.1 (noting that the Office of Hearings and Appeals, which includes the IBLA, may decide matters as fully and finally as the Secretary of the Interior); *see also IMC Kalium Carlsbad, Inc. v. Interior Bd. of Land Appeals*, 206 F.3d 1003, 1009 (10th Cir. 2000) (holding that IBLA has de novo review authority over the decisions of subordinate agencies such as BLM). Given previous determinations by the Secretary, BLM must revise the objectives included in the Proposed RMP to recognize WDEQ's, and not BLM's, authority over air quality and air emissions in Wyoming.

BLM does not have the authority to impose regulations or mandate control measures on emission sources, including oil and gas operations, within Wyoming. *Wyoming Outdoor Council, et al.*, 176 IBLA at 26.

With respect to potential visibility impacts, BLM's authority is also limited by existing federal law. Under the CAA, a federal land manager's authority is strictly limited to considering whether a "proposed major emitting facility will have an adverse impact" on visibility within designated Class I areas. 42 U.S.C. § 7475(d)(2)(B). Oil and gas operations do not meet the definition of a major emitting facility. Further, under the CAA, the regulation of potential impacts to visibility and authority over air quality in general rests with the WDEQ. 42 U.S.C. § 7407(a). The goal of preventing impairment of visibility in Class I areas will be achieved through the regional haze state implementation plans (SIPs) that were recently approved. 42 U.S.C. § 7410(a)(2)(J); 79 Fed. Reg. 5032 (Jan. 30, 2014); 77 Fed Reg. 73,926 (Dec. 12, 2012). Although federal land managers with jurisdiction over Class I areas may participate in the development of regional haze SIPs, BLM has no such jurisdiction in Wyoming because it does not manage a Class I area in the State. 42 U.S.C. § 7491; *see also* Wyo. Stat. Ann. §§ 35-11-201 – 214. Accordingly, BLM has no authority over air quality and cannot impose emissions restrictions, either directly or indirectly, on oil and natural gas operations in Wyoming, particularly if the overall goal is to reduce potential visibility impacts.

BLM should also recognize that the agency does not have the authority to implement, regulate, or enforce the PSD increment. BLM's lack of authority regarding PSD increment analysis was recently recognized in the Memorandum of Understanding (MOU) issued by the DOI, Department of Agriculture, and the EPA which indicates that BLM NEPA documents relating to oil and gas activities will model PSD increment consumption for informational purposes only. *See* Memorandum of Understanding Among Department of Agriculture, DOI and the Environmental Protection Agency Regarding Air Quality Analyses and Mitigation for Federal Oil and Gas Decisions Through the National Environmental Policy Act Process (EPA MOU), Section V.G (June 23, 2011). Wyoming's PSD program was approved by the EPA in June of 2012, 77 Fed. Reg. 33021 (Jun. 12, 2012), and currently controls Wyoming's enforcement of the PSD program within the State of Wyoming. There is no justifiable or legal support for BLM's alleged authority over PSD analysis. Given the limits on BLM's authority, and the fact a well-defined regulatory scheme exists to control visibility and PSD increment analysis, BLM must revise the objectives set forth in the Proposed Bighorn RMP regarding visibility and PSD consumption.

Further, contrary to BLM's representations in Appendix J, BLM is not authorized or required by FLPMA to regulate air quality. *See* Proposed RMP, Appd. J, pg. 7 ("BLM has the authority and responsibility under the Federal Land Policy and Management Act to manage public lands in a manner that will protect the quality of air and atmospheric values."). FLPMA does not require or authorize BLM to enforce air quality controls. Instead, FLPMA provides: "In the development and revision of land use plans, the Secretary shall— . . . (8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementations plans." 43 U.S.C. § 1712(c)(8). The language of the statute demonstrates BLM is required to "provide for compliance," not independently regulate air emissions. *Id*. So long as the Bighorn RMP does not interfere with the enforcement of state and federal pollution laws, BLM has satisfied its obligations under FLPMA. FLPMA

does not authorize BLM to independently regulate air quality control measures such as those imposed in the Proposed RMP.

Finally, from a NEPA perspective, BLM may analyze air quality impacts, but NEPA does not authorize BLM to impose air emissions regulations. As BLM is aware, NEPA is a procedural statute intended to produce informed decision making by federal agencies. *United States Dep't of Trans. v. Public Citizen, 541 U.S. 752, 756-57 (2004); Lee v. United States Air Force*, 354 F.3d 1229, 1237 (10th Cir. 2004). While NEPA mandates that agencies follow certain procedures when reaching decisions that significantly affect the environment, NEPA does not impose any requirement on agencies to reach a particular decision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989); Lee, 354 F.3d at 1237. Moreover, NEPA does not require agencies "to elevate environmental concerns over other valid concerns." *Lee*, 354 F.3d at 1237. Once the agency adequately identifies and evaluates environmental concerns, "NEPA places no further constraint on agency actions." *Pennaco Energy, Inc. v. United States Dep't of the Interior*, 377 F.3d 1147, 1150 (10th Cir. 2004). Accordingly, NEPA provides no basis for BLM to regulate air quality or impose air emissions regulations.

Given these limitations, BLM must revise its air quality management Goals, Objectives, and Management Actions in Table 2-9 of the Proposed RMP. BLM cannot attempt to impose air emission regulations through its normal management responsibilities. The State of Wyoming, with oversight from the EPA, has primacy over air quality issues within Wyoming. Rather than attempting to regulate air quality or air emissions, BLM should defer to the expertise of the proper regulatory authority, the WDEQ, and presume that air quality will meet the applicable standards, or that WDEQ will take appropriate action to ensure that its air quality standards are met. From a NEPA perspective, BLM should simply inform the public that WDEQ will monitor and enforce air quality standards in Wyoming, and that BLM will assist with WDEQ actions to the extent permitted by law.

BLM Bighorn Air Resources Management Plan, (Air Plan) included as Appendix J to the Proposed Bighorn RMP, similarly represents a legally impermissible extension of BLM authority with respect to air matters. The Air Plan is inappropriate for several reasons. First, the provisions of the Air Plan set forth in detail when and how BLM will conduct air quality modeling for oil and gas operations. The provisions of Appendix J do not comply with the MOU among the United States Department of Agriculture, DOI, and the United States EPA regarding air quality analyses and mitigation for federal oil and gas decisions through the NEPA process. This Memorandum, executed on June 23, 2011, is the current national management guidance determining when and how air quality modeling for oil and gas projects will be conducted. The appendix will create unnecessary confusion and even contradicting requirements of when and how air quality modeling and monitoring should be performed. It is inappropriate for BLM Field Offices to attempt to develop their own procedures for air quality modeling when the DOI has agreed to specific provisions on a national scale. BLM Director should eliminate the vast majority of Appendix J in the Proposed RMP and simply include a copy of the current national policy as exemplified in the MOU between the DOI, Department of Agriculture, and the EPA. Any deviation from this national MOU should be eliminated in the Proposed RMP.

More importantly, the Bighorn Air Resources Management Plan unlawfully attempts to impose specific mitigation measures and emission limitations on oil and gas operations.

Appendix J of the Proposed Bighorn RMP Air Resources Plan provides that BLM will "require addition air emission control measures and strategies . . . if proposed or committed measures are insufficient to achieve air quality goals [] and objectives []," and that project proponents "may be required to apply mitigation including but not limited to best management practices, and other control technologies or strategies." Proposed RMP, Appd. J, pg. J-10. Further, project proponents "will be required to identify operator-committed measures in [their] proposal[s]." Proposed RMP, Appd. J, pg. J-10. BLM also suggests that it "can require specific actions and measures necessary to protect air quality in response to adverse impacts at the project permitting stage." Proposed RMP, Appd. J, pg. J-8. The Trades appreciates BLM's recognition that it may only attach additional restrictions at the permitting stage if consistent with valid existing rights. Proposed RMP, Appd. J, pg. J-8. Nevertheless, given BLM's lack of authority over air quality, it is inappropriate for the agency to impose emissions or mitigation measures on oil and gas operations at all. Instead, emission controls should only be imposed by agencies with expertise and authority over air quality in Wyoming, which, according to the Secretary of the Interior, is the WDEQ. *See Wyoming Outdoor Council, et al.*, 176 IBLA at 26. BLM should not attempt to control emissions on oil and gas operations within the State of Wyoming.

