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

Director Kornze:

Pursuant to 36 C.F.R. § 219.59(a) and 43 C.F.R. § 1610.5-2(a), Montana Petroleum Association (MPA), American Petroleum Institute (API), and Western Energy Alliance ("the Alliance") collectively referred to as "the Trades," hereby protest the Idaho and Southwestern Montana Greater Sage-Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement ("Proposed LUPA/Final EIS").

PROTESTING PARTY

This Protest is filed by MPA, which has an address of 25 Neill Avenue, Suite 202, Helena, Montana 59601 and a phone number of (406) 442-7582. 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 Dave Galt at (406) 442-7582.

Both the Bureau of Land Management's (BLM) and Environmental Protection Agency's (EPA) Notices of Availability for the Proposed LUPA and Final Environmental Impact Statement (EIS) were published in the Federal Register on May 29, 2015. 80 Fed. Reg. 30,711 (May 29, 2015) (BLM Notice of Availability); 80 Fed. Reg. 30,714 (May 29, 2015) (EPA Notice of Availability). As such, this Protest is timely.

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 LUPA because the Trades have interests that may be adversely affected by the adoption of the Proposed LUPA and because the Trades actively participated in the planning process for the Proposed LUPA. 43 C.F.R. § 1610.5-2(a).

Interests that May be Affected

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 the Agencies plan to manage lands in the planning area with respect to the greater sage-grouse and its habitat. 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 to consumers. The management restrictions and closures in the Proposed LUPA 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

The Alliance and Public Lands Advocacy (PLA) filed comments dated January 29, 2014 on the Draft LUPA/Draft Environmental Impact Statement (EIS). A copy of this letter is attached as Attachment 1. Since release of the Draft LUPA/Draft EIS, PLA's Executive Director has retired and the organization is no longer operational. API was a member of PLA and provided funding for this PLA and its direct work developing comments on the Draft RMP. Additionally, API has directly engaged with BLM regarding development of the LUPA. API, among others, met with BLM Director Neil Kornze on August 13, 2014 in Washington, D.C. to discuss amendments to the LUPA; API also participated via teleconference in a follow-up meeting with Mr. Kornze on September 12, 2014 in Denver, Colorado. Per BLM's Land Use Planning Handbook, these meetings provide API with standing to protest. *See* BLM Handbook H-1601-1 – Land Use Planning Handbook, App. E § I(B)(1)(a) (Re. 1-1693 03/11/15).

EXECUTIVE SUMMARY

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). 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 LUPA, however, does not balance conservation of the greater sage-grouse and responsible oil and natural gas development. The Proposed LUPA will severely restrict oil and natural gas development on existing federal leases across 50,000 acres of greater sage-grouse habitat. *See* Proposed LUPA at 3-100. It also proposes to close more than 2.3 million acres to future oil and gas leasing. Where leasing will occur, the Proposed LUPA will restrict surface occupancy on more than ten million acres. Nationwide, similar land use plans developed to protect the greater sage-grouse will prohibit surface occupancy on new leases across an additional 31 million acres of public land beyond the lands currently designated as No Surface Occupancy (NSO). 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 LUPA 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 LUPA is inconsistent with the Montana and Idaho plans to conserve the greater sage-grouse in violation of FLPMA. Furthermore, given the similarities between the Montana plan and the Wyoming Executive Order to conserve the greater sage-grouse, the Agencies' refusal to adopt the Montana Plan is arbitrary and capricious.

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

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

- The Proposed LUPA violates FLPMA and the National Forest Management Act (NFMA) because the Agencies have not afforded the public a meaningful opportunity to comment on the new components of the Proposed LUPA and because the requirement that mitigation achieve a "net conservation gain" is inconsistent with FLPMA.

- The Proposed LUPA 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.

- The Proposed LUPA improperly cedes authority over oil and gas operations on federal leases to the FWS and is inconsistent with the Energy Policy Act of 2005 (EPAct).

- The Agencies may not adopt numerous components of the Proposed LUPA, including the monitoring framework, the adaptive management strategy, the density and disturbance caps, the Required Design Features (RDFs), the prohibition on tall structures, and noise limits.

- The Proposed LUPA proposes to close lands to future fluid mineral leasing with complying without FLMPA's withdrawal requirements.

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

STATEMENT OF PROTESTED ISSUES AND PROTESTED PARTS OF PLAN

I. The Proposed LUPA is Inconsistent with the Montana Plan and the Idaho Plan.

The Trades protest the significant inconsistencies between the Proposed LUPA and the Montana Greater Sage-Grouse Habitat Conservation Strategy, *see* Montana Executive Order 10-2014 ("Montana Plan"), and the Federal Alternative of Governor C.L. "Butch" Otter for Greater Sage-Grouse Management in Idaho, *see* Proposed LUPA/Final EIS, app. Q ("Idaho Plan"). These inconsistencies are the result of BLM's choice to impose a national, one-size-fits-all approach to sage-grouse conservation in violation of FLPMA's requirement for BLM to coordinate land use planning with state and local governments. The Proposed LUPA diverges from the Montana Plan in many important respects. For example, the Montana Plan imposes a five percent disturbance cap within core areas. Montana Plan at 14, 17. The Proposed LUPA, on the other hand, requires a three percent disturbance cap. Proposed LUPA/Final EIS at 2-29, AD-1. The Montana Plan imposes a 0.25 mile buffer around active leks in general habitat and

0.6 miles around leks in core habitat, Montana Plan at 14, 19, while the Proposed LUPA imposes total NSO stipulations in priority habitat management areas (PHMAs) and sage-grouse focal areas (SFAs) and buffers in all habitat, Proposed LUPA/Final EIS at 2-51, FML-1.

Similarly, although the Idaho Plan imposes NSO restrictions on all core habitat zones (CHZ) (similar to PHMAs) and important habitat zones (IHZ) (similar to important habitat management areas (IHMA)), oil and gas development is allowed if a proponent can demonstrate that the project will not cause declines in sage-grouse populations and that unavoidable impacts will be mitigated. Idaho Plan at V.D.4.iv.b, V.E.ii. The Proposed LUPA, on the other hand, imposes NSO stipulations on new leases within PHMA and IHMA, subject to a single, limited exception where a proponent can demonstrate that the action "[w]ould not have direct, indirect, or cumulative effects on the [greater sage-grouse] or its habitat" or the action "[i]s proposed to be undertaken as an alternative to a similar action occurring on a nearby parcel, and would provide a clear conservation gain to [greater sage-grouse]." Proposed LUPA/Final EIS at 2-52, FLM-3. Oil and gas activities are subject to best management practices in the Idaho Plan, including a five percent disturbance cap in IHZs, Idaho Plan at V.G.2.ii, while the Proposed LUPA imposes a three percent disturbance cap in IHMA, Proposed LUPA/Final EIS at 2-29 – 2-30, AD 1. In addition, the Idaho Plan imposes a single lek buffer of one kilometer around occupied leks, Idaho Plan at V.G.2.iii, while the Proposed LUPA imposes 3.1 mile buffers for energy development, Proposed LUPA/Final EIS at 2-34, AD-9.

BLM's failure to identify and reconcile these inconsistencies in the Proposed LUPA violates FLPMA's directive that land use plans "shall be consistent with" state and local land use programs "to the maximum extent" consistent with federal law. 43 U.S.C. § 1712(c)(9).[1] BLM must reconcile the Proposed LUPA and the Montana Plan by replacing the Proposed LUPA's NSO stipulations with the reasonable NSO stipulations in Montana, and adopting the five percent disturbance cap in place of the three percent disturbance cap. In addition, BLM must reconcile the Proposed LUPA and the Idaho Plan by adopting the NSO exception for CHZ and IHZ in Idaho in place of the NSO stipulation exceptions for PHMA and IHMA in the Proposed LUPA, and replacing the 3.1 mile buffers with the State of Idaho's more reasonable one kilometer buffers.

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

[1] The Trades requested that BLM incorporate the Idaho Plan (available at the time of the Draft LUPA) and the Montana Plan (in development at the time of the Draft LUPA) in the Proposed LUPA/Final EIS. Trade Comments at 2.

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). Thus, 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 are particularly significant with respect to management of the greater sage-grouse. Montana originally developed a sage-grouse conservation plan in 2005. Montana Plan at 2. In February 2013, Governor Bullock created a sage-grouse advisory council, which provided recommendations to the Governor on January 29, 2014. On September 9, 2014, the Governor signed Executive Order 10-2014, which implemented the council's recommendations. Montana Plan at 2. Idaho developed its first sage-grouse plan in 2006, amended the plan in 2009, and, in response to Secretary of the Interior Ken Salazar's invitation in 2011 for state's to prepare management plans for sage-grouse, developed the Idaho Plan in 2012. Idaho Executive Order 2012-02 at unpaginated 1. Governor "Butch" Otter then submitted to the Agencies the Governor's Alternative, which appears in Appendix Q of the Proposed LUPA. Idaho Plan at 1; *see* Proposed LUPA/Final EIS, app. Q. Given FLPMA's clear directives and Montana's and Idaho's determined effort to conserve the greater sage-grouse through their state plans, BLM is obligated to ensure that the Proposed LUPA is consistent with Montana's and Idaho's existing greater sage-grouse management program.

Nevertheless, BLM has chosen to disregard the Idaho and Montana Plans and impose uniform land use requirements throughout greater sage-grouse habitat in both Montana and Idaho. BLM's plan fails to take into account state and local needs and requirements and diverges from the Montana and Idaho Plans in important respects. For example, the Montana Plan imposes a five percent disturbance cap within core areas. Montana Plan at 14, 17. The Proposed LUPA, on the other hand, requires a three percent disturbance cap. Proposed LUPA/Final EIS at 2-29, AD-1. Montana Plan imposes a 0.25 mile buffer around active leks in general habitat and 0.6 miles around leks in core habitat, Montana Plan at 14, 19, while the Proposed LUPA imposes total NSO stipulations in PHMAs, IHMAs, and SFAs and buffers in all habitat, Proposed LUPA/Final EIS at 2-51, FML-1.

Similarly, although the Idaho Plan imposes NSO restrictions on all core habitat zones ("CHZ") (similar to PHMAs) and important habitat zones ("IHZ") (similar to important habitat management areas (IMHA)), oil and gas development is allowed if a proponent can demonstrate that the project will not cause declines in sage-grouse populations and that unavoidable impacts will be mitigated. Idaho Plan at V.D.4.iv.b, V.E.ii. The Proposed LUPA, on the other hand, imposes NSO stipulations on new leases within PHMA and IHMA, subject to a single, limited exception where a proponent can demonstrate that the action "[w]ould not have direct, indirect, or cumulative effects on the [greater sage-grouse] or its habitat" or the action "[i]s proposed to be

undertaken as an alternative to a similar action occurring on a nearby parcel, and would provide a clear conservation gain to [greater sage-grouse]." Proposed LUPA/Final EIS at 2-52, FLM-3. Oil and gas activities are subject to best management practices in the Idaho Plan, including a five percent disturbance cap in IHZs, Idaho Plan at V.G.2.ii, while the Proposed LUPA imposes a three percent disturbance cap in IHMA, Proposed LUPA/Final EIS at 2-29 – 2-30, AD 1. In addition, the Idaho Plan imposes a single lek buffer of one kilometer around occupied leks, Idaho Plan at V.G.2.iii, while the Proposed LUPA imposes 3.1 mile buffers for energy development, Proposed LUPA/Final EIS at 2-34, AD-9.

Prior to signing the Final Record of Approval (ROD) and Approved Land Use Plan, BLM must reconcile these differences and conform the Proposed LUPA to the Montana and Idaho Plans "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).

Similarly, the disregard for the provisions of the Montana and Idaho Plans evidenced in the Proposed LUPA is inconsistent with NFMA and Forest Service regulations. Although the Forest Service is not required to ensure absolute consistency with state and local plans, 36 C.F.R. § 219.4(b)(3), the Forest Service is required to coordinate its planning efforts with equivalent efforts of state and local governments. 16 U.S.C. § 1604(a); 36 C.F.R. § 219.4(b)(1). During this coordination process, the Forest Service is required to review state and local planning and land use policies, and attempt to identify and resolve or reduce conflicts and inconsistencies between its own land use policies and those of applicable state and local governments. 36 C.F.R. § 219.4(b)(2). As the Forest Service stated in its preamble to the Federal Register notice promulgating these regulations, the coordination requirement was intended to "help identify multiple uses in the plan area, resolve conflicts, and facilitate the forward movement of effective land management activities." 77 Fed. Reg. 21,162, 21,177 (April 9, 2012).

Indeed, conforming the Proposed LUPA to the Montana and Idaho Plans also makes practical sense, particularly with respect to greater sage-grouse land use restrictions. Unlike the top-down approach imposed by the Proposed LUPA, the Montana and Idaho Plans are the result of collaborative efforts between the states, landowners, industry, and other interested parties. These state and local stakeholders are better situated than the Agencies to strike a balance between conservation of the greater sage-grouse and promotion of economic development across the state, and the Montana and Idaho Plans represent the most appropriate balance of these two goals. Furthermore, state wildlife agencies, which have responsibility over unlisted species, *see* 43 C.F.R. § 24.2(a), have the most accurate, on-the-ground information regarding the greater sage-grouse. Accordingly, the Trades request that the BLM Director remand the Proposed LUPA with instructions that the provisions of the Montana and Idaho Plans be adopted and incorporated into the Final ROD and Approved Resource Management Plan.

II. The Agencies' Failure to Adopt the Montana Plan Is Arbitrary and Capricious.

The Agencies' refusal to adopt the Montana Plan as to the Montana portion of the planning area is arbitrary and capricious under the Administrative Procedure Act (APA).[2] 5 U.S.C. § 706. The Montana Plan is nearly identical in its sage-grouse restrictions to a similar plan adopted by the State of Wyoming, which the Agencies in Wyoming adopted in their sage-grouse management plan revisions. *Compare* Wyoming Executive Order 2011-5, Attachment B at 8 – 12 (describing five percent disturbance cap, 0.6 mile core lek buffers, 0.25 mile general lek buffers, and two mile seasonal buffers), *with* Montana Plan, Attachment D at 14 – 17 (describing the same stipulations). The Wyoming Greater Sage-Grouse Land Use Planning Amendments (May 2015) ("Wyoming 9-Plan LUPA"), the Buffalo Resource Management Plan revision (May 2015) ("Buffalo RMP"), and the Bighorn Basin Resource Management Plan revision (May 2015) ("Bighorn Basin RMP"), for example, incorporate the Wyoming Plan's NSO lek buffers, Wyoming 9-Plan LUPA at 2-60, Management Nos. 129, 130; Buffalo RMP at 186, 192, 196, SS WL-4024; Bighorn Basin RMP at 2-23, Record No. 4117; the Wyoming Plan's seasonal restrictions, Wyoming 9-Plan LUPA at 2-60 – 2-61, Management Nos. 131 – 33; Buffalo RMP at 191, 195, 199, SS WL-4024; Bighorn Basin RMP at 2-23, Record Nos. 4118, 4119; and the Wyoming Plan's five percent disturbance cap, Wyoming 9-Plan LUPA at 2-58, Management No. 127; Buffalo RMP at 186, SS WL-4024; Bighorn Basin RMP at 2-23, Record No. 4117. Even the Agencies admit in the Proposed LUPA that the Montana Plan "is similar to the Wyoming executive order." Proposed LUPA/Final EIS at 5-11. The Agencies provided no explanation in the Proposed LUPA for their choice to adopt these important provisions in the Wyoming Plan but failure to consider or adopt the same provisions in the Montana Plan.