The trades also object tot eh BLM's unlawful attempt to require operators to submit detailed emission inventories with individual APDs prior to the completion of the Class 1 "characterization." Proposed RMP, Appd. J, pg. J-7. The requirement creates a duplicative air emissions calculation requirement which may contradict EPA methods. EPA requires emissions to be calculated based on the potential to emit of the current or planned facility. Emissions are calculated and permits are sought when business concerns dictate the facility needs to be changed (or after a change depending on the permitting program) in a way that crosses additional emissions thresholds. Furthermore, it is impossible to project oil and gas emissions through the life of a project due to variables that may impact production such as the oil price, new technology, economics of the basin, etc. It is likely that BLM lifetime emissions estimates will be inconsistent with EPA methods and may cause confusion regarding air permitting requirements. BLM should remove this requirement.

Finally, BLM imposes a number of unreasonable air monitoring and reporting measures in the Comprehensive Air Resources Protection Plan (CARPP). Section 2.3.2, for example, allows BLM to require project proponents to conduct air quality monitoring. *See* Proposed RMP, Appd. J, pg. J-9. If no monitoring stations are available, BLM will require project proponents to site, install, operate, and maintain any required equipment. Bighorn RMP, Appd. J, pg. J-9. This is an incredibly burdensome requirement. Installing and maintaining a monitoring station for a single year can cost over $300,000, and $20,000 to $30,000 per year in maintenance costs thereafter. There already exists an extensive network of air monitoring stations throughout Wyoming, which can provide representative data for most, if not all, projects within the Planning Area. BLM should not impose such unreasonable measures because they are unnecessary and very burdensome on project proponents, with no corresponding benefits.

Given the express and unequivocal language from the Secretary of the Interior that WDEQ, not BLM, has authority to regulate air quality in Wyoming, BLM should remove the language in Table 2-9 and Appendix J providing for imposition of emission controls and restrictions. Accordingly, all of Appendix J, and Table 2-9 from pages 2-86 to 2-88 should be eliminated from the Final Record of Decision and Approved Resource Management Plan.

VII. The Trades Protest BLM's Scientific Basis for the Restrictions on Oil and Gas Leasing and Development in the Proposed RMP.

A. BLM Inappropriately Relied Upon the NTT and COT Reports to Justify the Restrictions on Oil and Gas Leasing and Development in the Proposed RMP.

The stipulations, restrictions, and conservation measures in the Proposed RMP are largely based on the U.S. Fish and Wildlife Service's *Greater Sage-Grouse (Centrocercus urophasianus) Conservation Objections: Final Report* (Feb. 2013) (COT Report) and BLM's *Report on National Greater Sage-Grouse Conservation Measures Produced by the BLM Sage-Grouse National Technical Team* (Dec. 2011) (NTT Report). Reliance on these reports is arbitrary and capricious under the APA. 5 U.S.C. § 706(2)(A). The NTT Report and the COT Report failed to utilize the best available science; failed to adhere to the standards of integrity, objectivity, and transparency required by the agency guidelines implementing the Data Quality Act (DQA), Consolidated Appropriates Act of 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-153 – 2763A-154 (2000); and suffered from inadequate peer review. BLM should remove from the Final Record of Decision all references to these reports and any conservation measures that rely upon them, such as noise limitations and most of the required design features.[8] The Trades commented on BLM's inappropriate reliance upon these reports in the DRMP/Draft EIS. Trades' Comments on the Supplemental EIS, pg. 1 – 3; 27 - 32.

1. The NTT and COT Reports Fail to Utilize the Best Available Science.

Federal agencies are generally required to use the best available science in carrying out their regulatory duties, including land use planning. *See* 67 Fed. Reg. 8452, 8457 (Feb. 22, 2002) (OMB Guidelines) (quoting 42 U.S.C. § 300g-1(b)(3)(A)); Executive Order 13563, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011) (requiring agencies to use the "best available science" in carrying out their regulatory functions); U.S. Dep't of the Interior, Information Quality Guidelines Pursuant to Section 515 of the Treasury & General Gov't Appropriations Act for Fiscal Year 2001, Part II(4)(a), at 2 (undated); *see also* 36 C.F.R. § 219.3 (requiring Forest Service land use planning decisions to be based on best available science). Several federal courts have interpreted this standard to require consideration of "all existing scientific evidence relevant to the question at hand"; agencies may not ignore relevant scientific information.[9] *Ecology Ctr.*,

[8] Western Energy Alliance, Petroleum Association of Wyoming, Montana Petroleum Association, and other stakeholders filed Data Quality Act challenges in March 2015 to the NTT Report, the COT Report, and the U.S. Geological Survey's (USGS) Greater Sage-Grouse Monograph with BLM, FWS, and USGS. The Trades incorporate these challenges, and their exhibits, into this Protest. *See* Western Energy Alliance, et al., Data Quality Act Challenge to U.S. Department of the Interior Dissemination of Information Presented in the Bureau of Land Management National Technical Team Report (Mar. 18, 2015) ("NTT DQA Challenge"), available at http://www.blm.gov/wo/st/en/National_Page/Notices_used_in_Footer/data_quality.html; Western Energy Alliance, et al., Data Quality Act Challenge to U.S. Department of the Interior Dissemination of Information Presented in the U.S. Fish and Wildlife Service Conservation Objectives Team Report (Mar. 18, 2015) ("COT DQA Challenge"), available at https://www.fws.gov/informationquality/; Western Energy Alliance, et al., Data Quality Act Challenge to U.S. Department of the Interior Dissemination of Information Presented in the U.S. Geological Survey Greater Sage-Grouse Monograph (Mar. 18, 2015), Attachment 5, available at http://www.usgs.gov/info_qual/greater_sage-grouse_ecology-and-conservation.html.

[9] The cited cases interpret the best available science standard in actions brought under the ESA, which does not govern BLM's land use planning decisions.

Inc. v. U.S. Forest Serv., 451 F.3d 1183, 1194 n.4 (10th Cir. 2006) (citing *Heartwood Inc. v. U.S. Forest Serv.*, 380 F.3d 428, 436 (8th Cir. 2004)); *see Kandra v. United States*, 145 F. Supp. 2d 1192, 1208 (D. Or. 2001) (holding that agencies may not ignore available biological information). The NTT and COT Reports do not satisfy this standard.[10]

For example, at least one reviewer has noted numerous technical errors in the NTT Report, including use of citations that are not provided in the "Literature Cited" section. Megan Maxwell, *BLM's NTT Report: Is It the Best Available Science or a Tool to Support a Pre-determined Outcome?*, p. 13-14 (May 20, 2013) (NWMA Review), Attachment 4. In addition, for two of the most frequently cited authors in the NTT Report, J.W. Connelly and B.L. Walker, 34 percent of the citations had no corresponding source available to review. *Id.* at 14. Additionally, there are articles listed in the "Literature Cited" section that are not directly referenced and do not appear to have been used within the NTT Report itself. *Id.* These technical errors limit the ability of outside reviewers or the public to verify claims in the NTT Report and reduce the report's scientific credibility.

The NTT Report also cites authority misleadingly in a number of cases. NWMA Review at 14. For example, the NTT Report stipulates that with regard to fuel management, sagebrush cover should not be reduced to less than 15 percent. NTT Report at 26. However, the source cited for this proposition, John W. Connelly, et al., *Guidelines to Manage Sage-Grouse Populations & their Habitats*, 28 Wildlife Society Bulletin 967 (2000) ("Connelly et al. 2000"), does not support the NTT Report's conclusion. NWMA Review at 14. Rather, Connelly et al. 2000 states that land treatments should not be based on schedules, targets, and quotas. Connelly et al. 2000 at 977. Connelly et al. 2000 distinguished between types of habitat and provided corresponding sagebrush canopy percentages which vary from 10 percent to 30 percent depending on habitat function and quality. NWMA Review at 14 (citing Connelly et al. 2000 at 977, tbl. 3). The NTT Report failed to explain how this nuanced range of canopy cover percentages, which varies for breeding, brood-rearing, and winter habitat, as well as for mesic sites and arid sites, could translate into a range-wide 15 percent canopy cover standard. Misleading citations, failure to properly reference and list sources in the Literature Cited section, and similar technical errors render the NTT Report difficult to read, difficult to verify, and far less than the "best available science."

The NTT Report also fails to adequately support its propositions and conclusions. For example, the NTT Report provided no scientific justification for the three percent disturbance cap discussed in that report. Rather, the disturbance cap was based upon the "professional judgment" of the NTT authors and the authors of the studies they cited, which represents opinion, not fact. *See* Western Energy Alliance, et al., Data Quality Act Challenge to U.S. Department of the Interior Dissemination of Information Presented in the Bureau of Land Management National Technical Team Report at 30 (Mar. 18, 2015) ("NTT DQA Challenge"),

[10] Some courts have declined to hold agencies to a best available science standard in NEPA actions and have required agencies only to perform a reasoned analysis of the evidence before them. *See, e.g., Greer Coal., Inc. v. U.S. Forest Serv.*, 470 F. App'x 630, 633 (9th Cir. 2012) (citing *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 988 (9th Cir. 1985)). The Proposed RMP, however, also fails this standard because the agencies ignored "evidence before them" that contradicted the results and conclusions in the NTT and COT Reports. *Greer Coal., Inc. v. U.S. Forest Serv.*, 470 F. App'x 630, 633 (9th Cir. 2012).

Attachment 5. Other scientific literature not considered in the NTT Report has refuted the belief that there is a widely accepted or "magic" number of habitat patch size or population that can defensibly be used to identify a viable population of any species, much less greater sage-grouse. Curtis H. Flather, et. al, *Minimum Viable Populations: Is There a "Magic Number" for Conservation Practitioners?*, 26 Trends in Ecology & Evolution 307, 314 (June 2011), Attachment 6. Moreover, the Proposed RMP's noise restrictions, also recommended by the NTT report, are based upon flawed studies that relied on unpublished data and speculation, and employed suspect testing equipment under unrealistic conditions. NTT DQA Challenge at 42 – 46. Conservation measures based upon "professional judgment" and flawed studies do not constitute the best available science, and BLM should not have relied upon these studies or the NTT Report in the Proposed RMP.

Finally, the NTT Report failed to cite or include numerous scientific papers and reports on oil and gas operations and mitigation measures that were available at the time the report was created. *See* NTT DQA Challenge, Exhibit C. For example, the NTT Report failed to cite a 2011 paper (which was made available to the NTT authors) that discusses the inadequacy of the research relied upon by the NTT Report in light of new technologies and mitigation measures designed to enhance efficiency and reduce environmental impacts. *E.g.*, Rob R. Ramey, Laura M. Brown, & Fernando Blackgoat, *Oil & Gas Development & Greater Sage-Grouse (Centrocercus urophasianus): A Review of Threats & Mitigation Measures*, 35 J. of Energy & Development 49 (2011) ("Ramey, Brown, & Blackgoat"), Attachment 7. As explained by Ramey, Brown, and Blackgoat, studies released prior to the NTT Report's publication were based upon older, more invasive forms of development:

> Current stipulations and regulations for oil and gas development in sage-grouse habitat are largely based on studies from the Jonah Gas Field and Pinedale anticline. These and other intensive developments were permitted decades ago, using older, more invasive technologies and methods. The density of wells is high, largely due to the previous practice of drilling many vertical wells to tap the resource (before the use of directional and horizontal drilling of multiple wells from a single surface location became widespread), and prior to concerns over sage-grouse conservation. This type of intensive development set people's perceptions of what future oil and gas development would look like and what its impact to sage-grouse would be. These fields, and their effect on sage-grouse, are not necessarily representative of sage-grouse responses to less intensive energy development. Recent environmental regulations and newer technologies have lessened the threats to sage-grouse.

Ramey, Brown, & Blackgoat at 70; *see also* NTT DQA Challenge, Exhibit A at 5 (stating that reliance on older data is not representative of current development and thus an inappropriate basis for management prescriptions). The NTT authors' refusal to consider this paper and to rely instead on papers that address outdated forms of oil and gas development renders most of the NTT Report's recommendations for oil and gas development inapplicable to current practices.

The effects of oil and gas development are overstated in the papers cited above and similar literature on the impacts of energy development on sage-grouse. Oil and gas development in Wyoming, home to nearly half the entire sage-grouse population, has affected no

more than 25 percent of the over 2,350 leks in Wyoming. David H. Applegate & Nicholas L. Owens, *Oil & Gas Impacts on Wyoming's Sage-Grouse: Summarizing the Past & Predicting the Foreseeable Future, 8 Human-Wildlife Interactions* 284, 284 (2014) ("Applegate & Owens"), Attachment 8. Yet, much of the existing literature on sage-grouse assumes oil and gas development in sage-grouse habitat is widespread and the primary ongoing threat to sage-grouse in the eastern portion of its range (Colorado, Montana, Utah and Wyoming). Not only has the existing level of impact from oil and gas impacts been severely overstated, but, more importantly, the technology associated with oil and gas development has shifted dramatically over the last decade from vertical wells with dense well pad spacing to directional and horizontal wells with significantly less disturbance and fragmentation per section of land developed. Applegate & Owens at 287 – 89. In 2012, the disturbance reduction resulting from this dramatic shift in drilling technology may have approached approximately 70 percent in Wyoming alone. *Id.* at 289. All pre-2014 literature that purports to characterize oil and gas impacts to sage-grouse is derived from oil and gas development from vertically drilled fields. As such, the scientific literature on foreseeable impacts to sage-grouse from oil and gas development is outdated and fails to recognize the fundamental change in drilling technology that is being deployed in oil and gas producing basins across the United States. BLM should not rely on the NTT Report when forming oil and gas stipulations and conservation measures in the Proposed RMP, because the NTT Report does not represent the best available science.

The COT Report also fails to utilize the best available science, and BLM inappropriately relied upon it in the Proposed RMP. The COT Report provides no original data or quantitative analyses, and therefore its validity as a scientific document hinges on the quality of the data it employs and the literature it cites. *See* Western Energy Alliance, et al., Data Quality Act Challenge to U.S. Department of the Interior Dissemination of Information Presented in the U.S. Fish and Wildlife Service Conservation Objectives Team Report, Exhibit A at 1 (Mar. 18, 2015) ("COT DQA Challenge"), Attachment 9. The COT Report, like the NTT Report, fails to cite all of the relevant scientific literature and, as a result, perpetuates outdated information and assumptions. COT DQA Challenge, Exhibit A at 1. For example, the COT Report ignores numerous studies on the effects of predation on sage-grouse populations, and therefore underestimates the significance of predation as a threat. COT DQA Challenge at 56 – 63. The COT Report also relies upon a paper by Edward Garton from 2011 for its threats analysis, population definitions, current and projected numbers of males, and probability of population persistence. COT Report at iv, 12, 16, 29, 30, 32 (citing Edward O. Garton, et al., *Greater Sage-Grouse Population Dynamics & Probability of Persistence, in Greater Sage-Grouse: Ecology & Conservation of a Landscape Species & Its Habitats* 293 (Steven T. Knick & John W. Connelly eds., 2011) ("Garton et al. 2011")). This paper contains serious methodological biases and mathematical errors. COT DQA Challenge, Exhibit A at 2. Furthermore, the paper's data and modeling programs are not public and thus not verifiable nor reproducible. *Id.* Finally, the COT Report provides a table assigning various rankings to greater sage-grouse threats, but gives no indication that any quantitative, verifiable methodology was used in assigning these ranks. *See* COT Report at 16 – 29, tbl. 2. Absent a quantifiable methodology, these rankings are subjective and BLM should not rely upon any conservation measures derived from them.