The APA requires that agencies explain their decisions sufficiently that "the agency's path may reasonably be discerned." *Alaska Dep't of Envt'l Conservation v. Envt'l Protection Agency*, 540 U.S. 461, 496 – 97 (2004). Given that the Montana Plan and the Wyoming Plan contain many identical restrictions and that the Montana Plan was available prior to release of the Proposed LUPA, the Agencies were required to provide a reasoned explanation of their choice to adopt the plan in Wyoming but not in Montana. The Agencies did note the Montana Plan's existence. Proposed LUPA/Final EIS at 1-10. The Agencies did not, however, provide an explanation for their choice to adopt the Wyoming Plan but not the Montana Plan. The Executive Order establishing the Montana Plan was signed in September, 2014, over eight months prior to release of the Proposed LUPA. The Agencies' explanation for failing to adopt the Montana Plan is insufficient, because the Agencies did not explain <u>why</u> they chose not to incorporate the Montana Plan and in particular failed to discuss why a nearly identical plan was adopted in Wyoming but not in Montana. The Agencies' failure to adopt the Montana Plan is therefore arbitrary and capricious under the APA. The Agencies should eliminate the Proposed LUPA's three percent disturbance cap and 3.1 mile lek buffers, Proposed LUPA/Final EIS at 2-

[2] The Trades did not comment upon the Agencies' failure to adopt the Montana Plan because it was not yet available at the time the Draft LUPA was released. The Montana Plan was available, however, when the Proposed LUPA was released.

29, 2-51, FML-1, and instead adopt the Montana Plan's five percent disturbance cap and 0.25 mile buffers in general habitat and 0.6 mile buffers in priority habitat. Montana Plan at 14, 17, 19.

III. The Agencies Must Conduct a Formal Rulemaking under the Administrative Procedure Act.

The Trades protest the Agencies' adoption of several elements of the Proposed LUPA—specifically, the compensatory mitigation requirement, the "net conservation gain" standard, and conservation measures that include lek buffer distances, RDFs, and density and disturbance caps—because each constitutes a substantive rule that the Agencies cannot apply before they complete the formal rulemaking procedures required by the APA.[3] *See* 5 U.S.C. § 553. Additionally, the Trades protest the limitations on exceptions, modifications, and waivers of NSO stipulations in PHMA, IHMA, and SFAs because they improperly amend a BLM regulation without completing the formal rulemaking procedures. Because the land use planning process is not equivalent to a formal rulemaking, these provisions of the Proposed LUPA are void until the Agencies adopt these rules in accordance with APA rulemaking procedures.

A. The Proposed LUPA Announces Substantive, Legislative Rules.

The compensatory mitigation requirement, "net conservation gain" standard, lek buffer distances, RDFs, and density and disturbance caps set forth in the Proposed LUPA 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). 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

[3] The Trades did not comment upon the lek buffers or the "net conservation gain" standard because they were newly included in the Proposed LUPA. Proposed LUPA/Final EIS at 2-3, 2-4. The Trades commented upon the disturbance and density caps in the Draft LUPA. Trade Comments at 4. Finally, the Trades commented upon the flawed science underlying the RDFs. Trade Comments at 3.

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 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).

FLPMA directs that the Agencies "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.[4] 43 U.S.C. § 1740 (citing 5 U.S.C. § 553(a)). Until the Agencies promulgate such rules and regulations, "such lands shall be administered under existing rules and regulations concerning such lands to the extent practical." *Id.*

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 LUPA/Final EIS at 2-34, MIT-3. First, this requirement applies 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 LUPA but appears in all of the land use plans the Agencies released on May 29, 2015 to protect the greater sage-grouse. Bighorn Basin RMP, app. Y at Y-15; Proposed Resource Management Plan and Final Environmental Impact Statement for the Billings and Pompeys Pillar Management Plan Revision at 2-125 (June 2015) ("Billings-Pompeys Pillar RMP"); Buffalo RMP at 188; HiLine District Office Proposed Resource Management Plan and Final Environmental Impact Statement at 46, 192 (June 2015) ("HiLine RMP"); Proposed LUPA/Final EIS at 2-34, MIT-3; Lewistown Field Office Proposed Resource Management Plan and Final Environmental Impact Statement at 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 at 2-46 (June 2015) ("Miles City RMP"); Nevada and Northeastern California Greater Sage-Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement at 2-89 (June 2015) ("Nevada-NE California LUPA"); Northwest Colorado Greater Sage-Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement at 2-50 (June 2015) ("NW Colorado LUPA"); Proposed North Dakota Greater Sage-Grouse Resource Management Plan Amendment and Final Environmental Impact Statement at 2-30 (June 2015) ("North Dakota RMP"); Oregon Sub-Regional Greater Sage-Grouse Proposed

[4] 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.

Resource Management Plan Amendment and Final Environmental Impact Statement at 2-56 (June 2015) ("Oregon RMP"); South Dakota Proposed Resource Management Plan and Final Environmental Impact Statement at 58 (June 2015) ("South Dakota RMP"); Utah Greater Sage-Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement at 2-17, MA-GRSG-3; 2-20, MA-GRSG-5 (June 2015) ("Utah LUPA"); Wyoming 9-Plan LUPA at 2-59; app. D at D-15. Although BLM often characterizes its LUPAs as policy statements, *see Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 70-71 (2004), the Agencies' regulations direct that resource management authorizations such as approvals of Applications for Permit to Drill (APDs) conform to and be consistent with the requirements of the LUPA. 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 Agencies. *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 "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 the Agencies' regulations, requires 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 LUPA'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 LUPA'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 the Agencies' 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, BLM's standard oil and gas lease only requires that lessees "conduct operations in a manner that minimizes adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources, and to other land users." *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 Council on Environmental Quality (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 LUPA'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 LUPA'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 the Agencies released on May 29, 2015 to protect the greater sage-grouse. Bighorn Basin RMP at 2-13, 2-31; Billings-Pompeys Pillar RMP at 2-125; Buffalo RMP at 78; HiLine RMP at 46, 192; Proposed LUPA/Final EIS at 2-34, MIT-3; Lewistown RMP at 2-25 – 2-26, Action FM-1.2; Miles City RMP, Table 2-5 at 2-46; Nevada-NE California LUPA at 2-22, Action SSS 2; 2-23, Action SSS-3; North Dakota RMP at 2-30; NW Colorado LUPA at 2-50; Oregon RMP at 2-56; South Dakota RMP at 58; Utah LUPA at 2-17, MA-GRSG-3; 2-20, MA-GRSG-5; Wyoming 9-Plan LUPA at 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 LUPA/Final EIS, Glossary at 8-16. Generally, "mitigation" is considered to 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 <u>offset</u> 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 Forest Service's planning regulations, the CEQ has defined mitigation as "[c]ompensating for the impact by <u>replacing</u> or providing <u>substitute</u> resources." 40 C.F.R. § 1508.20(e) (emphasis added). BLM and Forest Service NEPA regulations do not offer an alternative definition. *See* 36 C.F.R. §220.3; 43 C.F.R. § 46.30. BLM NEPA Handbook similarly defines mitigation as measures that can "<u>reduce or avoid</u> adverse effects to biological, physical, or socioeconomic resources." BLM Handbook H-1790-1 – National Environmental Policy Act at Glossary,

pg. 133 (Rel. 1-1710 01/30/2008) (emphasis added). Even the Proposed LUPA defines mitigation in the conventional sense as including measures "that could reduce, avoid, or eliminate adverse impacts" by "compensating for the impact by replacing or providing substitute resources or environments." Proposed LUPA/Final EIS, Glossary at 8-15 (emphasis added). 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 the Agencies 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(A), *infra*, the Agencies could have considered alternative standards such as "no net loss." *See* 36 C.F.R. § 332.3. By settling on the net conservation gain standard, the Agencies acted as legislators. As a result, this rule is a formal rule requiring notice and comment under the APA.

3. The Conservation Measures Set Forth in the Proposed LUPA Are Substantive Rules.

Finally, the lek buffer distances, RDFs, and density and disturbance caps 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 PHMA and IHMA or in all sage-grouse management areas in the planning area. Proposed LUPA/Final EIS at 2-31 – 2-34, AD-1, AD-3, AD-4, AD-9. Furthermore, these same measures appear in all the LUPAs outside of Wyoming that the Agencies released on May 29, 2015 to protect the greater sage-grouse[5]; even the criteria the Agencies will apply to justify exceptions to the lek buffer distances are the same between these LUPAs. Billings-Pompeys Pillar RMP, app. AA at AA-84 – AA-85; HiLine RMP, app. M.5 at 1589 – 90; Proposed LUPA/Final EIS, app. DD at DD-2 – DD-3; Lewistown RMP, app. M at M-2; Miles City RMP at GRSG BUF-1; Nevada-NE California LUPA, app. B at B-2; North Dakota RMP, app. J at J-2 – J-3; NW Colorado LUPA, app. B at B-2; Oregon RMP, app. S at S-2 – S-3; South Dakota RMP, app. V-3 at 1 – 2; Utah LUPA, app. F at F-2. 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

[5] Some minor variation may exist among the particular RDFs outlined in each individual LUPA but, on the whole, the RDFs set forth in the LUPA are the same as those identified in the NTT Report. *See* NTT Report App. D. Additionally, the LUPA for Northwest Colorado contains conflicting statements about whether the disturbance caps are calculated using the same methodology as the other LUPAs.

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 the 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.

With respect to the lek buffer distances and the density and disturbance caps, the Agencies' imposition of numerical thresholds—3.1 mile lek buffers for energy infrastructure, 0.25 mile noise buffers, a three percent disturbance cap, and one facility per 640 acres density cap—are legislative determinations by the Agencies. Courts have recognized that rules that turn on a number are likely to reflect "an arbitrary choice among methods of implementation." *See Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 496 (2010) (quoting *Hoctor v. USDA*, 82 F.3d 165, 170 (7th Cir. 1996)). In this case, the Agencies chose the thresholds from a range of options. For example, the study on which the Agencies based on the lek buffer distances also supported two mile buffers. *See* USGS, *Conservation Buffer Distance Estimates for Greater Sage-Grouse—A Review*, Open File Report 2014-1239 at 7 (2014). Therefore, the Agencies weighed the evidence before them and determined where to establish the thresholds. Although courts have suggested that numerical limits are less likely to constitute legislative rules "in scientific and other technical areas, where quantitative criteria are common," *Hoctor*, 82 F.3d at 170, the fact that scientific information influenced the Agencies' decisions does not change the legislative nature of their determinations. Unlike statutes that limit agencies' discretion through scientific standards, such as the Endangered Species Act which requires FWS to base decisions on the "best available scientific and commercial data," 16 U.S.C. § 1533(b)(1), FLPMA and the Forest Service's Multiple-Use, Sustained-Yield Act both require the agencies to manage for multiple use—an "enormously complicated task of striking a balance among the many competing uses to which land can be put." *See* 16 U.S.C. §§ 528, 531(a); 43 U.S.C. § 1701(7); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004). Accordingly, the Agencies had the discretion to establish other thresholds. Their selection of the thresholds and measures in the LUPAs reflects their legislative determination, and these determinations must be subject to notice and comment under the APA.

B. The Proposed LUPA Improperly Amends BLM Regulations.

The Proposed LUPA improperly amends BLM's regulation relating to modification and waiver of lease stipulations at 43 C.F.R. § 3101.1-4 without following the formal rulemaking procedures at 5 U.S.C. § 553 as required by FLPMA. *See* 43 U.S.C. § 1740; Proposed LUPA/Final EIS at 2-52 – 2-53, FLM-3. The Proposed LUPA states that in SFAs, BLM will never modify, waive, or grant an exception to an NSO stipulation. Proposed LUPA/Final EIS at 2-51, FLM-1. Similarly, the Proposed LUPA provides that in PHMA and IHMA, BLM will never modify or waive an NSO stipulation. Proposed LUPA/Final EIS at 2-51, FLM-1. Furthermore, the Proposed LUPA provides that BLM may only grant a one-time waiver of an NSO stipulation (known as an exception) if the Idaho Department of Fish and Game/Montana Fish, Wildlife, and Parks Department, FWS, and BLM unanimously find that certain criteria are met. *Id.* at 2-52 – 2-53, FLM-3; BLM Handbook H-1624-1 – Planning for Fluid Mineral

Resources, Glossary, pg. V-10 (Rel. 1-1749 1/28/2013) (defining an exception as a limited type of waiver). By categorically prohibiting BLM from modifying or waiving NSO stipulations, and by requiring that FWS and the Idaho Department of Fish and Game or the Montana Fish, Wildlife, and Parks Department find that an exception is warranted, the Proposed LUPA alters BLM regulations related to authority to issue modifications and waivers of lease stipulations.

Section 3101.1-4, 43 C.F.R., expressly states that BLM must grant waivers and modifications to stipulations in certain circumstances. This section directs that oil and gas lease stipulations "shall be subject to modification or waiver" only in certain circumstances (emphasis added). The regulation further explains that BLM alone determines whether these circumstances exist, stating that a stipulation may be modified or waived "only if the authorized officer determines that the factors leading to its inclusion in the lease have changed sufficiently to make the protection provided by stipulation no longer justified or if the proposed operation would not cause unacceptable impacts." 43 C.F.R. § 3101.1-4 (emphasis added). The "authorized officer" means any employee of BLM authorized to perform the duties described in Group 3000 and 3100 of Title 43; it does not include an employee of another agency. 43 C.F.R. § 3000.0-5(e).

The Proposed LUPA's waiver and modification provisions are inconsistent with 43 C.F.R. § 3101.1-4. First, the Proposed LUPA prohibits waivers and modifications despite the regulation's language that stipulations "shall be subject to modification or waiver." Second, the Proposed LUPA expands decision-making authority on whether to grant an exception to parties beyond BLM to FWS and the Idaho Department of Fish and Game or the Montana Fish, Wildlife, and Parks Department. These direct contradictions reflect that BLM is attempting to alter its regulations through the LUPA.

BLM cannot finalize the provisions of the Proposed LUPA prohibiting exceptions, modifications, and waivers in PHMAs, IHMAs, and SFAs until it amends its regulation at 43 C.F.R. § 3101.1-4 through formal rulemaking procedures, as required by the APA. *See* 5 U.S.C. § 553. When agencies seek to establish procedures other than those set forth in their regulations, they must amend those regulations through a formal rulemaking process. *City of Idaho Falls v. Fed. Energy Reg. Comm'n*, 629 F.3d 222, 231 (Fed. Cir. 2011). If an agency action "adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy," the action is a legislative rule requiring compliance with the notice and comment procedures at 5 U.S.C. § 553. *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014). Because the provisions of the Proposed LUPA related to exceptions, modifications, and waivers of stipulations attempt to amend BLM's regulation at 43 C.F.R. § 3101.1-4 without following the formal rulemaking procedures required by 5 U.S.C. § 553, BLM must revise the Proposed LUPA to remove the limitations on waivers, modifications, and exceptions.