The COT Report also fails to even mention hunting, which is a well-documented source of greater sage-grouse mortality. *See generally* COT Report; Kerry P. Reese & John W. Connelly, Harvest Mgmt. for Greater Sage-Grouse: *A Changing Paradigm for Game Bird*

Mgmt., in Greater Sage-Grouse: Ecology & Conservation of a Landscape Species & Its Habitats 101, 106 tbl. 7.3 (Steven T. Knick & John W. Connelly eds., 2011) (showing estimated harvest of 207,433 birds from hunting from 2001 through 2007) ("Reese & Connelly"). Comparing the FWS reported harvest rates in the 2010 12-month finding on the greater sage-grouse, 75 Fed. Reg. 13,909 (Mar. 23, 2010), to the population projections developed by Garton et al. 2011 suggests that harvest rates for sage-grouse exceeded 20 percent of the overall spring population for approximately 25 years from 1970 thru 1995. Harvest rate declines after 1995 correspond to sage-grouse population increases since that time. BLM and the Department of the Interior have failed to discuss or reconcile these two data sets, both of which were relied upon in the 2010 listing. The best available scientific data suggests an ongoing decrease in the harvest rate that is deemed acceptable from 30 percent in 1981 to 20 to 25 percent in 1987 to five to 10 percent in 2000. Reese & Connelly at 110 – 11. High harvest rates coupled with limited lek counts suggest hunting may have been a primary cause of suggested significant population declines from the 1960s through the 1980s. Further, as noted below in text taken directly from the 2010 12-month finding, FWS suggests over 2.3 million birds were harvested in the 1970s alone:

> Harvest levels have varied considerably since the 1950s, and in recent years have been much lower than in past decades (Figure 3) (Service 2009, unpublished data). From 1960 to 1980, the majority of sage-grouse hunting mortality occurred in Wyoming, Idaho, and Montana, accounting for at least 75 to 85 percent of the annual harvest (Service 2009, unpublished data). In the 1960s harvest exceeded 120,000 individuals annually for 7 out of 10 years. Harvest levels reached a maximum in the 1970s, being above 200,000 individuals in 9 of 10 years with the total estimate at 2,322,581 birds harvested for the decade. During the 1980s, harvest exceeded 130,000 individuals in 9 of 10 years (Service 2009, unpublished data). The harvest was above 100,000 annually during the early 1990s but in 1994 dropped below 100,000 for the first time in decades.

75 Fed. Reg. at 13,963. Rather than address this quantifiably documented source of mortality, the COT Report focuses on purported threats with no validly documented connection to population declines. COT DQA Challenge, Exhibit A at 2. In doing so, the COT Report "elevates hypothetical threats to the level of real threats while selectively ignoring known sources of sage-grouse mortality." *Id.*

The COT Report's errors, as described above, include reliance upon flawed studies, selective citation to some literature while ignoring other literature,[11] and failure to address known and significant threats to sage-grouse while exaggerating the impact of hypothetical threats. Due to these errors and similar errors in the NTT Report, the COT Report and NTT Report are not the best available science and BLM's reliance upon these documents in the Proposed RMP was in error. BLM should remove all references to these reports and all conservation measures derived from them in the Final Record of Decision.

[11] The COT Report does not address numerous studies. *See* COT DQA Challenge, Exhibit C.

2. The NTT and COT Reports Do Not Adhere to the Requirements of the Data Quality Act and its Implementing Guidelines.

The NTT and COT Reports do not adhere to the standards set forth in the DQA or the Office of Management and Budget's (OMB) and the DOI's implementing guidelines and policies. In its Consolidated Appropriations Act for Fiscal Year 2001, Congress directed the OMB to issue guidelines "for ensuring and maximizing the quality, objectivity, utility, and integrity" of information disseminated by federal agencies. Pub. L. No. 106-554, § 515(a), 114 Stat. 2763, 2763A-153 – 2763A-154 (2000). The OMB's guidelines, in turn, require federal agencies to issue their own guidelines "for ensuring and maximizing" information quality. Pub. L. No. 106-554, § 515(b), 114 Stat. 2763, 2763A-154. The OMB issued its guidelines in February 2002, *see* OMB Guidelines, and DOI and BLM have both issued guidelines as well. U.S. Dep't of the Interior, Information Quality Guidelines Pursuant to Section 515 of the Treasury & General Gov't Appropriations Act for Fiscal Year 2001 (undated) (DOI Guidelines); Bureau of Land Mgmt., Information Quality Guidelines (Feb. 9, 2012) (BLM Guidelines). An agency's failure to follow its own procedures, even those established in agency guidance documents, is arbitrary and capricious. *See Ecology Ctr., Inc. v. Austin*, 430 F.3d 1057, 1069 (9th Cir. 2005), *overruled on other grounds*, *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008); *see also S. Utah Wilderness Alliance*, 2012 WL 1184350, *15 (Mar. 8, 2012) ("[A]gency-wide procedural requirements . . . are binding on BLM, and will generally be enforced by the Board, when they are 'reasonable and consistent with the law[.]").

OMB's guidelines require that all information disseminated by federal agencies meet basic standards of objectivity, utility, and integrity. OMB Guidelines, Part III(1), 67 Fed. Reg. at 8459; *see* DOI Guidelines, II, at 1; BLM Guidelines, 2(a), at 7. Objectivity requires that information be presented in an accurate, clear, complete, and unbiased manner; that information be given an appropriate context, including dissemination of other information if required; and that the agency identify its sources together with supporting data and models. OMB Guidelines, V(3)(a), 67 Fed. Reg. at 8459; *see* BLM Guidelines, 2(a), at 7; *see also* Memorandum of March 9, 2009: Scientific Integrity, 74 Fed. Reg. 10,671, 10,671 (Mar. 11, 2009) (requiring that information be appropriately and accurately reflected by agencies). Utility refers to the usefulness of the information to its intended users and the public. OMB Guidelines, V(2), 67 Fed. Reg. at 8459; BLM Guidelines, 2(a), at 7.

Among other things, objectivity and utility require that data and methodology be made available to the public so qualified individuals may determine whether the results are reproducible and verifiable. OMB Guidelines, V(3)(b)(ii)(B), 67 Fed. Reg. at 8459 (requiring that data and methodology be made sufficiently transparent that an independent reanalysis can be undertaken, absent countervailing interests in privacy, trade secrets, intellectual property, and confidentiality protections); DOI Guidelines, II(2), at 2; BLM Guidelines, 2(c), at 8. Furthermore, information disseminated to the public must be subject to especially rigorous review when the agency decides not to release supporting data or where disseminated information is "influential." OMB Guidelines, V(3)(b)(ii); DOI Guidelines, II, at 1; BLM Guidelines, 2(b), at 7 (defining influential information as information that will have "a clear and substantial impact at the national level for major public and private policy decisions as they relate to Federal public lands and resources issues").

The NTT and COT Reports do not satisfy these standards. Both reports rely on faulty studies with questionable methodology and assumptions, as detailed above. The NTT Report contained numerous references to studies for which it did not provide citations, and it failed to provide supporting data for many of the non-public studies it cited. NWMA Review at 14; NTT DQA Challenge at 25 – 26. The NTT Report gave no reason for this omission of key data, which is inconsistent with the guidelines implementing the DQA. *See* OMB Guidelines, V(3)(b)(ii)(B), 67 Fed. Reg. at 8459 (requiring that data and methodology be made sufficiently transparent that an independent reanalysis can be undertaken, absent countervailing interests in privacy, trade secrets, intellectual property, and confidentiality protections); DOI Guidelines, II(2), at 2; BLM Guidelines, 2(c), at 8. Similarly, the NTT Report did not provide any evidence that, because supporting data were not provided, an exceptionally rigorous robustness check was performed as required. OMB Guidelines, V(3)(b)(ii)(B)(ii), 67 Fed. Reg. at 8459; BLM Guidelines, 2(c), at 8. The studies upon which the NTT Report relies are therefore unverifiable and not reproducible, which is inconsistent with the DQA guidelines. OMB Guidelines, V(3)(b)(ii)(B), 67 Fed. Reg. at 8459; BLM Guidelines, 2(c), at 8. The COT Report similarly cited frequently to a study whose data and programs are not public and, therefore, not reproducible. COT DQA Challenge, Exhibit A at 7.