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

The Agencies cannot finalize the provisions of the Proposed LUPA requiring compensatory mitigation, requiring that mitigation achieve a "net conservation gain," imposing conservation measures, and prohibiting exceptions, modifications, and waivers in PHMAs,

IHMAs, and SFAs until they follow formal rulemaking procedures, as required by the APA. *See* 5 U.S.C. § 553. The Proposed LUPA does not constitute a formal rulemaking process. First, FLPMA specifically requires the Agencies 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 LUPA 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 the Agencies introduced many rules in the Proposed LUPA (rather than the Draft LUPA)—including the lek buffer distances and the limitations on modification and waiver of, and exception to, lease stipulations—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).

Third, the provisions of the Proposed LUPA constituting legislative rules have not been subject to notice required by 5 U.S.C. § 553(b). Although notice of the Proposed LUPA was published in the Federal Register, the notice only informed the public that the Agencies had revised their land use plans. The notice did not alert the public to the fact that the Agencies were 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 LUPA are not comparable to the formal rulemaking provisions of the APA, the Agencies may not implement the legislative rules set forth in the Proposed LUPA until the complete the formal rulemaking process required by the APA.

Finally, by failing to characterize the mandates of the Proposed LUPA as legislative rules, the Agencies skirt other procedural requirements imposed on legislative rules. For example, the Regulatory Flexibility Act requires agencies to consider the impact of their regulatory proposals on small businesses, to analyze alternatives that minimize small entity businesses, and to make their analyses available for public comment. *See* 5 U.S.C. § 601 *et seq.* Although the Agencies predict only a marginal decrease in oil and gas production due to the historically sporadic interest in oil and gas in the planning area, the nationwide economic impacts of the rules could be significant. The Agencies must initiate a formal rulemaking process and analyze the impact of the rule on small businesses.

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

The Trades protest the Proposed LUPA's requirement that mitigation yield a "net conservation gain."[6] First, this standard violates FLPMA, which does not require that BLM

[6] The Trades did not comment upon the "net conservation gain" standard because it did not appear in the Draft LUPA. Proposed LUPA/Final EIS at 2-4.

management actions yield a "net conservation gain." Second, the requirement that oil and gas lessees provide mitigation sufficient to achieve a "net conservation gain" may lead to regulatory takings. Finally, this standard is vaguely defined and will almost certainly lead to inconsistent application among BLM field offices.

A. The Requirement that Mitigation Achieve a "Net Conservation Gain" Violates FLPMA.

The Proposed LUPA'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."

Moreover, this standard ignores the requirements that the Proposed LUPA imposes on land users to avoid and minimize impacts to the greater sage-grouse. The Proposed LUPA already requires existing oil and gas lessees to attempt to site development 3.1 miles from a lek, adopt RDFs, and adhere to stringent disturbance and density limitations. *See* Proposed

LUPA/Final EIS, at 2-30 – 2-32, apps. B, DD. These measures significantly burden development of existing leases. The requirement that oil and gas lessees must also provide mitigation to yield a "net conservation gain" ignores the significant measures they have already adopted to avoid and minimize impacts to the greater sage-grouse.

The Proposed LUPA 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. Rather, BLM asserts that the "net conservation gain strategy is in response to the overall landscape goal to enhance, conserve, and restore [greater sage-grouse] and its habitat." Proposed LUPA/Final EIS at 2-4. BLM's stated goal of "enhance, conserve, and restore" is beyond BLM's authority under FLPMA. BLM must revise the Proposed LUPA to require that land users avoid unnecessary or undue degradation to the greater sage-grouse and its habitat.

B. The Requirement to Provide Mitigation Sufficient to Achieve a "Net Conservation Gain" May Lead to Fifth Amendment Takings.

Although a "net conservation gain" is a laudable goal for the Proposed LUPA, this standard may present constitutional hurdles. The Agencies may lead to takings under the Fifth Amendment of the U.S. Constitution by requiring oil and gas lessees to offset the 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 LUPA/Final EIS, Glossary at 8-16. 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 taking challenge, the Agencies should revise the Proposed LUPA to remove the requirement that mitigation produce a "net conservation gain."

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

Even if the standard "net conservation gain" was consistent with FLPMA and even if BLM could require compensatory mitigation without a rulemaking, the term "net conservation gain" is vaguely defined. The Proposed LUPA defines it 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 LUPA/Final EIS, Glossary at 8-16, 8-7. 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, 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 Forest Service 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." Setting aside the fact that "net conservation gain" is inconsistent with FLPMA and that BLM presently lacks authority to require compensatory mitigation, the definition of "net conservation gain" fails to provide both the Agencies and land users with sufficient guidance about the amount of compensatory mitigation it requires.

V. The Agencies Must Comply with the National Environmental Policy Act Prior to Finalizing the Proposed Land Use Plan.

We protest the Proposed LUPA because the Agencies have not yet complied with NEPA. As the Agencies are 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 LUPA, requires the Agencies 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). The Agencies have not yet complied with NEPA because they must release a Supplemental Draft EIS for public review and comment before issuing a ROD. Additionally, the Agencies failed to analyze a reasonable range of alternatives. The Agencies also did not adequately analyze the anticipated impacts of the management measures in the Proposed LUPA. Finally, the Agencies failed to analyze the cumulative impacts of the Proposed LUPA, together with other greater sage-grouse LUPAs across the nation, on oil and gas leasing and development.[7]

A. The Agencies Must Prepare a Supplemental Draft EIS.

1. The Agencies 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 LUPA and Proposed LUPA without notice and an opportunity for public comment. In particular, the Trades protest the unexpected adoption of the wholly new Proposed LUPA rather than one of the alternatives analyzed in the Draft EIS. Although the Agencies maintain that components of the Proposed LUPA were analyzed in other alternatives, the combination of these components in the Proposed LUPA creates a dramatically different alternative that requires notice and public comment. Furthermore, the Proposed LUPA 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, lek buffer distances, and adaptive management triggers and responses, as well as extensive revisions to the monitoring plan and mitigation

[7] Commenters noted the necessity for the Agencies to comply with NEPA in preparing the Proposed LUPA. Proposed LUPA, app. T at T-12.

strategy. These proposed changes violate NEPA because they were not included in the Draft LUPA and because the Agencies did not allow the public an opportunity to meaningfully comment on these provisions.[8]

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).

In the present situation, the Proposed LUPA does not constitute a minor variation to one of the alternatives in the Draft LUPA, nor is the imposition of the Proposed LUPA within the spectrum of alternatives analyzed in the draft. The Proposed LUPA is a new alternative that was not analyzed in the Draft LUPA. Although the Agencies maintain that components of the Proposed LUPA were analyzed in other alternatives, the combination of these components in the Proposed LUPA creates a dramatically different alternative that requires notice and public comment. The Agencies attempt to justify the adoption of the lek buffers, for example, by noting that they considered "closure to fluid minerals." Proposed LUPA/Final EIS at 2-3. The Agencies considered in the Draft LUPA several alternatives that would have closed additional mineral acres to future fluid mineral leasing. Draft LUPA, Table 2-2 at 2-25. In no way did consideration of making this acreage unavailable for <u>future</u> leasing warn the public that the Agencies would choose instead to apply 3.1 mile lek buffers to <u>existing</u> oil and gas leases. The Agencies did not provide adequate justification for their adoption of the Proposed LUPA and should have prepared a supplemental Draft EIS.

Furthermore, the Proposed LUPA also contains wholly new components. None of the alternatives presented in the Draft LUPA included the requirements that mitigation produce a net conservation gain, the revised mitigation strategy, the revised monitoring plan, and the lek buffer

[8] The Trades did not comment upon the lek buffers or the "net conservation gain" requirement because they did not appear in the Draft LUPA. Furthermore, commenters noted the necessity for BLM to provide the mitigation and monitoring plans for public review. Proposed LUPA, app. T at T-18 – T-19.

distances. BLM first presented the public with these components when it released the Proposed LUPA.

Most troubling is the fact that the net conservation gain requirement, revised mitigation plan, revised monitoring plan, and lek buffer distances were not incorporated into the Proposed LUPA and Final EIS in response to public comment on the Draft LUPA/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, the Agencies appear to have incorporated the net conservation gain requirement, revised mitigation plan, and revised monitoring plan to respond to national policies by BLM and FWS that were released after the Draft LUPA/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). Similarly, the lek buffer distances appear to have been added to make the Proposed LUPA consistent with the greater sage-grouse provisions in other land use plans. *See* Fact Sheet: BLM/USFS Greater Sage-Grouse Conservation Effort (noting that land use plans to conserve the greater sage-grouse are based on three objectives for conserving and protecting habitat). 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, lek buffer distances, adaptive management triggers and responses, and the expanded mitigation framework were not presented in the Draft LUPA. Although the Draft LUPA acknowledged that the Proposed LUPA/Final EIS would include more details about the monitoring and mitigation plans, *see* app. E at E-8; app. F, these "placeholders" did not allow the public a meaningful opportunity to comment on the substance of the monitoring and mitigation plans.[9] The inclusion of the net conservation gain requirement, revised mitigation plan, revised monitoring plan, and lek buffer distances coupled with the re-formulated alternative adopting components of the alternatives analyzed in the Draft EIS, hence 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 LUPA, BLM must provide a Supplemental Draft EIS with notice and an opportunity for comment in compliance with its NEPA obligations.

[9] Furthermore, commenters requested the opportunity to review and comment on these components of the plans. Proposed LUPA, app. T at T-18 – T-19.

2. The Agencies Must Prepare a Supplemental Draft EIS to Analyze the New Montana Plan.

The Agencies must prepare a Supplemental Draft EIS to analyze the newly released Montana Plan to conserve the greater sage-grouse.[10] The CEQ regulations implementing NEPA state that "[a]gencies . . . [s]hall prepare supplements to either draft or final environmental impact statements if . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts . . . ." 40 C.F.R. § 1502.9(c). The new information must present a "seriously different picture of the likely environmental consequences of the proposed action" not adequately discussed in the Draft EIS.

Since the Draft LUPA was released, the state of Montana released the Montana Greater Sage-Grouse Habitat Conservation Strategy to conserve the greater sage-grouse. The Montana Plan divides sage-grouse habitat in Montana into core, connectivity, and general habitat. *See* Montana Plan, Attachment A. The plan imposes a number of conservation measures and stipulations tailored to these different types of habitat and conditions in Montana. For example, the Montana Plan imposes a five percent disturbance cap within core areas. Montana Plan at 14, 17. The Montana Plan also imposes a 0.25 mile buffer around active leks in general habitat and 0.6 miles around leks in core habitat, Montana Plan at 14, 19, and prohibits noise at the perimeter of a lek from exceeding ten dBA above ambient from 6:00 p.m. to 8:00 a.m. during the breeding period (March 1 to July 15), allowing for site-specific noise levels where warranted, Montana Plan at 15.

State actions can prompt the need for a Supplemental Draft EIS. For example, the U.S. Court of Appeals for the First Circuit has held that a governor's moratorium on the construction of new highways necessitated a Supplemental Draft EIS for a proposal to expand a highway. *Essex County Preservation Ass'n v. Campbell*, 536 F.2d 956, 950-51 (1st Cir. 1976)**.** The court reasoned that the moratorium affected traffic patterns and the need to expand the highway. *Id.* Similarly, the release of the Montana Plan constitutes significant new information that the Agencies must consider in a Draft LUPA because it affects the analysis of the cumulative impacts of the Agencies' management strategy on sage-grouse habitat and populations. *See* 40 C.F.R. § 1508.7 (defining "cumulative impact" as the impact of the proposed action combined with past, present, and reasonably foreseeable future federal and non-federal actions). The Agencies did not adequately analyze the cumulative impacts of the Montana Plan. Aside from a few references to the plan in Chapter 5, *see* Proposed LUPA/Final EIS at 5-19, 5-21, 5-26, 5-29, 5-40, 5-43, 5-47, the Agencies listed the plan's major provisions and noted it was "similar to the Wyoming executive order." Proposed LUPA/Final EIS at 5-10 – 5-11. The Agencies did not consider the Montana Plan in any detail, and did not discuss its impacts in Chapter 4. Additionally, the management proposed under the Montana Plan presents another management alternative that the Agencies should consider adopting. Because the Montana Plan constitutes "significant new circumstances," the Agencies must prepare a Supplemental Draft EIS.

[10] The Trades commented upon the necessity for BLM to consider the Montana Plan. Trade Comments at 2.

B. The Agencies 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 LUPA.[11] First, the Final EIS does not analyze an alternative to the Proposed LUPA'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 LUPA's monitoring framework, including alternatives that BLM has the resources to implement. Third, the Final EIS does not analyze alternatives to the adaptive management triggers and responses. Fourth, the Final EIS does not analyze alternatives to the lek buffer distances. Finally, the Final EIS does not analyze the alternative of the Montana Plan.

Importantly, all of these elements are new components of the Proposed LUPA. The Agencies' last-minute addition of these elements without consideration of alternatives reinforces the need for the Agencies to prepare a 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 LUPA's mitigation standard, which is a net conservation gain. Proposed LUPA/Final EIS at 2-34, MIT-3. The Final EIS should have considered alternative, lesser mitigation standards, such as no net loss of greater sage-grouse habitat.[12] Because the Proposed LUPA defines its purpose and need as "incorporat[ing] measures that will help conserve, enhance and restore [greater sage-grouse] habitat by reducing, eliminating, or minimizing threats to that habitat," lesser mitigation standards that simply maintained current amounts of greater sage-grouse habitat would also

[11] Commenters noted the necessity for BLM to consider a reasonable range of alternatives. Proposed LUPA, app. T at T-12 – T-15.

[12] 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 the Agencies should have considered an alternative to the "net conservation gain" standard, the Trades do not waive these arguments. Rather, if the Agencies maintain 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.

achieve the purpose and need of the Proposed Action. *See* Proposed LUPA/Final EIS at 1-14. 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 the Agencies to administer and would allow for easier compliance by land users.

Presumably, the Agencies incorporated the net conservation standard without considering alternatives because this standard was identified in the FWS's Greater Sage-Grouse Range-wide Mitigation Framework. In that document, FWS suggested it views programs with a "no net loss" standard less favorably than programs with a "net conservation gain" standard because the programs with a "no net loss" standard "are unlikely to positively influence the conservation status of the species." FWS, *Greater Sage-Grouse Range-wide Mitigation Framework* 4 (2014). FWS, however, made this statement without any accompanying environmental analysis and without allowing the public the formal opportunity to review and comment on the document.

The Trades acknowledge that the Agencies did consider in the Draft EIS a "no unmitigated loss" mitigation standard. Draft LUPA at 2-74. The Agencies even acknowledge that one of the goals of Alternative D is "to provide for no unmitigated loss" to greater sage-grouse habitat, *id.* at 4-45, but they note in Chapter 2 that this standard is an alternative to the three percent disturbance cap, not to the "net conservation gain" standard. Proposed LUPA/Final EIS, Table 2-12 at 2-206. Further, the Agencies stated in their response to public comments that "[n]o net unmitigation [sic] loss" has been removed from the Proposed Plan." Proposed LUPA/Final EIS, app. T at T-28. Finally, the Agencies included no direct comparison between the two standards in or Chapter 4. *See* Proposed LUPA/Final EIS at 4-45. The Agencies must analyze alternatives to the "net conservation gain" standard before they may adopt it in a ROD.

2. Monitoring Framework

The Proposed LUPA 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 LUPA. Proposed LUPA/Final EIS, app. E. The monitoring framework calls for monitoring to occur at broad and mid-scales and at fine and site-scales. *Id.* at 7. The details of the monitoring framework were first presented in the Proposed LUPA; they appear to have been developed by BLM's Washington Office and integrated into all greater sage-grouse LUPAs. *See* BLM, *The Greater Sage-Grouse Monitoring Framework* (2014).

The Agencies must analyze alternatives to the proposed monitoring framework because the monitoring components on their face cannot be implemented by BLM. In the Proposed LUPA, the Agencies expressly recognize that they will require "[a]dditional capacity or re-prioritization of ongoing monitoring work and budget realignment" to achieve half of the proposed monitoring commitments. Proposed LUPA/Final EIS, app. E at 43. Specifically, the Agencies recognize they lack 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 the Agencies admit they lack resources to implement is unreasonable. Agencies 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, the Agencies should have analyzed at least one alternative monitoring strategy that they have the resources to implement.

3. Adaptive Management Triggers and Responses

The Proposed LUPA outlines adaptive management responses that will affect management of the entire 25,722,800-acre planning area.[13] Specifically, the Proposed LUPA sets forth complex triggers that evaluate greater sage-grouse populations and habitat. A hard trigger is reached when either there occurs a 20 percent loss of key habitat[14] within a biologically significant unit (BSU) of a PHMA or IHMA within a Conservation Area[15] when compared to a 2011 baseline, or when there occurs a 20 percent decline in the current three year average of total maximum number of male sage-grouse compared to the 2011 baseline and a finite rate of change "significantly below" 1.0 within PHMA or IHMA within a Conservation Area. Proposed LUPA/Final EIS at 2-28, AM-7, AM-9. Soft triggers follow the same structure except the threshold is 10 percent loss instead of 20 percent loss. Proposed LUPA/Final EIS at 2-28 – 2-29, AM-8, AM-10. The Proposed LUPA calls for few specific responses to these triggers. In response to hard triggers, all IHMA are treated as PHMA within the Conservation Area in which the trigger was reached. Proposed LUPA/Final EIS at 2-29, AM-12. In response to soft triggers, an "Implementation Team" would meet to evaluate causal factors and recommend additional potential implementation level activities. Proposed LUPA/Final EIS at 2-29, AM-11. The Proposed LUPA does not provide that an amendment to the LUPA will occur, or that the public will be provided with notice or the opportunity to comment on adaptive management responses, before adaptive management responses are implemented. Given the significant area and number of land users affected, the Agencies must examine alternatives to the adaptive management triggers and responses. Given that the adaptive management triggers do not adequately examine the effectiveness of the Agencies' planning strategy, as outlined further in section IX.B, *infra*, the Agencies should consider alternatives to these triggers. Similarly, the Agencies should consider alternatives to the hard and soft trigger responses.

[13] Commenters noted the necessity for the Agencies to provide more detail concerning adaptive management. Proposed LUPA, app. T at T-26 – T-28.

[14] Defined as "areas of generally intact sagebrush that provide [greater sage-grouse] habitat during some portion of the year." Proposed LUPA/Final EIS at 2-28.

[15] Defined as "[a]reas determined to be necessary to monitor population objectives to evaluate the disturbance density and adaptive regulatory triggers and engage adaptive management responses. Conservation Areas may contain priority, important, and general habitat management areas and sagebrush focal areas. Specifically, these areas are Mountain Valleys, Desert, West Owyhee, and Southern and Southwestern Montana." Proposed LUPA, Glossary at 8-8. See Proposed LUPA/Final EIS at 2-24 for a list of Conservation Areas.

4. Lek Buffers

In addition to the fact that the Agencies improperly adopted the 3.1 mile lek buffer distance for energy infrastructure, the Agencies did not analyze a reasonable range of alternatives to the buffers. *See* Proposed LUPA/Final EIS, Table 2-13 at 2-220. This buffer was adopted in response to the USGS Buffer Report. Proposed LUPA 2-3. The Agencies maintain that they analyzed a range of alternatives because the range of alternatives is "qualitatively within the spectrum of alternatives analyzed." *Id.* The Agencies ignore, however, that the USGS report identified a range of distances at which energy infrastructure is believed to impact the greater sage-grouse. *See* Buffer Report at 7-8. Although the Trades disagree with these distances, they nonetheless reflect a range of alternative buffer distances the Agencies should have considered, including distances less than 3.1 miles. Furthermore, the USGS Report explains that negative population trends occurred when eight active wells occurred within 3.1 miles of leks. *Id.* at 7. Because the Proposed LUPA would limit disturbance to one facility per square mile in PHMA, a buffer distance based on more dense development is unnecessary. Accordingly, the Agencies should analyze alternatives to the 3.1 mile buffer in the EIS.

5. Montana Executive Order 10-2014

The Agencies did not adequately analyze or consider the Montana Plan, which was released prior to the Proposed LUPA. Montana Plan at 8. The Montana Plan presents a viable and state-specific alternative to the Proposed LUPA. Like the Proposed LUPA, the Montana Plan divides sage-grouse habitat in Montana into different categories depending on the purpose and importance of the habitat. *See* Montana Plan, Attachment A. The plan imposes a number of conservation measures and stipulations tailored to these different types of habitat and conditions in Montana. For example, the Montana Plan imposes a five percent disturbance cap within core areas. Montana Plan at 14, 17. The Montana Plan also imposes a 0.25 mile buffer around active leks in general habitat and 0.6 miles around leks in core habitat, Montana Plan at 14, 19, and prohibits noise at the perimeter of a lek from exceeding ten dBA above ambient from 6:00 p.m. to 8:00 a.m. during the breeding period (March 1 to July 15), allowing for site-specific noise levels where warranted, Montana Plan at 15. BLM may not agree that the Montana Plan is preferable to the Proposed LUPA, but BLM provided no justification whatsoever for failing to consider the Montana Plan as an alternative. Accordingly, the Agencies should analyze the Montana Plan as an alternative to the Proposed LUPA.

C. The Final EIS Does Not Adequately Analyze the Impacts of the Proposed LUPA.

The Final EIS does not adequately analyze the effects of the surface disturbance cap on oil and gas development and other land uses.[16] Specifically, the Agencies did not disclose the current status of BSUs within which surface disturbance caps will be calculated. Proposed LUPA/Final EIS at 2-29 – 2-30, AD-1; *see id.* at 3-5 – 3-23. Without this information, the Trades have no way of assessing the potential impacts of the surface disturbance caps because

[16] The Trades commented upon the surface disturbance caps in the Draft LUPA. Trade Comments at 4.

there is no information showing how much disturbance remains within the cap in each BSU. The Final EIS does not adequately analyze the impacts of the surface disturbance caps.

The Final EIS also does not adequately analyze the aggregated impacts of the Proposed LUPA's leasing and development restrictions on oil and gas development. The Proposed LUPA discourages development on existing leases within buffer distances, discourages issuance of rights-of-way across 8,365,000 of lands, and imposes new compensatory mitigation requirements, new lek buffers, and new density and disturbance caps. The measures, when combined with the extensive limitations on new leases, including NSO stipulations in SFAs, PHMA, and IHMA, and Controlled Surface Use (CSU) and timing limitation (TL) stipulations in General Habitat Management Areas (GHMAs), will cumulatively stymie oil and gas development on federal lands within the planning area. The Final EIS does not adequately recognize the cumulative impacts of leasing and development restrictions on federal lands.

Additionally, the Final EIS does not adequately analyze the effects of the requirement that land users provide compensatory mitigation to obtain a "net conservation gain." Most significantly, the Final EIS does not analyze whether sufficient compensatory mitigation is available to satisfy the requirements of the mitigation framework. The Agencies must examine whether adequate mitigation opportunities exist in the planning area, such as through conservation easements or restoration activities. This analysis is particularly important because the Service has not endorsed any mitigation banks or exchanges in Colorado, Utah, Montana, and California; accordingly, land users may have a difficult time securing mitigation opportunities. The Agencies cannot condition permits on a requirement that land users cannot fulfill due to lack of mitigation. Accordingly, the Agencies must analyze the availability of compensatory mitigation in the Final EIS.

Finally, the Agencies have not adequately analyzed the impacts right-of-way avoidance and exclusion areas will have upon existing oil and gas leases. The Proposed LUPA would designate 8,365,000 acres as right-of-way avoidance areas and 1,013,700 acres as right-of-way exclusion areas. At the same time, the Proposed LUPA states 69,200 acres of public and National Forest System minerals in the planning area are currently under lease for oil and gas. Proposed LUPA/Final EIS at 4-229. To the extent individual leases, or even groups of leases or potential development areas are isolated from roads or transportation infrastructure, lessees will be unable to develop the resources present. The Agencies must ensure that access is allowed to both existing and newly issued oil and gas leases in the planning area. Accordingly, the Agencies must analyze the impacts of the right-of-way avoidance and exclusion areas in the Proposed LUPA.

D. The Final EIS Does Not Adequately Analyze the Cumulative Impacts of the Proposed LUPA.

Finally, the Proposed LUPA/FEIS does not adequately analyze the cumulative impacts of the Proposed LUPA because it does not consider the impacts of the Proposed LUPA together with the impacts of the at least 13 other greater sage-grouse LUPAs. *See* 80 Fed. Reg. 30,676 (May 29, 2015). The CEQ regulations require agencies to analyze the "incremental impact of

the action" together with "other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. In this case, the Agencies should have analyzed the cumulative impacts of the Proposed LUPA with the other 13 LUPAs. Clearly, development of the EISs was a coordinated national effort by the Agencies. The Agencies announced the LUPAs and made them available on the same day. *See* 80 Fed. Reg. 30,718 (May 29, 2015); 80 Fed. Reg. 30,716 (May 29, 2015); 80 Fed. Reg. 30,714 (May 29, 2015); 80 Fed. Reg. 30,711 (May 29, 2015); 80 Fed. Reg. 30,709 (May 29, 2015); 80 Fed. Reg. 30,707 (May 29, 2015); 80 Fed. Reg. 30,705 (May 29, 2015); 80 Fed. Reg. 30,703 (May 29, 2015); *see also* Dep't of the Interior Press Release, *BLM, USFS Plans for Western Public Lands Provide for Greater Sage-Grouse Protection, Balanced Development* (May 28, 2015). Moreover, many of the Proposed LUPAs contain consistent—if not standardized—provisions, such as the monitoring framework, mitigation framework, and lek buffer distances. All of the LUPAs propose to impose NSO stipulations with limited waiver and modification on new leases in PHMA. All of them require that compensatory mitigation yield a "net conservation gain."

The Agencies must analyze the cumulative impacts of these nation-wide management actions on the greater sage-grouse and, in particular, the cumulative impacts on mineral leasing and development. In the planning area for the Proposed LUPA alone, more than ten million acres are designated for leasing subject to NSO and 2,353,200 acres are closed to mineral leasing entirely. *See* Proposed LUPA/Final EIS, Table 2-9 at 2-94. Nationwide, BLM and the Forest Service propose to designate an additional 31 million mineral acres as subject to NSO stipulations.[17] Throughout greater sage-grouse range, the cumulative amount of land leased with NSO (and therefore effectively rendered inaccessible) could have significant impacts on the development of federal oil and natural gas resources.[18] The Agencies have not, however, examined the cumulative impacts of their management actions on federal oil and natural gas leasing and development. *See* Proposed LUPA/Final EIS at Chapter 5. The Agencies must analyze these cumulative impacts in an EIS before they issue a ROD and Final LUPA.

VI. The Proposed Land Use Plan Must Comply with FLPMA and the National Forest Management Act.

The Trades protest the Proposed LUPA because the Agencies have not complied with FLPMA and NFMA. First, the public has not had a meaningful opportunity to comment on new

[17] Bighorn Basin RMP, Table 2-3 at 2-9; Billings-Pompeys Pillar RMP, Table 2.2 at 2-22; Buffalo RMP at 78; HiLine RMP, Table 2.3 at 52; Idaho-SW Montana LUPA, Table 2-9 at 2-92, 2-94; Miles City RMP, Table 2-2 at 2-5; Nevada-NE California LUPA, Table 2-14 at 2-107; North Dakota RMP, Table 2-3 at 2-41; NW Colorado LUPA, Table 2.6 at 2-56; Oregon RMP, Table 2-11 at 2-85, 2-86; South Dakota RMP, Table 2-2 at 43; Utah LUPA, Table 2.3 at 2-81; Wyoming 9-Plan LUPA, Table 2-7 at 2-85.

[18] Many of the land use plans also close additional acreage to fluid minerals leasing to conserve the greater sage-grouse and its habitat. The Trades attempted to calculate an accurate, nationwide figure for acreage closed to leasing, but were unable to determine an accurate figure. The public's inability to comprehensively assess the number of acres closed to leasing nationally for sage-grouse conservation highlights the deficiencies' in the cumulative impacts discussion.

elements of the Proposed LUPA. Second, the Agencies must amend the LUPA to implement any adaptive management responses.[19]

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 LUPA not only as a violation of NEPA but also as a violation of FLPMA. The Agencies' introduction of new components in the Proposed LUPA—including the requirement that mitigation produce a net conservation gain, the revised mitigation plan, the revised monitoring plan, the lek buffer distances, and the adaptive management triggers and responses—deprived the public of a meaningful opportunity to comment on these components as required by BLM's planning regulations. 43 C.F.R. § 1610.2. BLM's own planning handbook unequivocally directs BLM 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, the monitoring plan, the lek buffer distances, and the adaptive management triggers and responses unquestionably are a "substantial change" when compared to the alternatives included in the Draft LUPA, BLM should have prepared and released for comment a supplement to the Draft LUPA.

Similarly, the inclusion of new components in the Proposed LUPA is a violation of the Forest Service's regulations. The Forest Service regulations require the public to be provided an opportunity to meaningfully participate in and comment upon preparation of land use plans. 36 C.F.R. § 219.4(a); 219.5(a)(2)(i); 219.7(c)(1). Because the requirement that mitigation produce a net conservation gain, the mitigation plan, the monitoring plan, the lek buffer distances, and the adaptive management triggers and responses were either not included in or substantially changed from the Draft LUPA, the Agencies should have prepared and released for comment a supplement to the Draft LUPA. The Trades request that the Proposed LUPA be remanded to the Agencies so that they can provide for additional public involvement and comment in compliance with their regulations.