Further, both the NTT Report and COT Report are biased against oil and natural gas development, which compromises their objectivity. Objectivity requires that information be presented in an accurate, clear, complete, and unbiased manner. OMB Guidelines, V(3)(a), 67 Fed. Reg. at 8459; *see* BLM Guidelines, 2(a), at 7. Contrary to this standard, the NTT Report makes the exaggerated and biased claim that impacts to greater sage-grouse from oil and gas development are "universally negative and typically severe." NTT Report at 19. This statement was not based on any supporting data, but rather was based upon subjective interpretations of results by the authors of cited studies, and upon an erroneous assumption that temporary decreases in lek attendance equate to population level declines. *See* NTT DQA Challenge at 29, 31, 64; *id.*, Exhibit A at 4 at 1, 9. The data that the NTT Report relied upon for this assertion, furthermore, focused on older forms of oil and gas development that has since been surpassed by more efficient, more environmentally friendly forms of development. NTT DQA Challenge, Exhibit A at 5 – 6; Ramey, Brown, & Blackgoat at 70. The NTT's selective reliance upon outdated studies to support an expansive assertion that oil and gas impacts are "universally negative and typically severe" evidences a clear bias in contravention of the objectivity standards required by DQA guidelines.

The COT Report similarly ignores well-documented threats such as hunting and predation and instead focuses on hypothetical threats including oil and gas. *See* Section VII.A.1, *supra*. The COT Report also combines oil and gas and other types of energy development (e.g., wind and solar) into a single threat category, which creates the perception that these developments pose the same type and level of threats to the greater sage-grouse. COT DQA Review, Exhibit A at 5 – 6. Oil and gas development impacts, however, are partially temporary in nature, as opposed to wind and solar projects, which present a more permanent impact on the landscape. *Id.* Policy decisions based on these biased threats assessments will undoubtedly bias management prescriptions more heavily against oil and gas than is warranted by the data. BLM should not have relied upon the NTT Report or the COT Report due to their biased presentation of information.

The NTT Report and COT Report rely upon studies for which data and models are not public and, therefore, which are not reproducible. Furthermore, both reports evidence clear bias against oil and natural gas development in the selection of literature reviewed, the presentation of threats to sage-grouse, and exaggerated statements based not upon a full review of data and studies but upon a few selected studies chosen to support a particular policy regime. BLM's reliance upon these reports in the Proposed RMP is, therefore, inconsistent with the DQA guidelines' requirements that agencies ensure transparency and objectivity in disseminating information. BLM should remove all references to the NTT and COT reports and any conservation measures derived from these reports in the Final ROD.

3. The NTT and COT Reports Failed to Disclose or Address Conflicts of Interest.

Both the NTT and COT Reports suffer from numerous conflicts of interest. The DOI's Manual defines a conflict of interest as "any personal, professional, financial, or other interests that conflict with the actions or judgments of those covered by this policy." Dep't of the Interior, 305 DM 3, 3.5(E), pg. 3 (#3995, 12/16/14). The Manual further prohibits Department employees from participating in a matter that causes a conflict of interest or the appearance of one, and from reporting personal opinions and professional judgment as facts. 305 DM 3, 3.7(A)(5), (7), pg. 10. Three of the authors of the NTT Report are also authors, researchers, and editors of three of the NTT Report's most cited sources. *See* NWMA Review at 4. Thus, the NTT Report largely consisted of a review by its authors of their own work or the work of previous collaborators, which created the perception that these authors may have been acting for the benefit of their own "personal, professional, financial, or other interests" at the expense of the public. 305 DM 3, 3.5(E), pg. 3.

The COT Report's authors similarly suffered from conflicts of interest. The National Academy of Science considers financial interests, reviewing one's own work, and public statements and positions in favor of a particular policy as potential conflicts of interest. Nat'l Acad. of Sci., Nat'l Acad. Of Eng'g, Inst. of Med., & Nat'l Research Council, Policy on Comm. Composition & Balance & Conflicts of Interest for Comms. Used in the Development of Reports at unpaginated 4 – 6 (May 2003), Attachment 10. Each of these conflict situations is present in the COT Report. Several authors cited in the COT Report were also authors of the NTT Report or studies cited by the NTT Report. *See, e.g.*, COT DQA Challenge at 16 – 18. These authors reviewed their own work in the NTT report, which was then cited in the COT Report. *Id.* The COT Report's failure to disclose or take into account these conflicts undermines its objectivity. Further, several of the authors cited in the COT Report have made public declarations in favor of a highly restrictive regulatory regime to conserve greater sage-grouse. *See* Letter to Secretary of the Interior Sally Jewell & Secretary of Agriculture Tom Vilsack, Mar. 12, 2015, Attachment 11. Finally, as explained in the COT DQA Challenge at 22 – 24, several authors and peer reviewers of the COT Report had received sage-grouse research funding in the past, or had previously co-authored relevant papers with individuals who had received such funding, which calls into question their objectivity in reviewing or participating in the development of a report with such enormous influence on federal greater sage-grouse policy. Both the NTT and COT Reports suffer from serious conflicts of interest. BLM should remove all references to these reports from the Final ROD.

4. The NTT and COT Reports Suffered from Inadequate Peer Review.

Both the NTT and COT Reports lacked adequate peer review. OMB Guidelines generally state that information is considered objective if the results have been subjected to formal, independent, external peer review, but that presumption is rebuttable upon a persuasive showing that the peer review was inadequate. OMB Guidelines, Part V(3)(b), 67 Fed. Reg. at 8459. Because the NTT and COT Reports suffered from inadequate peer review, their results and conclusions cannot be considered objective.

As an initial matter, the peer review of the NTT Report was conducted by former Nevada Department of Wildlife Director, Ken Mayer. NTT DQA Challenge, Exhibit A at 24. There is no evidence that Mr. Mayer had, at the time of the peer review: (1) ever served as an editor or associate editor of a scientific journal; (2) organized a scientific peer review using accepted standards; (3) served as a peer reviewer at a scientific journal; or (4) ever published a peer-reviewed scientific paper in a reputable scientific journal. That the NTT Report's peer review lead had insufficient experience in leading the type of rigorous peer review required of such an influential document demonstrates the haphazard manner in which the NTT review process was conducted. *See* OMB Guidelines, Part V(3)(b)(ii); DOI Guidelines, Part II, at 1; BLM Guidelines, Part 2(b), at 7. In addition, Mr. Mayer insisted that peer reviewers not address the science relied upon in the NTT Report. *See* NTT DQA Challenge at 21 – 22. Rather, Mr. Mayer asked reviewers to opine on whether the recommended conservation measures "meet the objectives of preventing losses or degradation of habitat and prevent [sic] decreases in the distribution of sage-grouse." *Id.* Thus, the peer review was conducted from the outset with the assumed policy goal of conserving sage-grouse habitat, and the reviewers were asked not to review the science but to confirm the policy prescriptions developed by the NTT Report's authors. The review process could more correctly be labeled a policy review than a scientific peer review.

In addition, the NTT Report failed to address numerous comments and issues raised by peer reviewers. NTT DQA Challenge, Exhibit A at 25 – 31. Some of the reviewers expressed real concern with the NTT Report. One reviewer noted:

> The document is an odd mix of scientific citations and policy decisions, with no real tie between the two. This seems a strange blend of policy loosely backed by citations, with no analysis of science. Because there is no iteration of the rational scientific basis for the very prescriptive strategies, I would anticipate strong blowback by Industry and by Environmental Groups . . . .

Id. at 26. Yet another reviewer remarked that "the document suffers from a 1-size fits all approach that lacks context," and that lumping all seasonal habitats into either "priority" or "general" is "tremendously over simplistic." *Id.* at 28. Additional criticism included a lack of definition of priority and general habitat, a lack of performance or realistic adaptive management, and a lack of flexibility with regard to NSO and other restrictions, among numerous other comments. *Id.* 28 – 30.