B. The Agencies Must Amend the LUPA Before they May Implement Adaptive Management Responses.

The Agencies must amend the LUPA before they may implement the adaptive management responses identified in the Proposed LUPA. The adaptive management strategy in the Proposed LUPA calls for responses to "soft" and "hard" triggers based on information collected through monitoring. Proposed LUPA/Final EIS at 2-28 – 2-29, AM-7 – AM-16. The Proposed LUPA, however, defines few specific responses to the triggers. Specifically, the

[19] The Trades lacked the opportunity to comment on the adaptive management responses in their comments on the Draft LUPA/Draft EIS because these issues did not arise in the draft documents.

Proposed LUPA sets forth complex triggers that evaluate greater sage-grouse populations and habitat. A hard trigger is reached when either there occurs a 20 percent loss of key habitat within a BSU of a PHMA or IHMA within a Conservation Area when compared to a 2011 baseline, or when there occurs a 20 percent decline in the current three year average of total maximum number of male sage-grouse compared to the 2011 baseline and a finite rate of change "significantly below" 1.0 within PHMA or IHMA within a Conservation Area. Proposed LUPA/Final EIS at 2-28, AM-7, AM-9. Soft triggers follow the same structure except the threshold is 10 percent loss instead of 20 percent loss. Proposed LUPA/Final EIS at 2-28 – 2-29, AM-8, AM-10. The Proposed LUPA calls for few specific responses to these triggers. In response to hard triggers, all IHMA are treated as PHMA within the Conservation Area in which the trigger was reached. Proposed LUPA/Final EIS at 2-29, AM-12. In response to soft triggers, an "Implementation Team" would meet to evaluate causal factors and recommend additional potential implementation level activities. Proposed LUPA/Final EIS at 2-29, AM-11. BLM cannot implement the Proposed LUPA's "responses" to soft and hard triggers without amending the plan.

First, the Agencies' 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 "LUPA 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 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."). Similarly, the Forest Service's planning regulations promulgated under NFMA direct that a plan amendment is "required to add, modify, or remove one or more plan components, or to change how or where one or more plan components apply to all or part of the plan area . . . ." 36 C.F.R. § 219.13(a). The Forest Service's regulations further direct that plans must be revised when "conditions on a plan area have changed significantly . . . ." 36 C.F.R. § 219.7(a).

Second, the Agencies cannot implement the "responses" to the soft triggers because there is nothing to implement. The Proposed LUPA does not define any concrete actions that BLM will implement in response to the soft triggers. See Proposed LUPA/Final EIS at 2-29, A-11. The planning regulations do not permit BLM to change the management prescriptions in an LUPA via an open-ended placeholder. As one court observed, "BLM could circumvent the mandates of § 1610.5-5 (i.e., requiring environmental assessments and impact statements, public

disclosure, etc.) by merely designing a management plan that 'contemplates' a wide swath of future changes." Klamath Siskiyou Wildlands Ctr. v. Boody, 468 F.3d 549, 557 (9th Cir. 2006).

Finally, BLM cannot implement the "responses" to the triggers because it did not consider any alternatives to the responses, or analyze the impacts of the responses, in the EIS accompanying the Proposed LUPA. See Proposed LUPA/Final EIS at 4-51. FLPMA, NFMA and NEPA require BLM and Forest Service to consider management alternatives and analyze the impacts of these alternatives in the accompanying EIS. See 36 C.F.R. § 219.14(b)(2); 40 C.F.R. §§ 1502.14, 1502.16; 43 C.F.R. §§ 1610.4-5, 1610.4-6. Therefore, BLM must consider alternatives to the trigger responses and analyze their potential environmental impacts before it may implement them. Because BLM has neither analyzed alternatives to the trigger responses nor analyzed their potential impacts, BLM may not implement the trigger responses without amending the Proposed LUPA.

VII. The Agencies Cannot Impose New Restrictions on Valid Existing Rights and Operations.

The Trades protest the Agencies' decisions to impose new restrictions on existing federal oil and gas leases. The Proposed LUPA/Final EIS attempts to impose numerous restrictions on existing oil and gas leases. *See* Proposed LUPA/Final EIS at 2-31, AD-1 (density limitation); 2-31, AD-2 (three percent disturbance cap); 2-34, AD-9 (lek buffers); 2-34, MIT-3 (compensatory mitigation). Most concerning, the Agencies propose to limit infrastructure, linear resources, and surface disturbance within lek buffer distances in PHMA, IHMA, and GHMA, to impose density and disturbance caps in PHMA and IHMA, and to require compensatory mitigation to offset impacts to greater sage-grouse to achieve a net conservation gain. *See id.* at 2-31, AD-1; 2-31, AD-2; 2-34, AD-9; 2-34, MIT-3. These conditions are new and were not attached as stipulations on oil and gas leases issued within the planning area.[20]

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, the Agencies 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 the Agencies' imposition of new restrictions that are inconsistent with existing leases.[21] First, BLM does not have the authority to impose new restrictions on valid existing leases through a LUPA. Second, the Agencies cannot unilaterally modify federal leases, which are valid existing contracts. Third, the Agencies "cannot impose new restrictions on existing leases that render development uneconomic or impossible. Finally, the Agencies may not impose uniform conservation measures on existing

[20] The Trades commented upon the density and disturbance caps. Trade Comments at 4. The Trades did not comment upon the lek buffers or "net conservation gain" standard because these issues did not arise in the Draft LUPA. Proposed LUPA/Final EIS at 2-3, 2-4.

[21] The Trades commented on BLM's inability to modify existing lease rights through the land use planning process. Trade Comments at 5.

leases without site-specific information. The Trades encourage the Agencies to revise the Proposed LUPA 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 Land Use Plan Amendment.

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 resource management plans (LUPAs), 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, an LUPA 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 LUPA cannot defeat or materially restrain a federal lessee's valid and existing rights to develop its leases through unreasonable Conditions of Approval (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 LUPAs 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.

With respect to the Proposed LUPA, BLM's attempt to impose new conditions and measures on existing leases is inconsistent with valid existing rights. In particular, the Proposed LUPA's provisions requiring application of lek buffer distances and evaluation of impacts on leks in PHMA, IHMA, and GHMA leave no room for consideration of valid existing rights. In PHMA and IHMA, BLM may approve actions within the lek buffer distances "only if" a lek buffer distance other than the distance identified in the Proposed LUPA offers the same or greater level of conservation. Proposed LUPA/Final EIS, app. DD at DD-2 – DD-3. In GHMA, BLM may approve actions within the lek buffer distances under a broader set of

circumstances[22]—but "only if" those circumstances apply. *See* Proposed LUPA/Final EIS, app. DD at DD-2. The Proposed LUPA does not leave BLM room to consider valid existing rights granted under a lease if development cannot occur under the circumstances identified in the Proposed LUPA. For example, if BLM cannot identify a buffer distance in PHMA or IHMA that offers the same or greater level of protection to greater sage-grouse and its habitat than the distance identified in the Proposed LUPA, the Proposed LUPA does not expressly allow BLM to authorize development when necessary to accommodate valid existing rights. *See* Proposed LUPA/Final EIS, app. DD at DD-2 – DD-3. The Agencies must revise the Proposed LUPA to expressly allow BLM to authorize development to honor valid existing rights when application of the Proposed LUPA otherwise would not allow development on existing leases. BLM lacks authority under FLPMA to impose these measures.

B. The Agencies 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).

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[22] In GHMA, BLM may approve actions within lek buffer distances "only" in the following circumstances:

> Based on best available science, landscape features, and other existing protections, (e.g., land use allocations and state regulations), BLM determines that a lek buffer distance other than the applicable distance identified above offers the same or a greater level of protection to GRSG and its habitat, including conservation of seasonal habitat outside of the analyzed buffer area; or BLM determines that impacts on GRSG and its habitat are minimized such that the project will cause minor or no new disturbance (e.g., co-location with existing authorizations); and Any residual impacts within the lek buffer distances are addressed through compensatory mitigation measures sufficient to ensure a net conservation gain, as outlined in the Greater Sage-Grouse Mitigation Strategy.

Proposed LUPA, app. DD at DD-2.

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. U.S. 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, the Agencies' 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 it 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 <u>already stipulated to have a buffer</u>." *Id.* (emphasis added). Any attempts by the Agencies to impose measures that expand express stipulations attached to leases are inconsistent with the leases' contractual terms.

The Proposed LUPA/Final EIS attempts to impermissibly alter the contractual rights granted under oil and gas leases by imposing a variety of measures on existing leases. Proposed LUPA/Final EIS at 2-31, AD-1; 2-31, AD-2; 2-34, AD-9; 2-34, MIT-3. First, the requirement to provide compensatory mitigation is a fundamental change to lease terms that improperly alters the contract between the United States and lessors. Second, BLM cannot defer or deny development on leases issued prior to adoption of the Proposed LUPA because the density or disturbance caps have been reached. Finally, the Proposed LUPA's attempt to alter stipulations to protect the greater sage-grouse on existing leases is inconsistent with the rights granted under these leases.

1. The Requirement to Provide Compensatory Mitigation is a Fundamental Change to Lease Terms.

The Proposed LUPA suggests compensatory mitigation may be required whenever development will impact the greater sage-grouse. *See* Proposed LUPA/Final EIS at 2-51. Clearly, the Proposed LUPA requires compensatory mitigation to develop within lek buffer distances in GHMA and to develop existing leases in PHMA and IHMA when the density and disturbance caps have been exceeded. Proposed LUPA/Final EIS, 2-32, AD-2; app. DD at DD-2.

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 its leasing regulations contain any requirement to provide compensatory mitigation and do not authorize BLM to require compensatory mitigation.[23] *See* 43 C.F.R. pts. 1600, 3100. Moreover, no BLM or Department of the Interior 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). Additionally, 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 LUPA's requirement that lessees provide compensatory mitigation to provide a net conservation gain.

[23] The 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 LUPA, Glossary at 8-16.

Furthermore, an attempt by BLM to require compensatory mitigation would be patently inconsistent with the terms of its oil and gas leases.[24] 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, 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 LUPA states that lessees must first minimize their impacts and then mitigate impacts that cannot be minimized, Proposed LUPA/Final EIS at 2-51, 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 LUPA to state that it will not require compensatory mitigation of existing lessees.

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[24] 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 Department of the Interior 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).

2. BLM Cannot Defer or Deny Development on Leases Issued Prior to Adoption of the Proposed LUPA Based on the Proposed LUPA.

The Proposed LUPA directs the Agencies to defer approvals of permits to drill. First, prior to approving development in PHMA or IHMA, BLM must evaluate whether density of energy facilities in a proposed project area is less than one facility per 640 acres and evaluate whether the disturbance within a BSU and proposed project area is less than three percent. Proposed LUPA/Final EIS, app. G at G-8. If either density or disturbance exceeds these caps, BLM must "defer the project." *Id.* at G-8. The Proposed LUPA recognizes that some projects "cannot be deferred due to valid existing rights," in which case BLM should "fully disclose the local and regional impacts of the proposed action in the associated NEPA [analysis]." *Id.* at G-9.

The Proposed LUPA should clarify that BLM may not defer oil and gas activities on leases that were issued before approval of the Proposed LUPA. The Energy Policy Act of 2005 requires BLM to approve applications for permits to drill if the requirements of NEPA "and other applicable law" have been completed. 30 U.S.C. § 226(p)(2). Thus, BLM can only defer decisions on permits when the requirements of NEPA "and other applicable law" have not been met. *See id.* BLM's planning authority conferred through FLPMA is not "other applicable law" that allows BLM to defer development due to the density and disturbance limitations on existing federal leases because LUPAs developed pursuant to FLPMA are subject to valid existing rights. *See Colo. Envt'l Coal., et al.*, 165 IBLA 221, 228 (2005). At most, BLM may count development on these leases toward the density and disturbance caps but, once these caps are reached, BLM may only defer or deny development on new leases. BLM should revise the Proposed LUPA to clearly state that BLM may not defer or deny development on oil and gas leases issued prior to approval of the Proposed LUPA.

3. The Proposed LUPA's New Measures Cannot Alter Stipulations on Existing Oil and Leases that Protect the Greater Sage-Grouse.

The Proposed LUPA outlines a variety of measures that will apply to existing oil and gas leases. Most significantly, the Proposed LUPA's requirement that lessees site development outside of lek buffer distances in PHMA, IHMA, and GHMA is a *de facto* NSO stipulation that BLM is attempting to attach to existing leases.

The lek buffer distance requirement improperly expands NSO and CSU stipulations attached to existing leases within the planning area. Many federal oil and gas leases within the planning area are subject to NSO stipulations of lesser distances than the 3.1 mile lek buffers. *See, e.g.*, Final Record of Decision and Approved Dillon Resource Management Plan, app. K at 137 (Feb. 2006) (0.25 miles); Final Record of Decision and Approved Challis Resource Management Plan, Attachment 10 at 115 (July 1999) (500 feet from strutting grounds, 0.25 mile from essential habitat); *see also* Draft LUPA, Table 2-4 at 2-55. BLM lacks authority to impose the new lek buffer distance requirement on leases with stipulations that prescribe buffer distances under 43 C.F.R. § 3101.1-2. Furthermore, the lek buffer distance is inconsistent with the contractual rights granted under existing oil and gas leases that already contain NSO and CSU

stipulations. Accordingly, BLM must revise the Proposed LUPA to state that the lek buffer distances will not apply to existing oil and gas leases with NSO and CSU stipulations to protect the greater sage-grouse.

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 NSO stipulations, BLM cannot completely deny development on the leasehold (absent a nondiscretionary statutory prohibition against development). *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 LUPA 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 LUPA will impose a variety of restrictions on development of existing leases. The cumulative burden of these restrictions will render development uneconomic or impossible throughout greater sage-grouse habitat and particularly in PHMA and IHMA. The Proposed LUPA proposes to discourage siting development in GHMA, IHMA, and PHMA, impose lek buffer distances and density and disturbance caps, require RDFs, and require compensatory mitigation to produce a net conservation gain. *See* Proposed LUPA2-31, AD-1; 2-31, AD-3; 3-32, AD-4; 2-34, AD-9; 2-34, MIT-3. Collectively, these restrictions will either make development on existing leases impossible or so uneconomic that they effectively prohibit development. BLM, however, cannot impose conditions of approval 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 LUPA to reduce the restrictions imposed on existing leases.

D. The Conditions 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. With respect to BLM's proposal to impose lek buffer distances and RDFs, these measures apply categorically to all leases within PHMA, IHMA, and GHMA and are not based on site-specific information.

Although 43 C.F.R. § 3101.1-2 allows BLM to require "reasonable measures" to minimize adverse impacts to resource values, this provision only allows BLM to require measures based on site-specific conditions and not the categorical requirements established in the Proposed LUPA. The U.S. Court of Appeals for the District of Columbia has interpreted a similar regulation of the National Park Service that allowed the agency to include "additional reasonable conditions" on the permits it issues. *See United States v. Picciotto*, 875 F.2d 345 (D.C. Cir. 1989). The court determined that, "[b]y its own terms, the language allows the Park Service only to attach specific limitations to individual permits as part of its permit-granting procedure, not to adopt rules applicable to the general public." *Id.* at 347. Accordingly, BLM cannot categorically attach uniform requirements to drilling permits.