To their credit, the NTT authors recognized significant scientific shortcomings with the draft report. Their response to this realization, however, was less credible. A non-public

"Science Support Team" was convened in Phoenix, Arizona shortly before the report was finalized to develop more robust supporting science. NTT DQA Challenge at 26 – 27. Two of the "Science Support Team" members, Naugle and Knick, were authors of both the NTT Report and some of the report's most frequently cited sources. Reviewing one's own work can be a conflict of interest, *see* Section VII.A.3, *supra*, particularly in this case where a small number of scientists are creating and reviewing much of the science being used to support federal land use policy throughout the sage-grouse's range. A crucial part of the scientific review process should not be conducted by authors of the work being considered.

The COT Report's peer review process suffered from similar deficiencies. Many of the peer reviewers of the COT Report were compromised by conflicts of interest and hence could not provide independent reviews. Moreover, the COT Report's authors failed to address a number of concerns expressed by peer reviewers. For example, reviewers identified at least 15 relevant scientific papers that the COT Report's authors failed to cite or review. COT DQA Challenge at 31. Further, "the majority of the reviewers found that the report fell short of meeting its stated goals in several important areas, and they identified opportunities to better achieve those goals and improve its utility for decision making . . . ." *Id.* Other reviewers questioned the COT Report authors' use of scientific sources to establish risks. *Id.* Notably, one reviewer insisted that "[w]e have a poor empirical basis for understanding most potential impacts on sage-grouse," and that "this severely limits our ability to predict the response of sage-grouse populations to changes in their habitats." *Id.* at 34. There is no evidence the COT Report's authors incorporated or even addressed these and other criticisms in the final COT Report.

Inadequate peer review compromises the objectivity of agency information, and use of non-objective information is inconsistent with the DQA guidelines. OMB Guidelines, Part V(3)(b), 67 Fed. Reg. at 8459. BLM should remove all references to these reports in the Final Record of Decision, as well as any conservation measures based upon them.

VIII. The Trades Protest the "Net Conservation Gain" Standard.

In addition to their protest that the "net conservation gain" standard violates FLPMA and requires a rulemaking, *see* Section IV, the Trades protest the Proposed RMP's requirement that mitigation yield a "net conservation gain." First, this standard is vaguely defined and will almost certainly lead to inconsistent application among BLM field offices. Second, the requirement that oil and gas lessees provide mitigation sufficient to achieve a "net conservation gain" may lead to a regulatory takings.

A. The Standard "Net Conservation Gain" is Vaguely Defined.

The Proposed RMP vaguely defines "net conservation gain" as the "actual benefit or gain above baseline conditions," which are "[t]he pre-existing condition[s] of a defined area and/or resource that can be quantified by an appropriate metric(s)." Proposed RMP at Glossary-24. This definition is vague because it does not explain how much gain above baseline conditions is necessary. For example, if an oil and gas operator disturbs one acre of habitat, must the oil and gas operator replace it with 1.1 acres of habitat, 1.5 acres of habitat, two acres of habitat, or six acres of habitat or more? (This example assumes that the replacement habitat is as durable and timely as the impacted habitat.) Likely the answer will vary among BLM field offices and USFS

ranger district offices, with some offices satisfied that 1.1 acres meets the definition of "net conservation gain" while others will require a lessee to obtain six acres "just to be safe." The definition of "net conservation gain" must be revised to provide both BLM and land users with more guidance about the amount of compensatory mitigation it requires.

B. The Requirement to Provide Mitigation Sufficient to Achieve a "Net Conservation Gain" May Create a Regulatory Takings.

Although a "net conservation gain" is a laudable goal for the Proposed RMP, this standard may present constitutional hurdles. BLM may create a regulatory takings by requiring oil and gas lessees to offset their impacts of their activities to achieve a "net conservation gain," particularly with respect to valid existing rights. The law is clear that agencies cannot require land users to commit compensatory mitigation unless there is "nexus" and "rough proportionality" between the required mitigation and the effects of the proposed land use. *Koontz v. St. Johns River Mgmt. Dist.*, 570 U.S. __, 133 S. Ct. 2586, 2595 (2013). Requiring holders of federal oil and natural gas leases to provide an express "net conservation gain" may run afoul of the requirement that mitigation have a "rough proportionality" to the impact. The definition of "net conservation gain" makes clear that mitigation cannot simply restore impacts to baseline condition; rather, mitigation must improve baseline conditions. *See* Proposed RMP at Glossary-24, Glossary-4. The requirement that mitigation improve baseline conditions is inconsistent with the case law requiring a "nexus" and "rough proportionality" between mitigation and the impacts of a land use. To avoid a regulatory takings challenge, BLM should revise the Proposed RMP to remove the requirement that mitigation produce a "net conservation gain."

Additionally, they must provide a detailed analysis of the demand/supply equation for implementing compensatory mitigation. In Wyoming approximately two-thirds of the mineral estate and one-half of the surface is owned by the United States. This ownership pattern will necessarily rely heavily upon federally controlled lands for any potential future mitigation efforts. Given the charge that compensatory mitigation sites must meet standards for additionally and durability to what degree will federally controlled lands be able to contribute to the supply side. Additionally, BLM has not properly considered the demand side of the equation. If BLM is going to primarily rely upon private lands for supplying areas for application of compensatory mitigation or go through additional planning to identify and change management direction to supply mitigation sites that should be disclosed in this analysis.

IX. Protests of Specific Elements of the Proposed RMP

A. Monitoring Framework

The Trades protest several components of the monitoring framework. First, and most significant, the Trades protest BLM's proposals to monitor implementation and effectiveness of the Proposed RMP, as well as seasonal habitat, connectivity at the fine scale, and habitat conditions at the site scale. *See* Proposed RMP at Y-24 – Y-60. The Trades do not necessarily object to the substance of what will be monitored, but rather object to BLM's proposal to monitor these elements even though they expressly recognize that this monitoring will require "[a]dditional capacity or re-prioritization of ongoing monitoring work and budget." Proposed

RMP at Y-57. Presently, BLM are lacking the resources to meet their existing statutory and regulatory obligations, such as timely processing applications for permits to drill. *See, e.g.*, Government Accountability Office, *Oil and Gas Development: BLM Needs Better Data to Track Permit Processing Times and Prioritize Inspections* (2013). BLM should not tax their limited resources and commit to additional obligations knowing that they lack the resources necessary to fulfill these obligations. Moreover, BLM may expose itself to lawsuits alleging that they have failed to implement the Proposed RMP if they cannot secure the funding or resources necessary to implement the monitoring framework. Therefore, BLM should revise the monitoring framework and only commit to implement measures that BLM has the funding and resources to implement.

Second, the Trades protest the monitoring framework's requirement that BLM compare current sagebrush levels to the levels that "pre-Euro-American" landscape could have supported. Not only is this comparison speculative because BLM cannot determine with certainty the sagebrush levels a "pre-Euro-American" landscape could have supported, this comparison does not provide meaningful information to support future land management decisions. The Proposed RMP does not explain or identify how BLM will utilize this information in future land management decisions.

B. Adaptive Management Strategy

In addition to their position that BLM may not implement the adaptive management framework without amending the Proposed RMP, *see* sections IV.C, the Trades protest the substance of the adaptive management provisions in the Proposed RMP as arbitrary and capricious. First, the adaptive management responses do not require a causal relationship between the management measures and the adaptive management triggers. Second, the adaptive management strategy does not allow for adaptive management changes that reduce burdens on oil and gas lessees in response to information learned. Finally, BLM's definition of "adaptive management" is inconsistent with commonly accepted definitions of the term.

1. The Adaptive Management Strategy Must Articulate Factors BLM will Consider when Assessing the "Causal" Factors of Triggers Being Reached.

The purpose of adaptive management is to adjust management decisions to respond to information learned regarding uncertainties in the management strategy. The Proposed RMP defines adaptive management as "[A] decision process that promotes flexible decision making that can be adjusted in the face of uncertainties as outcomes from management actions and other events become better understood." Proposed RMP at 2-29. Guidance from the DOI reinforce that the purpose of adaptive management is to respond to outcomes of management decisions. DOI guidance directs that "[a]daptive management should only be considered in situations where management actions substantially influence the outcome." *Adaptive Management: The U.S. Department of the Interior Technical Guide* 15 (2009).