BLM's Handbook on Planning for Fluid Mineral Resources, H-1624-1, confirms this interpretation. It explains that protective measures imposed on APDs, rather than stipulations attached upon lease issuance, are "conditions of approval" (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 conditions of approval 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).

The lek buffer distances and RDFs in the Proposed LUPA are not based on site-specific information. They categorically apply in all PHMA, IHMA, and/or GHMA—which comprise 43 percent of the planning area. To the extent BLM will consider site-specific information, it is to

justify an exception to the lek buffer distances or RDFs. For example, BLM may approve activities within an applicable lek buffer distance if "[b]ased on best available science, landscape features, and other existing protections, (*e.g.*, land use allocations and state regulations), BLM determines that a lek buffer distance other than the applicable distance identified above offers the same or a greater level of protection to GRSG and its habitats." Proposed LUPA/Final EIS, app. DD at DD-2 – DD-3. Similarly, BLM may grant exceptions to the otherwise mandatory RDFs if site-specific analysis demonstrates a particular RDF does not apply to the project, an alternative RDF provides equal or greater protection to the species, or an RDF will provide no additional protection to the species or its habitat. Proposed LUPA/Final EIS, app. B at B-1. BLM's consideration of site-specific information only to justify exceptions to the lek buffer distances and RDFs inappropriately shifts the burden of establishing the applicability of the proposed COA—rather than BLM demonstrating a COA or buffer is warranted, the lessee must demonstrate the COA or buffer is <u>not</u> warranted. BLM regulations and Planning for Fluid Minerals Handbook do not allow BLM to categorically impose COAs such as the lek buffer distances and RDFs through the Proposed LUPA.

VIII. The Proposed Land Use Plan is Inconsistent with Federal Law.

The Trades protest the Proposed LUPA because it violates the APA and because it is not in accordance with federal law. *See* 5 U.S.C. § 706(2)(A). First, the Proposed LUPA improperly cedes authority over species that are not listed as threatened or endangered under the Endangered Species Act (ESA) to FWS. Second, the Proposed LUPA violates EPAct because it proposed to adopt lease stipulations that are more restrictive than necessary to protect the greater sage-grouse.

A. <u>The Proposed LUPA Improperly Cedes Authority Over Oil and Gas Operations on Federal Leases to the U.S. Fish and Wildlife Service.</u>

The Trades protest the Proposed LUPA's requirement that FWS find certain criteria met before BLM can grant an exception to an NSO stipulation in PHMA and IHMA.[25] This

[25] On BLM lands, BLM will grant an exception to the NSO stipulation if BLM, FWS, and the Idaho Department of Fish and Game/Montana Fish, Wildlife, and Parks Department find that the proposed action "[w]ould not have direct, indirect, or cumulative effects on [greater sage-grouse] or its habitat" or the proposed action "[i]s proposed to be undertaken as an alternative to a similar action occurring on a nearby parcel, and would provide a clear conservation gain to [greater sage-grouse]." Proposed LUPA/Final EIS at 2-52-2-53, FLM-3. On Forest System lands, FWS, Forest Service, and Idaho Department of Fish and Game/Montana Fish, Wildlife, and Parks Department must unanimously agree that "[t]here would be no direct, indirect, or cumulative effects to [greater sage-grouse] or its habitats or [g]ranting the exception provides an alternative to a similar action occurring on a nearby parcel and [t]he exception provides a clear net conservation gain to [greater sage-grouse.]" *Id.* at 2-70, GRSG-M-FMUL-ST-077-Standard.

provision improperly cedes management authority over development of federal oil and gas leases to FWS.[26]

FWS lacks any management authority over oil and gas leasing and development on the public lands. Under the Mineral Leasing Act of 1920, as amended, the Secretary of the Interior has exclusive authority to lease public lands and, with the Secretary of Agriculture's consent, National Forest System lands, for oil and gas development, and to administer operations on such mineral leases (subject to Forest Service supervision of surface use on National Forest System lands). *See* 30 U.S.C. § 226. The Secretary has delegated this authority exclusively to BLM. *See* 43 C.F.R. pt. 3100; Dep't of the Interior Departmental Manual, 235 DM 1 § 1.1(K) (Oct. 5, 2009). The Director of BLM "shall carry out such functions and shall perform such duties as the Secretary may prescribe with respect to the management of the lands and resources under his jurisdiction according to the applicable provisions of [the Federal Land Policy and Management Act] and any other applicable law." 43 U.S.C. §1731. That statute does not authorize the Director to re-delegate to FWS any authority delegated to him by the Secretary.

BLM has developed a comprehensive regulatory program for administering the development of federal oil and gas resources. *See* 43 C.F.R. parts 3000, 3100, 3160. This program allows BLM both to attach stipulations to oil and gas leases and to modify or waive these stipulations.[27] *Id.* §§ 3101.1-3, 3101.1-4 ("A stipulation included in an oil and gas lease shall be subject to modification or waiver only if the authorized officer determines that the factors leading to its inclusion in the lease have changed sufficiently to make the protection provided by the stipulation no longer justified or if proposed operations would not cause unacceptable impacts." (emphasis added)). The "authorized officer" means any employee of BLM authorized to perform the duties described in Group 3000 and 3100 of Title 43 and does not include an employee of another agency. 43 C.F.R. § 3000.0-5(e). *See also* 43 C.F.R. §3164.3 (stating that the authorized officer is responsible for approving and supervising the surface use of all drilling, development and production activities on federal oil and gas leases). FWS has no statutory or delegated authority to administer the development of federal oil and gas leases, or to modify or waive terms of and stipulations to, oil and gas leases on public and National Forest System lands.

The Secretary of the Interior has not delegated administration of the Mineral Leasing Act to FWS or any agency besides BLM—not surprisingly, because such a delegation would be contrary to the management scheme for public lands established by Congress in the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§1701-1782. "Public lands" are defined as any land and interest in land owned by the United States and administered by the Secretary of the Interior through BLM (with exceptions not relevant here). 43 U.S.C. § 1702(e). Congress

[26] The Trades did not comment upon the requirement for FWS to consent to NSO exceptions because this provision did not appear in the Draft LUPA. Draft LUPA, Table 2-3 at 2-35 – 2-36.

[27] BLM defines exceptions to lease stipulations as "a limited type of waiver." BLM Handbook H-1624-1 – Planning for Fluid Mineral Resources, Glossary, pg. V-10 (Rel. 1-1749 1/28/2013).

established the policy that the public lands administered by BLM be managed on the basis of multiple use and sustained yield, in a manner that will (among other goals) provide food and habitat for fish and wildlife but also in a manner which recognizes the Nation's need for domestic sources of minerals and other commodities from the public lands. 43 U.S.C. § 1701. Unlike BLM's multiple use mission in managing the public lands, the mission of FWS is far narrower. In addition to administering the ESA, FWS's mission of administering the lands in the National Wildlife Refuge System is conservation of the fish, wildlife and plant resources of the refuges and their habitat. 16 U.S.C. § 668dd(a)(2). In contrast, BLM is charged with the "enormously complicated task" (*Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004)) of managing more than 246 million acres of public lands for multiple use. *See Public Land Statistics 2014*, Table 1-4. Had Congress intended for FWS to have a role in the administration of oil and gas leases covering the public lands administered by BLM, presumably Congress would have so provided when it amended the Mineral Leasing Act in 1987 to provide, among other things, that before substantially modifying the terms of any oil and gas lease, the Secretary of the Interior would provide notice of the proposed action by posting notice "in the appropriate local office of the leasing and land management agencies." 30 U.S.C. §226(f). Of course, BLM is the leasing and land management agency for the lands subject to the LUPA; there is no indication that Congress expected any other agency to have a role in deciding whether and how to modify a lease stipulation.

BLM's proposal to cede its decision-making authority on stipulation exceptions to FWS is analogous to BLM's authority with respect to decisions on leasing and stipulations for National Forest System lands prior to the 1987 amendment of the Mineral Leasing Act which required Forest Service consent to leasing of National Forest lands. The IBLA summarized BLM's authority under the law then in effect as follows:

> The discretion to lease or not to lease is vested in the Secretary for oil and gas leasing of national forest lands as well as other public domain lands. Chevron Oil Co., 24 IBLA 159 (1976); 30 U.S.C. § 181 (1976). Where public domain land is administered by another agency, such as the Forest Service, BLM should properly consider the recommendations of that agency regarding lease issuance or the imposition of stipulations, but this does not relieve BLM of the need to make an independent determination supported by the record of whether and under what conditions a lease may issue in the public interest consistent with multiple use values. Esdras K. Hartley, 54 IBLA 38, 88 I.D. 437 (1981). The recommendation of the Forest Service regarding the national forest public lands are [sic] important, but not conclusive, in determining whether a lease should be issued. Chevron Oil Co., supra; Stanley M. Edwards, 24 IBLA 12 (1976); Esdras K. Hartley, 23 IBLA 102 (1975). A BLM decision refusing to issue a lease will be upheld provided it sets forth the reasons for doing so and facts of record support the conclusion that the refusal is required in the public interest. Esdras

> K. Hartley, 54 IBLA 38, 88 I.D. 437 (1981); Robert P. Kunkel, supra at 78.

Natural Gas Corp. of California, 59 IBLA 348, 351 (1981) (emphasis added). Just as, under the law in effect prior to 1988, BLM could not delegate its decision-making authority to the Forest Service on whether to lease National Forest lands or the terms of any stipulations attached to such leases, BLM cannot now delegate to FWS its authority to grant an exception to a lease stipulation. The NSO stipulation proposed for PHMA and IHMA lands sets forth the circumstances under which an exception could be granted (*i.e.,* would not have direct, indirect or cumulative effects on the greater sage-grouse or its habitat or would be an alternative to a similar action on a nearby parcel and would provide a clear conservation gain to greater sage-grouse). BLM has wildlife biologists qualified to make such determinations. Moreover, BLM could certainly consult with FWS, along with the Idaho Department of Fish and Game and Montana Fish, Wildlife, and Parks Department, in making that determination. *See, e.g.,* 43 C.F.R. § 24.6 authorizing BLM and FWS to enter into cooperative agreements (including such agreements with state wildlife agencies) on various topics pertaining to the protection of fish and wildlife habitat. However, BLM may not abdicate the authority delegated to it by the Secretary to administer the Mineral Leasing Act and the terms of oil and gas leases issued under those statutes to another federal agency, including FWS.

The Trades emphasize that although BLM may not delegate its decision-making authority on exceptions to lease stipulations, BLM should consult with the Idaho Department of Fish and Game and Montana Fish, Wildlife, and Parks Department on any proposal to grant an exception to an NSO stipulation in PHMA or IHMA. The Trades recognize that Congress has repeatedly affirmed that states have primacy over unlisted wildlife on public and National Forest System lands. *See* 16 U.S.C. §§ 528 ("Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests . . . ."), 1604(g) (requiring coordination with "state and local governments" when developing land management plans); 43 U.S.C. § 1732(b) ("nothing in this Act shall be construed . . . as enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife"). *See also* 43 C.F.R. §§ 24.3(b) (recognizing that "Congress has, in fact, reaffirmed the basic responsibility and authority of the States to manage fish and resident wildlife on Federal lands"), 24.4(d) (recognizing that states "possess primary authority and responsibility for management of fish and wildlife" on BLM lands). Although BLM may not cede its decision-making authority on exceptions to oil and gas lease stipulations, the Trades believe that, given the Idaho Department of Fish and Game's and Montana Fish, Wildlife, and Parks Department's expertise in managing the greater sage-grouse, BLM would benefit from input from the Idaho Department of Fish and Game and Montana Fish, Wildlife, and Parks Department when making these decisions.

The provision of the Proposed LUPA requiring FWS to find that criteria related to the greater sage-grouse are met before BLM may grant an exception to an NSO stipulation is inconsistent with congressional policy regarding management of unlisted wildlife on the public and National Forest System lands. For these reasons, the Agencies must revise the Proposed

LUPA to remove the requirement that FWS consent to exceptions to NSO stipulations in PHMA or IHMA.

B. The Proposed Land Use Plan is Inconsistent with the Energy Policy Act of 2005.

The Trades protest the Proposed LUPA because it is inconsistent with EPAct.[28] EPAct 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." EPAct, Pub. L. No. 109-58, § 363(b)(3), 119 Stat. 594, 722 (2005). This MOU was finalized in April of 2006 as BLM MOU WO300-2006-07 and, like EPAct, requires that lease stipulations will be "only as restrictive as necessary to protect the resource(s) for which they are applied."

The requirement that lessees mitigate impacts to greater sage-grouse to provide a "net conservation gain" is more restrictive than necessary. The Agencies could have required lessees to mitigate impacts to avoid unnecessary or undue degradation, *see* 43 U.S.C. § 1732(b). Though inconsistent with FLPMA, the Agencies did not even consider requiring that mitigation achieve "no net loss" of greater sage-grouse habitat.[29] Because the requirement that mitigation achieve a "net conservation gain" is inconsistent with EPAct, the Agencies must revise the Proposed LUPA to remove the "net conservation gain" requirement.

Likewise, the lek buffer distances are more restrictive than necessary. The 3.1 mile buffers are not scientifically defensible, as explained in Section X.B, *infra*. Furthermore, in the Final EIS, the Agencies did not analyze whether alternative buffer distances would offer substantially similar protection to the greater sage-grouse. *See* Proposed LUPA/Final EIS, Table 2-13 at 2-220. Because the lek buffer distances are unnecessarily restrictive, the Agencies must revise the Proposed LUPA to identify measures that comply with the directives of EPAct.

Finally, the requirement on National Forest System lands that lessees limit noise from discretionary activities during construction, operation, and maintenance to not exceed 10 decibels above ambient sound levels (not to exceed 20-24 dB) at occupied leks from two hours before to two after official sunrise and sunset during breeding season is overly restrictive, particularly because the noise limitation is not justified by science. *See* Proposed LUPA/Final EIS at 2-59. The threshold of 20 – 24 decibels is unreasonable. The Occupational Safety & Health Administration's (OSHA) sound level scale discloses that ambient noise levels at the North Rim of the Grand Canyon average 25 dBA and that a "soft whisper" at two meters is

[28] The Trades commented upon the requirement that the Agencies consider the least restrictive stipulations necessary. Trade Comments at 5.

[29] The Trades recognize that the Agencies did consider in the Draft EIS a "no unmitigated loss" mitigation standard. Draft LUPA at 2-74. However, in the Final EIS, this standard was no longer included under the Alternative in which it had formerly appeared, Alternative D. *See* section V.B.1, *supra.*

approximately 35 dBA. *See* OSHA, *Occupational Noise Exposure*.[30] Accordingly, EPAct required the Agencies to consider and adopt less restrictive measures.