The adaptive management strategy may not implement responses when a trigger is reached for reasons other than BLM's management decisions. The adaptive management strategy must recognize that external factors beyond BLM's management may influence sage-

grouse populations and habitat, such as wildlife and disease. Conceivably, a natural event could cause significant declines in sage-grouse habitat or populations. Although it may be appropriate for the agencies to adjust their management to this event, such adjustments cannot be characterized as "adaptive management" because the need for the adjustment is unrelated to the management decisions made in the Proposed RMP. In other words, the cause of the trigger—wildfire or disease—is not related to BLM's management decisions.

Similarly, the triggers and responses must account for prior management decisions that may influence populations and habitat. Restoration of greater sage-grouse habitat following disturbance takes at least three to five years. Scott M. Lambert, *Seeding Considerations in Restoring Big Sagebrush Habitat*, *in* Sage-Grouse Habitat Restoration Symposium Proceedings, at 79 (USDA Forest Service Proceedings RMRS P 38, Nov. 2005) (recommending that big sagebrush restoration sites be rested from grazing three to five years after seeding to allow vegetation to become fully established), Attachment 12. Similarly, some studies have suggested that there is a time lag between anthropogenic effects and decreased lek attendance. Seth M. Harju, et al., *Thresholds & Time Lags in Effects of Energy Development on Greater Sage-Grouse Populations*, 74 J. Wildlife Mgmt. 437, 442 – 443 (2010), Attachment 13. Therefore, it is possible that events that occurred years before issuance of the ROD for the RMP may impact greater sage-grouse populations in the coming years—even if BLM's management under the plan improves the status of the greater sage-grouse. The triggers and their responses, however, do not account for the effects of prior actions. BLM must revise the Proposed RMP to require a relationship between a triggering event and management actions taken under the RMP before they will implement the response.

Finally, it is important to note that the agencies need not implement an adaptive management response if significant changes occur to sage-grouse populations or habitat. NEPA and BLM regulations provide avenues for adjustments due to changed conditions through plan amendments and supplemental environmental analysis. 40 C.F.R. § 1502.9(c)(1)(ii) (requiring supplemental environmental impact statements when "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts); 43 C.F.R. § 1610.5-5 ("An amendment shall be initiated by the need to consider monitoring and evaluation findings, new data . . . a change in circumstances . . . that may result in a change in the scope of resource uses or a change in the terms, conditions and decisions of the approved plan."). Accordingly, the Proposed RMP should revise the adaptive management so that adaptive management responses only occur when the principal event that caused the trigger to be reached is related to the management actions under the Proposed RMP.

2. The Adaptive Strategy Must More Clearly Articulate Responses to Triggers.

BLM's response to soft triggers, for example, includes some potential management responses, but does not specify how BLM will quantifiably measure their success (or lack thereof). Proposed RMP at 2-29 – 2-31. BLM's response to hard triggers, meanwhile, provides only that, if a trigger is tripped, BLM will convene a team to discuss potential causes and management responses. *Id.* at 2-30 – 2-31. BLM provides no detail as to how its team will determine the causal factors leading to a trigger breach, or what types of alternative management

actions may be considered in response to different causes. Further, BLM does not provide any follow up strategy to measure the success of alternative management actions.

3. The Adaptive Management Strategy Should Allow Changes that Reduce Burdens on Oil and Gas Lessees.

The Proposed RMP arbitrarily allows for adaptive management changes to increase oil and gas restrictions in the face of new information but does not reciprocally allow adaptive management changes to decrease oil and gas restrictions. The Proposed RMP sets forth triggers to adjust management of the greater sage-grouse to respond to habitat loss or population declines. Proposed RMP at 2-30 – 2-31. The Proposed RMP does not, however, identify any triggers that, if met, will ease regulatory burdens on oil and gas lessees. It is possible that BLM's presumption that oil and gas development and other activities do not, given current technology and management prescriptions, have any significant impact on greater sage-grouse. *See, e.g.*, Applegate & Owens at 287; Ramey, Brown, & Blackgoat at 70. If information continues to emerge that indicates that oil and gas do not impact the greater sage-grouse as BLM believe, the Proposed RMP should allow the agencies to adjust these measures through adaptive management. BLM should revise the Proposed RMP to allow decreased oil and gas restrictions through the adaptive management process.

C. Required Design Features

The Trades protest the Required Design Features listed in Appendix D of the Proposed RMP. Although the Trades extensively commented on the Required Design Features in the Draft RMP, BLM did not adjust any of the Required Design Features in response to the Trades' comments. Trades' Comments on Supplemental Draft, 29 - 32. Furthermore, as explained in section above, BLM did not respond to the Trades' comments as required by 40 C.F.R. § 1503.4(a). Accordingly, the Trades reassert their objections to the Required Design Features set forth in their comments on the Draft RMP and described in Attachment 3.

D. Cultural Resources and Historical Trails

The Trades protests BLM's decision to adopt surface use restrictions in unreasonably large buffer distances around important cultural sites and trails. Proposed RMP, Record Nos. 5020 through 5023, pgs. 2-171 to 2-172 (cultural sites); Record Nos. 7298 through 7300, pgs. 2-345 to 2-346 (National Historic Trails); Record Nos. 7302 through 7304, pgs. 2-347 to 2-348 (Other Trails). The Trades commented on these unreasonable measures in its comments on the Draft Bighorn Basin RMP. Trades Comments pgs. 31 - 32.

Under these proposed management actions, BLM proposes to adopt a default 3-mile surface-disturbance avoidance buffer around important cultural sites where setting is an important aspect of the integrity of the site, unless the visual horizon is closer. BLM proposes to adopt a similar default 3-mile buffer around the Nez Perce National Historic Trail and a similar default 2-mile buffer around other "important" trails that are not congressionally designated.

The Trades appreciates that BLM proposed to reserve some flexibility to decrease the default buffers distances in areas in which the visual horizon is closer. However, because the buffer distances proposed are so large, the proposed management for important cultural sites and

trails is still more restrictive than necessary and thus is in violation of the Energy Policy Act of 2005. Further, these un-necessarily large buffers will limit multiple use across the landscape, in violation of BLM's multiple use obligation under FLPMA.

Section 363 of the Energy Policy Act of 2005 requires the Secretary of the Interior and the Secretary of Agriculture to enter into a Memorandum of Understanding ("MOU") regarding oil and gas leasing and to ensure that lease stipulations are applied consistently, coordinated between agencies, and "only as restrictive as necessary to protect the resources for which the stipulations are applied." Energy Policy Act of 2005, Pub. L. No. 109-58, § 363(b)(3), 119 Stat. 594, 722 (2005). The MOU required by § 363 of the Energy Policy Act of 2005 was finalized in April of 2006 as BLM MOU WO300-2006-07. This requirement was also included in BLM's Land Use Planning Handbook. BLM Manual H-1601-1, Appd. C, Section II.H, pg. 24 (Rel. 1-1693 03/11/05). Thus, pursuant to the Energy Policy Act, the MOU, and BLM's own Land Use Planning Handbook, stipulations for oil and gas leases within the revised Sage-Grouse DLUPA should not be onerous or more restrictive than necessary.

BLM's management under its current RMP provides an example of an approach that comports with the principle of being only as restrictive as necessary to protect the resource. Under current management, cultural and trail protective buffer distances are either determined on a case by case basis, or are approximately ¼ mile. This reflects a reasonable approach that balances multiple use and protection of valuable resources.

Here, however, under the proposed RMP BLM is proposing to substantially increase the default buffer distance around cultural sites and trails to egregious levels. BLM would impose a default buffer distance of 3 miles around important cultural sites and National Historic Trails, and a 2 mile buffer around other historic trails. BLM has not demonstrated that such substantial and dramatic increases to protective buffer distances are necessary and that the approach under current management is inadequate.

Further, the proposed management actions contained in Record Nos. 5020 through 5023 potentially allows BLM to impose an onerous 3-mile surface use restriction buffer around virtually any historic property. See Proposed RMP Glossary, pg. 17 (defining Important Cultural Resources as "[a]ll historic properties allocated to Conservation for Future, Scientific, and Traditional Use categories. Additionally, on a case by case basis some historic properties assigned to Experimental and Public use categories may be determined to be included in this class of resource"). The Proposed RMP contains no maps that would inform the public or guide BLM regulators in understanding which cultural sites BLM currently contemplates as constituting Important Cultural Sites for which setting is an important aspect of the integrity of the site. Given the vague and broad definition of important cultural site, such a management action could be applied in a manner that unreasonably interferes with many land uses, including development of federal oil and gas lease estates.

Such excessive default buffer distances are also inconsistent with BLM's multiple-use mandate under FLPMA. 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). " 'Multiple use management' is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put, 'including, but not limited to,

recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.' " Norton v. Sothern Utah Wilderness Alliance, 542 U.S. at 58 (quoting 43 U.S.C. § 1702(c)). Further, under FLPMA, mineral exploration and development is specifically defined as a principal or major use of the public lands. 43 U.S.C. § 1702(l). Under FLPMA, BLM is required to foster and develop mineral development, not stifle and prohibit such development.

Because the Proposed RMP proposes egregious cultural and trail buffer distances, in the Approved Bighorn Basin RMP, BLM must not adopt the cultural resource and trail resource management actions that would impose such onerous and un-necessary buffers. Such action would be more restrictive than necessary in violation of the Energy Policy Act of 2005, and would suppress multiple use across the landscape, in violation of FLPMA.

BLM must also clarify its management approach for trails. (Record Nos. 7298 through 7300 and 7302 through 7304), BLM appears to provide Map 92 to demonstrate the segments of certain trails where setting contributes or does not contribute to an important aspect of the integrity for each trail. Nowhere in the Proposed RMP's, however, does BLM refer to Map 92 or explain how the proposed management actions would apply to the designations on Map 92 under the heading "Setting Consideration Zone." More specifically, in the approved Bighorn Basin RMP, BLM must clarify that buffer distances would NOT be adopted around segments of trails that have been identified as "noncontributing" to the visual integrity of the trail.

E. Right-of-Way Avoidance and Exclusion Areas

BLM have not adequately explained or justified the proposal to designate all PHMA avoidance areas. The Trades commented on the excessive ROW exclusion and avoidance area in its comments. Trade Comments, pg. 33. A lessee's ability to develop its leases could be significantly impacted if BLM inappropriately limits access to such leases. BLM must be willing to work with oil and gas lessees and operators to design access routes to proposed oil and gas development projects. If reasonable access is denied, operators cannot develop their leases and significant resources will be lost, in turn, hurting the local economy and federal treasury. While the issuance of the oil and gas leases does not guarantee access to the leasehold, a federal lessee is entitled to use such part of the surface as may be necessary to produce the leased substance. 43 C.F.R. § 3101.1-2 (2012). With respect to approved Federal Exploratory Units, the IBLA has noted that "[w]hen a federal unit has been approved and the unitized area is producing, rights-of-way are generally not required for production facilities and access roads within the unit area." *Southern Utah Wilderness Society*, et al., 127 IBLA 331, 372 (1993). BLM must recognize the lessee's right to use the lands included within their leasehold or units in order to develop the oil and gas resources. Obviously, if lessees are not allowed access to their lease parcels, or are prohibited from installing pipelines necessary to transport the produced resource, they are deprived of all economic benefit of the lease. In such situations the lessee, the State of Wyoming, and the federal government will be deprived of the economic benefit of potential oil and gas development.

F. BLM Proposes Unreasonable Limitations on Oil & Gas Production

The Trades protests BLM's adoption of a proposed management action that would allow BLM to propose timing limitations on production operations. Proposed Bighorn RMP, Record No. 4079, pg. 2-144. As noted above, BLM's proposed management action was promulgated in violation of NEPA because it was presented for the first time in the Final EIS and Proposed RMP. Further, the proposed management action is inconsistent with the Trades' valid existing rights and wholly inappropriate.

It would be inappropriate for BLM to preclude all production operations in crucial winter range areas. Such a decision would essentially preclude year-round production operations and would lead to a significant decrease in domestic energy production. Moreover, many species such as pronghorn and mule deer have been found to habituate to increased traffic so long as the movement remains predictable. *See* Reeve, A.F. 1984. *Environmental Influences on Male Pronghorn Home Range and Pronghorn Behavior*. PhD. Dissertation; Irby, L.R. et al., 1984; "*Management of Mule Deer in Relation to Oil and Gas Development in Montana's Overthrust Belt*" Proceedings III: Issues and Technology in the Management of Impacted Wildlife. To the extent BLM intends to apply the new restriction on existing leases, BLM could be violating existing leases or taking private property without just compensation. BLM must ensure that existing lease rights will be maintained and that production operations are allowed to continue throughout the year.

Current seasonal stipulations in the existing Bighorn Basin RMPs prohibit construction and drilling activities in specific crucial winter ranges, but do not prohibit routine production operations necessary to safely maintain facilities. Even the very threat of such a radical and unjustified restriction would seriously hamper future oil and gas development in the area because oil and gas operators would be unwilling to invest the millions of dollars necessary to drill an oil and gas well if they would be unable to produce the wells throughout the year. BLM's belief that any oil and gas wells would be drilled in big game winter range given such overly restrictive limitations on future production is specious. BLM would effectively eliminate all oil and gas development in identified crucial range. Further, BLM has not analyzed or apparently even considered the damage that could be done to oil and gas wells and reservoirs if they are shut-in on an annual basis. Nor has BLM analyzed the very real threat that federal minerals would be effectively drained by offsetting wells on State of Wyoming and private lands if federal wells are annually shut-in. Finally, BLM has not concerned the very real human and environmental safety issues posed by limiting access to existing wells. BLM must prepare significant additional analysis in order to disclose the significant adverse impacts that would be associated with the closure of oil and gas development on a seasonal basis, including the potential loss of federal reserves and royalties.

It also appears BLM failed to consider the significant detrimental impact to the local economy the seasonal prohibition on oil and gas operations would have upon the local economy. By precluding production during several months of the year, BLM would force operators to significantly reduce their workforces on an annual basis. The management action would create a seasonal boom and bust cycle with routine maintenance workers and pumpers being laid off annually. The inconsistent nature of the work would almost certainly reduce the number of local employees lessees are able to hire, which would restrict or eliminate the long-term beneficial

impacts of the oil and gas development to the local economy. BLM's socio-economic analysis does not account for this cycle.

To the extent BLM intends to apply these restrictions to existing leases, BLM may be both violating an operator's existing lease rights or engaging in a taking of an operators' property rights. Once BLM has issued a federal oil and gas lease without no surface occupancy stipulations, and in the absence of a nondiscretionary statutory prohibition against development, BLM cannot completely deny development on the leasehold. *See, e.g., National Wildlife Federation, et al.*, 150 IBLA 385, 403 (1999). Only Congress has the right to completely prohibit development once a lease has been issued. *Western Colorado Congress,* 130 IBLA 244, 248 (1994). Further, BLM cannot deprive oil and gas lessees of their valid and existing lease rights either directly or indirectly. When it enacted FLPMA, Congress made it clear that nothing therein, or in the land use plans developed thereunder, was intended to terminate, modify, or alter any valid or existing property rights. *See* 43 U.S.C. § 1701 (2015).

X. Additional Comments

The Trades have included herein attachment 3 that identifies additional clarifications and modifications to the Proposed RMP prior to its finalization. The Trades request the agencies carefully review these comments and make changes where appropriate in the final RMP and Record of Decision.

CONCLUSION AND REQUEST TO MEET WITH THE AGENCIES TO DISCUSS THE PROPOSED RMP.

This Protest reflects that we have serious and substantial concerns with the Proposed RMP. We respectfully request a meeting with BLM to discuss the issues outlined in this Protest. *See* BLM Land Use Planning Handbook H-1601-1 Appd. E, pg. 6 (Rel. 1-1693 03/11/05). We believe that through such discussion we can negotiate resolution to one or more of these issues. We thank BLM for consideration of this request.

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