IX. Protests of Specific Elements of the Proposed LUPA

A. Monitoring Framework

The Trades protest several components of the monitoring framework.[31] First, and most significant, the Trades protest the Agencies' proposals to monitor implementation and effectiveness of the Proposed LUPA, as well as seasonal habitat, connectivity at the fine scale, and habitat conditions at the site scale. *See* Proposed LUPA/Final EIS, app. E at 43. The Trades do not necessarily object to the substance of what will be monitored, but rather object to Agencies' 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 LUPA/Final EIS, app. E at 43. Presently, the Agencies are lacking the resources to meet their existing statutory and regulatory obligations, such as timely processing applications for permits to drill and conducting field inspections of oil and gas operations. *See, e.g.*, Government Accountability Office, *Oil and Gas Development: BLM Needs Better Data to Track Permit Processing Times and Prioritize Inspections* (2013). The Agencies should not tax their limited resources and commit to additional obligations knowing that they lack the resources necessary to fulfill these obligations. Moreover, the Agencies may expose themselves to lawsuits alleging that they have failed to implement the Proposed LUPA if they cannot secure the funding or resources necessary to implement the monitoring framework. Therefore, the Agencies should revise the monitoring framework and only commit to implement measures that the Agencies have the funding and resources to implement.

Second, the Trades protest the monitoring framework's requirement that the Agencies compare current sagebrush levels to the levels that "pre-Euro-American" landscape could have supported. Not only is this comparison speculative because the Agencies 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 LUPA does not explain or identify how the Agencies will utilize this information in future land management decisions.

Finally, the Trades protest the requirement that BLM separately monitor density of energy and mining (Measures 3). *See* Proposed LUPA/Final EIS, app. E at 26. It is unnecessary and arbitrary for the Agencies to single out and monitor energy density over other land uses. The Proposed LUPA directs that the Agencies monitor habitat degradation generally (Measure 2), which accounts for energy impacts. *See id.* at 22. Given that the Agencies' resources are already

[30] https://www.osha.gov/SLTC/noisehearingconservation/#loud (last visited June 27, 2015).

[31] The Trades did not comment upon the details in the monitoring framework because they were newly added to the Proposed LUPA. Commenters noted the necessity for BLM to provide the mitigation and monitoring plans for public review. Proposed LUPA, app. T at T-18 – T-19.

limited, and impacts from energy development will be evaluated through habitat degradation monitoring, the Agencies should revise the Proposed LUPA to remove the commitment to separately monitor density of energy and mining.

B. Adaptive Management Strategy

In addition to their position that the Agencies may not implement the adaptive management framework without amending the Proposed LUPA, *see* section VI(B), *supra*, the Trades protest the substance of the adaptive management provisions in the Proposed LUPA as arbitrary and capricious.[32] First, the adaptive management responses do not require a causal relationship between the management measures and the adaptive management triggers. Second, the Agencies must more clearly articulate responses to soft triggers. Finally, the Agencies should allow for adaptive management responses that reduce burdens on lessees.

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

The Trades protest the soft and hard adaptive management triggers and responses set forth in the Proposed LUPA as arbitrary because the adaptive management strategy does not describe the factors the Agencies will consider when assessing the "causal" factors of triggers being reached. A hard trigger is reached when either there occurs a 20 percent loss of key habitat[33] within a BSU of a PHMA or IHMA within a Conservation Area[34] when compared to a 2011 baseline, or when there occurs a 20 percent decline in the current three year average of total maximum number of male sage-grouse compared to the 2011 baseline and a finite rate of change "significantly below" 1.0 within PHMA or IHMA within a Conservation Area. Proposed LUPA/Final EIS at 2-28, AM-7, AM-9. Soft triggers follow the same structure except the threshold is 10 percent loss instead of 20 percent loss. Proposed LUPA/Final EIS at 2-28 – 2-29, AM-8, AM-10. The Proposed LUPA calls for few specific responses to these triggers. In response to hard triggers, all IHMA are treated as PHMA within the Conservation Area in which the trigger was reached, and an "Implementation Team" would evaluate causal factors and recommend additional management adjustments. Proposed LUPA/Final EIS at 2-29, AM-12. In response to soft triggers, an "Implementation Team" would meet to evaluate causal factors

[32] Commenters noted the inadequacy of the Agencies' description of adaptive management. Proposed LUPA, app. T at T-26.

[33] Defined as "areas of generally intact sagebrush that provide [greater sage-grouse] habitat during some portion of the year." Proposed LUPA/Final EIS at 2-28.

[34] Defined as "[a]reas determined to be necessary to monitor population objectives to evaluate the disturbance density and adaptive regulatory triggers and engage adaptive management responses. Conservation Areas may contain priority, important, and general habitat management areas and sagebrush focal areas. Specifically, these areas are Mountain Valleys, Desert, West Owyhee, and Southern and Southwestern Montana." Proposed LUPA, Glossary at 8-8. See Proposed LUPA/Final EIS at 2-24 for a list of Conservation Areas.

and recommend additional potential implementation level activities. Proposed LUPA/Final EIS at 2-29, AM-11.

The purpose of adaptive management is to adjust management decisions to respond to information learned regarding uncertainties in the management strategy. The Proposed LUPA defines adaptive management as "[A] decision process that promotes flexible resource management decision making that can be adjusted in the face of uncertainties as outcomes from management actions and other events become better understood." Proposed LUPA/Final EIS at 2-74. Guidance from the Department of the Interior and Forest Service reinforce that the purpose of adaptive management is to respond to outcomes of management decisions. Department of the Interior 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). Likewise, the Forest Service defines adaptive management as "[a] system of management practices based on clearly identified intended outcomes and monitoring to determine if management actions are meeting those outcomes." 36 C.F.R. § 220.3.

The adaptive management strategy may not implement responses when a trigger is reached for reasons other than the Agencies' management decisions. The adaptive management strategy must recognize that external factors beyond the Agencies' 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 LUPA. In other words, the cause of the trigger—wildfire or disease—is not related to the Agencies' 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 2. 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 3. Therefore, it is possible that events that occurred years before issuance of the ROD for the LUPA may impact greater sage-grouse populations in the coming years, even if the Agencies' 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. The Agencies must revise the Proposed LUPA to require a relationship between a triggering event and management actions taken under the LUPA 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, BLM regulations, and Forest Service regulations all provide avenues for adjustments due to changed conditions through plan amendments and supplemental environmental analysis. *See* 36 C.F.R. § 219.13(a) (stating that plan amendments "should be used to . . . help units adapt to new information or changing conditions"); 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 LUPA 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 LUPA.

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

The Agencies' response to soft triggers provides only that, if a trigger is tripped, the Agencies will convene a team to discuss potential causes and management responses. Proposed LUPA/Final EIS at 2-29, AM-11. The Agencies provide no detail as to how this 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.

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

The Proposed LUPA 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 LUPA sets forth triggers to adjust management of the greater sage-grouse to respond to habitat loss or population declines. Proposed LUPA/Final EIS at 2-28 – 2-29. Although the Proposed LUPA does provide that, after a trigger is reached and management changes are made in response, the changes may be removed if habitat or population return to acceptable levels, Proposed LUPA/Final EIS at 2-29, AM-14, the Proposed LUPA does not identify any triggers that, if met, will ease regulatory burdens on oil and gas lessees. It is possible 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.*, 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, 287 (2014) ("Applegate & Owens"), Attachment 4; 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, 70 (2011) ("Ramey, Brown, & Blackgoat"), Attachment 5. If information continues to emerge that indicates that oil and gas development does not impact the greater sage-grouse as the Agencies believe, the Proposed LUPA should allow the Agencies to

adjust these measures through adaptive management. Likewise, the Agencies should be allowed to adjust measures if sage-grouse populations increase, or if habitat improves by waiving or modifying timing or NSO stipulations and increasing disturbance and density caps. The Agencies should revise the Proposed LUPA to allow decreased oil and gas restrictions through the adaptive management process.

C. The Methodology for Calculating Density and Disturbance Caps Must be Revised.

The Trades protest BLM's methodology for calculating density and disturbance caps because it is vague and does not adequately inform the public regarding how the density and disturbance caps will be applied.[35] Although the Trades view the density and disturbance caps as unnecessarily restrictive given the other management prescriptions set forth in the Proposed LUPA, the Trades suggest that BLM examine the Density and Disturbance Calculation Tool adopted by the State of Wyoming to manage for greater sage-grouse because many oil and gas operators are already familiar with this tool.

Additionally, the Agencies must clearly define and publish maps of BSUs within which the disturbance caps apply in Idaho. *See* Proposed LUPA/Final EIS, app. G; Glossary at 8-7. The public has no way of knowing which areas constitute BSU and therefore cannot assess how impacts will be evaluated.

Furthermore, the Agencies must revise the west-wide habitat degradation data layers set forth in Table G-1. *See* Proposed LUPA/Final EIS, app. G at G-6. This table appears to assume that each well results in five acres of disturbance. *See id.* This figure assumes that all wells are vertical wells and that each well has five acres of disturbance; it does not appear to account for multiple wells on a single pad. With directional and horizontal drilling, disturbance per well is often much less. Members of the Trades have achieved over 32 wells on pads using directional drilling, and eight to ten wells per pad for horizontal wells are regularly achieved. Well pads with multiple wells are indeed larger than single well pads, but the disturbance per well is much smaller. BLM should use more realistic assumptions based on modern drilling practices.

Moreover, development on private lands should not be included toward density and disturbance limitations because the Agencies have no control over this development. Moreover, accounting for development on private lands makes planning difficult for federal lessees. Because of the long permitting times for development on federal oil and gas leases, conceivably an area could be comfortably below the density and disturbance caps at the start of a federal development project but, prior to approval of the federal project, construction of infrastructure on private lands consumes the remaining space under the cap. As a practical matter, the Agencies cannot accurately calculate disturbance amounts on private lands because they can only rely on aerial or satellite imagery.

[35] The Trades commented upon the Draft LUPA's density and disturbance caps. Trade Comments at 4.

The Proposed LUPA also should define a "facility" for purposes of applying the density cap. The Proposed LUPA does not clearly indicate whether a "facility" constitutes a single well pad or a cluster of related well pads and associated infrastructure such as compressors.

Finally, the Agencies states that, in Montana, if either anthropogenic disturbance alone exceeds three percent or anthropogenic disturbance plus habitat loss associated with conversion to agricultural tillage or fire exceeds five percent within a project analysis area in PHMA, then BLM will not approve further disturbances. Proposed LUPA/Final EIS, app. G at G-4. BLM should not count wildfire disturbance in its calculation of disturbance caps, particularly at the project level, because neither BLM nor project proponents have any control over the occurrence or extent of wildfire damage.

D. Withdrawals of Lands from Mineral Leasing

The Trades protest the Agencies' proposal to prioritize oil and gas leasing outside of SFAs, PHMAs, and IHMAs and, if leasing occurs, only lease SFAs, PHMAs, and IHMAs areas with NSO stipulations without the possibility of waiver or modification. *See* Proposed LUPA at 2-51, FLM-OBJ-1; 2-51, FLM-1. Although the Agencies failed to publish the size of SFAs, PHMAs, and IHMAs in the Final EIS, based on maps, it appears that these areas can be thousands of contiguous acres. The significant size of these areas renders much of the oil and gas estate beneath them inaccessible with modern technology. Although horizontal wells can extend as far as two miles, this distance is inadequate to access much of the mineral estate. Even if an oil and gas operator was able to site a horizontal well on non-federal lands within SFA, PHMA, or IHMA, it may be unable to obtain a right-of-way across federal lands to access the well locations because the SFA, PHMA and/or IHMA is designated a right-of-way avoidance area. By prohibiting surface occupancy across such large swaths of land, the Agencies effectively remove the SFAs, PHMAs and IHMAs from future leasing for oil and gas exploration and development.

The decision to effectively remove SFAs, PHMAs, and IHMAs from future leasing is significant. The Proposed LUPA designates more than 10 million mineral acres in SFAs, PHMAs, and IHMAs within the planning area as subject to NSO stipulations and closes more than 1.8 million mineral acres in these areas to future leasing. These significant restrictions on future oil and gas leasing will lead to significant declines in oil and gas production on federal lands. Both the federal and state treasuries will lose significant revenue in the form of bonuses, royalties and rentals.

With FLPMA, Congress intended to prevent BLM from closing such large areas from mineral leasing without congressional oversight. Minerals exploration and production, including oil and gas development, is one of the principal uses of the public lands. 43 U.S.C. § 1702(l). The Trades maintain the Proposed LUPA's proposal to prioritize leasing outside of PHMA and IHMA and to make PHMA and IHMA open for leasing with NSO stipulations that cannot be waived or modified constitutes a *de facto* withdrawal under FLPMA. *See* 43 U.S.C. §§ 1702(j) (defining "withdrawal"), 1714(l)(1) (referencing withdrawals resulting from closure of lands to leasing under the Mineral Leasing Act of 1920). FLPMA requires that the Secretary of the

Interior notify both houses of Congress of withdrawals of five thousand acres or more no later than the effective date of the withdrawal; as part of this notification, FLPMA also imposes additional procedural requirements. *Id.* § 1713(g). At a minimum, the Secretary of the Interior must report its decision to exclude a principal or major use of the public lands (mineral leasing) from tracts of land more than 100,000 acres to the House of Representatives and Senate, and complete additional procedural requirements. *Id.* § 1712(e). Accordingly, the Secretary of the Interior must comply with FLPMA and notify Congress of the *de facto* withdrawals of PHMA and IHMA from mineral leasing.

E. Right-of-Way Avoidance and Exclusion Areas

The Agencies have not adequately explained or justified the proposal to designate all PHMA and IHMA as right-of-way avoidance or exclusion areas. Lessees' ability to develop their leases could be significantly impacted if the Agencies inappropriately limit access to these leases. The Agencies 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 an oil and gas lease 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 (2006). 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). The Agencies must recognize the lessee's right to use the lands included within its leasehold or unit 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 Montana, and the federal government will be deprived of the economic benefit of potential oil and gas development.

F. The Agencies Cannot Limit "Tall Structures."

The Proposed LUPA sets forth a guideline applicable to nesting habitat on National Forest System lands to restrict development of "tall structures" within two miles from the perimeter of occupied leks with the potential to disrupt breeding or nesting by creating new perching/nesting opportunities for avian predators or by decreasing the use of an area. Proposed LUPA/Final EIS at 2-61. The Trades object to this guideline. First, the effects of "tall structures" on the greater sage-grouse are not understood. Although the Trades disagree with the USGS Report—which presumably is the report from which this requirement derives—this report expressly states: "[i]t is important to recognize that the effect of tall structures remains debated" and "solid evidence that sage-grouse instinctively avoid tall structures remains debated because of the difficulty in connecting predation risk to various combinations of infrastructure." USGS Report at 8. Because of the lack of science supporting the limits on "tall structures," the Agencies would act arbitrarily limiting tall structures, particularly on existing leases.

Second, definition of "tall structures" is vaguely defined as "[a] wide array of infrastructures . . . that have the potential to disrupt lekking or nesting birds by creating new perching/nesting opportunities and/or decreasing the use of an area." Proposed LUPA/Final EIS at 8-22. This definition likely will be misapplied between field offices. The Agencies should define "tall structures" to exclude oil and gas production equipment, such as wells, tanks, compressor stations, and other infrastructure sited on or near well pads. Although the Trades disagree with the analysis in the USGS Report, the USGS Report does not cite oil and gas infrastructure among the following examples of "tall structures": "poles that support lights, telephone and electrical distribution, communication towers, meteorological towers, and high-tension transmission towers." USGS Report at 8. Therefore, the Agencies should revise the Proposed LUPA to remove the limitation on "tall structures"; however, if they retain this limitation, they must define it to exclude oil and gas facilities.

G. Noise Limits

The Trades also protest the noise limits proposed in the LUPA. On National Forest System lands, the Proposed LUPA would restrict surface disturbing and disruptive activities, including noise at 10 dB above ambient (not to exceed 20-24 decibels) measured at the perimeter of an occupied lek, to lekking birds from 6:00 p.m. to 9:00 a.m. within a buffer distance of 3.1 miles between March 1 and April 30. Proposed LUPA/Final EIS at 2-52. First, the limits should only apply in PHMA and not in all habitat. Second, the Proposed LUPA provides no protocol or guidance for the measurement of noise levels. Finally, as explained in section VIII(B), *supra*, this threshold is unreasonably low.

X. The Trades Protest the Agencies' Scientific Basis for the Restrictions on Oil and Gas Leasing and Development in the Proposed LUPA.

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

The stipulations, restrictions, and conservation measures in the Proposed LUPA are largely based on the U.S. Fish and Wildlife Service's (FWS) *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 Administrative Procedure Act (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. The Agencies should remove from the Final Record of Decision all references to these reports and any conservation measures that rely upon

them, such as the three percent disturbance cap, noise limitations, and most of the required design features.[36]

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.[37] *Ecology Ctr., 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.[38]

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-*

[36] The Trades commented on the Agencies' inappropriate reliance upon these reports in the DLUPA/Draft EIS. *See* Trade Comments at 2 – 4. 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 7, available at http://www.usgs.gov/info_qual/greater_sage-grouse_ecology-and-conservation.html.

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

[38] 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 LUPA, 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).

determined Outcome?, p. 13-14 (May 20, 2013) ("NWMA Review"), Attachment 6. 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, which has been proposed in the Proposed LUPA. 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"). 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 8. Moreover, the Proposed LUPA'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 the Agencies should not have relied upon these studies or the NTT Report in the Proposed LUPA.

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.*, Ramey, Brown, & Blackgoat. As explained by Ramey, Brown, and Blackgoat, studies 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. Applegate & Owens at 284. 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. The Agencies should not rely on the NTT Report when forming oil and gas stipulations and conservation measures in the Proposed LUPA, because the NTT Report does not represent the best available science.

The COT Report also fails to utilize the best available science, and the Agencies inappropriately relied upon it in the Proposed LUPA. 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 the Agencies 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. The Agencies 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,[39] 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 the Agencies' reliance upon these documents in the Proposed LUPA was in error. The Agencies should remove all references to these reports and all conservation measures derived from them in the Final Record of Decision.

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 Department of the Interior's (DOI) 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.

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

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 development. *See* section X.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 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. The Agencies 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 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. The Agencies' reliance upon these reports in the Proposed LUPA is, therefore, inconsistent with the DQA guidelines' requirements that agencies ensure transparency and objectivity in disseminating information. The Agencies should remove all references to the NTT and COT reports and any conservation measures derived from these reports in the Final Record of Decision.

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. The Agencies should remove all references to these reports from the Final Record of Decision.

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 no surface occupancy 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 X.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. The Agencies should remove all references to these reports in the Final Record of Decision, as well as any conservation measures based upon them.

B. The Lek Buffers are not Supported by the Best Available Science.

The Agencies rely upon a recent report from the U.S. Geological Survey (USGS) to impose uniform buffer distances for anthropogenic disturbance across the planning area. Proposed LUPA/Final EIS at 2-3; *see* Daniel J. Manier, et al., Conservation Buffer Distance Estimates for Greater Sage-Grouse—A Review (USGS, Open-File Report 2014-1239) ("USGS Buffer Report"). In particular, the Agencies have chosen to implement buffers from linear features and energy development at 3.1 miles from active leks. Proposed LUPA/Final EIS, app. DD at DD-1. These buffer restrictions are problematic for two reasons.[40] First, they do not

[40] The 3.1 mile buffer was not in the Draft LUPA/Draft EIS because the USGS study was not released until 2014, hence the Trades did not comment upon it. *See* Proposed LUPA/Final EIS at 2-3. In their comments on the Draft LUPA/Draft EIS, the Trades generally commented on the flawed science underlying the Draft LUPA/Draft EIS. *See* Trade Comments at 2 – 4.

adequately incorporate the USGS Buffer Report's crucial qualification that departures from the buffer distances should be allowed to account for local and regional variations in habitat. Second, the buffer restrictions are not supported by current science.

The buffers appendix does not adequately consider and incorporate important qualifications in the USGS Buffer Report. The report attempted to synthesize and interpret the results of a number of different studies into manageable buffer distances for land use management agencies. *See* USGS Buffer Report at 1. The authors analyzed "the most relevant literature" for six different categories, including energy development. *Id.* From this literature, the authors determined an "interpreted range" of buffers for each category with upper and lower bounds. *Id.* at 14, tbl. 1. Although the interpreted range applies range wide, the authors are careful to note that variabilities in habitat and greater sage-grouse responses to different infrastructure types "can be substantial across the species' range," and that "[l]ogical and scientifically justifiable departures from the 'typical response,' based on local data and other factors, may be warranted when implementing buffer protections or density limits in parts of the species' range." *Id.* at 2.

The buffers appendix does not reasonably account for this qualification. Instead of providing a clear mechanism for "logical and scientifically justifiable departures," the Agencies make the buffer distances mandatory in general habitat subject to two limited exceptions and mandatory in priority habitat subject to one limited exception. For GHMA, the Proposed LUPA provides that exceptions may be granted if, based on the best available science, landscape features, and other existing protections, an alternative buffer distance provides the same or greater protection; or impacts on greater sage-grouse and its habitat are minimized such that the project will cause minor or no new disturbance, and any residual impacts are addressed through compensatory mitigation that ensures a net conservation gain. Proposed LUPA/Final EIS, app. DD at DD-2. For PHMA and IHMA, only the first exception criterion applies. In both cases, it is hard to imagine that what the Agencies consider the "best available science" would ever justify a decrease in lek buffer distances, particularly for oil and gas development. *See* section X.A.1, *supra*. The Agencies' version of "best available science" will likely more often lead the Agencies to apply the upper bound of its interpreted range of buffers rather than making any reasonable accommodations for oil and gas.

The buffer restrictions are also unsupported by sound science. As an initial matter, current data from the Pinedale planning area refutes the necessity of wide buffers surrounding sage-grouse leks. A recent review of this data showed that regional climatic variations, rather than anthropogenic threats such as oil and gas, accounted for 78 percent of the variation in lek attendance in the Pinedale area from 1997 to 2012. Rob R. Ramey, Joseph Thorley, & Lex Ivey, *Hierarchical Bayesian Analyses of Greater Sage-grouse Population Dynamics in the Pinedale Planning Area & Wyoming Working Groups: 1997-2012*, at 3 (Dec. 2014). Because current data demonstrates that the impacts of anthropogenic disturbances on sage-grouse populations are lower than previously thought, the buffer restrictions are not supported by current science.

Moreover, many of the studies that the USGS Buffer Report relied upon use outdated information and contain other methodological weaknesses or errors. One study the report cites

to describe the response by sage-grouse to industrial development contains serious flaws. D.E. Naugle, et al., *Energy Development & Greater Sage-Grouse, in Greater Sage-Grouse: Ecology of a Landscape Species & its Habitats*, Studies in Avian Biology No. 38 (S.T. Knick & J.W. Connelly eds., 2011) ("Naugle et al. 2011"). As one reviewer has noted, this study is not an impartial review of existing literature. The authors examined 32 studies, reports, management plans, and theses regarding sage-grouse responses to energy development, and dismissed all but seven of these studies, four of which were authored by the reviewers. Rob R. Ramey & Laura M. Brown, *A Comprehensive Review of Greater Sage-Grouse: Ecology & Conservation of a Landscape Species & its Habitat* at 115 (Feb. 2012), Attachment 12. Naugle et al. 2011 also misrepresented the results of another study to support their claim that sage-grouse abandon leks due to noise and human activity. *Id.* at 116. Further, of the seven studies reviewed, four focused on impacts to sage-grouse in the Pinedale/Jonah Field development area and two focused on coal bed natural gas (CBNG) development in the Powder River Basin. *Id.* Historical development in these areas is far more intensive and impactful than current development patterns and technologies, and these studies' results cannot serve as a basis for imposing management restrictions on different forms of development. *See* Applegate & Owens at 287 – 88 (noting that modern forms of development cause fewer impacts than older, more intensive forms of development). Naugle et al. 2011 overall is an inappropriate basis for the lek buffers.

Another study on which the USGS Buffer Report relied for its energy buffers in particular had similar problems. *See* USGS Buffer Report at 5, 7 (citing A.J. Gregory & J.L. Beck, *Spatial Heterogeneity in Response of Male Greater Sage-Grouse Lek Attendance to Energy Development*, PLoS One, June 2014). This study, like many similar studies, was based on peak male lek count data. *Id.* at 2; *see also* D.H. Johnson, et al., *Influences of Envt'l & Anthropogenic Features on Greater Sage-Grouse Populations*, 1997 – 2007, *in* Greater Sage-Grouse: Ecology of a Landscape Species & its Habitats, Studies in Avian Biology No. 38, at 407 (S.T. Knick & J.W. Connelly eds., 2011). Peak male lek count data tends to bias lek attendance estimates and therefore leads to inaccurate population trend estimates. Rob R. Ramey, et al., *Hierarchical Bayesian Analyses of Greater Sage-Grouse Population Dynamics in the Pinedale Planning Area & Wyoming Working Groups: 1997 – 2012*, at 2 – 3 (Dec. 2014), Attachment 13. Mean average lek counts provide a more accurate picture of population trends. *See, e.g.*, *id.*

Further, the Gregory and Beck study results are based on data that do not reflect current development realities. The study's conclusions are based on well density data and lek counts from 1991 through 2011. Gregory & Beck at 4. The period in which sage-grouse reacted most strongly to increasing well densities, according to the authors, was from 2007 – 2011. *Id.* However, the authors note that the trend in male lek attendance from 2007 – 2011 was a response to well-pad densities in 2004. *Id.* at 7. Despite significant changes in oil and gas development patterns and technologies since 2004, the authors extrapolate from these results a prediction that oil and gas development will lead to even greater decreases in lek attendance in the coming years. *Id.* This prediction assumes that oil and gas development in the future will mirror oil and gas development in the past, an unlikely outcome. In 2004, intensive development was the norm in the Powder River Basin, the Pinedale/Jonah Field, and in most oil and gas developments across the country. *See, e.g.*, Applegate & Owens at 287. As noted earlier in this protest,

horizontal and directional drilling permits increased 40-fold in the ten years following 2004, and more intensive, conventional development permits decreased by about half over the same time period. Applegate & Owens at 287. As Applegate and Owens note, "[a] single horizontal well now takes the place of 8 to 16 vertical wells," leading to reductions in well pad disturbances, linear disturbances, and disturbances due to human activity. *Id.* at 288. Gregory and Beck's study does not account for these changes in oil and gas technology and is an inappropriate basis for imposing buffers on all oil and gas development across greater sage-grouse range.

Other papers important to the USGS Buffer Report's energy buffers, *see* USGS Buffer Report at 7, also relied on well density data from the height of Wyoming's CBNG boom. *See, e.g.*, B.C. Fedy et al., *Habitat Prioritization Across Large Landscapes, Multiple Seasons, & Novel Areas: An Example Using Greater Sage-Grouse in Wyoming*, 190 Wildlife Monographs 1, 12 (Mar. 2014) (relying on Wyoming well data from 1998 through 2008 to determine effects of various well densities on greater sage-grouse); D.H. Johnson, et al., *Influences of Envt'l & Anthropogenic Features on Greater Sage-Grouse Populations, 1997 – 2007*, in Greater Sage-Grouse: Ecology of a Landscape Species & its Habitats, Studies in Avian Biology No. 38, at 407 (S.T. Knick & J.W. Connelly eds., 2011) (relying on data from 1997 through 2007); Kevin E. Doherty, *Greater Sage-Grouse Winter Habitat Selection & Energy Development, 72 J. of Wildlife Mgmt*. 187, 187 (relying on data from CBNG development in the Powder River Basin). Current development is less intensive than the CBNG development that took place from 1998 through 2008. In effect, the USGS Buffer Report reviewed data from some of the most intensive developments in the country and extrapolated from these results range wide buffers applicable to future development with significantly different impacts. This data is a weak basis from which to regulate current and future oil and gas development. *See* Applegate & Owens at 287; Ramey, Brown & Blackgoat at 70.

The Agencies' reliance upon the USGS Buffer Report to prescribe range wide lek buffers is arbitrary and capricious under the APA. 5 U.S.C. § 706(2)(A). The Agencies virtually dismiss the USGS Buffer Report's important qualifications regarding habitat variability and the need to respond to local and regional conditions. In addition, the current data do not support the need for buffers. Finally, the studies cited by the USGS Buffer Report generally relied on older well and lek count data that were strongly influenced by the last decade's surge in CBNG development and did not take into account recent advances in development technology and patterns. Because oil and gas development, regulations, and sage-grouse conservation policies have shifted significantly since the data underlying these studies were collected, the studies do not serve as a sound scientific basis for development of range wide management prescriptions, including lek buffers. *See* Ramey, Brown & Blackgoat at 70. The lek buffers are therefore not supported by current science, and the Agencies should remove them from the Final Record of Decision.

XI. Additional Comments

In addition to the protest points outlined above, the Trades offer the following comments on the Proposed LUPA.

1. The Agencies Should Not Adopt Alternatives B, C, and F

Although the Trades disagree with the Agencies' decision to adopt the Proposed LUPA, the Trades maintain that the Agencies should not adopt Alternatives B, C, and F. These alternatives are unnecessarily restrictive and will stymie oil and gas exploration and development on the public lands.[41]

2. The Agencies Should Not Close All Low or No Potential Areas to Future Leasing

As detailed in the Trades' comments upon the Draft LUPA, the Trades strongly protest the Agencies' decision to close all no and low potential oil and gas areas to future leasing. Proposed LUPA at 2-209. The agencies wrongly assume that areas currently identified as having no or low potential for oil and natural gas may not eventually prove to contain moderate or high potential. Due to major advances in geophysical exploration, drilling and completions technology in recent years, operators have produced significant amounts of oil and natural gas in areas across the country that were once thought to contain little or no economically accessible quantities. By closing these areas to future leasing the agencies will be unnecessarily preventing the exploration and possible production of oil and natural gas resources and associated economic benefits to local communities, states, and the nation. We strongly recommend that the agencies refrain from closing these areas to future leasing and instead apply more reasonable stipulations.[42]

[41] The Trades commented upon the unreasonableness of many of the conservation measures contained in these alternatives. Trade Comments at 4.

[42] The Trades commented upon the Draft LUPA's proposal to close all no and low potential acreage to leasing. Trade Comments at 4.

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

This Protest reflects that we have serious and substantial concerns with the Proposed LUPA. We respectfully request a meeting with the Agencies to discuss the issues outlined in this Protest. *See* BLM Land Use Planning Handbook H-1601-1 App. 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 the Agencies for consideration of this request.



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