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 and 43 C.F.R. § 1610.5-2(a), Montana Petroleum Association (MPA), the American Petroleum Institute (API), and Western Energy Alliance ("the Alliance"), collectively referred to as "the Trades," hereby protest the Proposed Miles City Field Office Proposed Resource Management Plan and Final Environmental Impact Statement ("Proposed RMP/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 RMP and Final Environmental Impact Statement (EIS) were published in the Federal Register on May 29, 2015. 80 Fed. Reg. 30,705 (May 29,

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

STATEMENT OF STANDING

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

Interests that May be Affected

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. MPA represents more than 200 companies involved in the upstream, midstream, and downstream sectors of the industry.

Many of the Trades' member companies have a direct interest in how BLM plans 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 BLM's 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 RMP will have a direct impact on the future viability of oil and natural gas development in the planning area and beyond.

Participation in the Planning Process

The Alliance, MPA, and Public Lands Advocacy (PLA) filed comments dated June 4, 2013, on the Draft RMP/Draft Environmental Impact Statement (EIS). A copy of this letter is attached as Attachment 1. Since release of the Draft RMP/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 PLA and its direct work developing comments on the Draft RMP. Additionally, API has directly engaged with BLM regarding development of the RMP. API, among others, met with BLM Director Neil Kornze on August 13, 2014 in Washington, D.C. to discuss amendments to the RMP; API also participated via teleconference in a follow-up meeting 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 RMP, however, does not balance conservation of the greater sage-grouse and responsible oil and natural gas development. The Proposed RMP will severely restrict oil and natural gas development on existing federal leases across 887,300 acres of greater sage-grouse habitat. Where leasing will occur, the Proposed RMP will restrict surface occupancy on more than 1.56 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. These restrictions elevate conservation of the greater sage-grouse above all other land uses in a manner wholly inconsistent with multiple use management.

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

- The Proposed RMP is inconsistent with the Montana plan 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, BLM's refusal to adopt the Montana plan is arbitrary and capricious.

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

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

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

- The Proposed RMP violates FLPMA because BLM has not afforded the public a meaningful opportunity to comment on the new components of the Proposed RMP.

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

- The Proposed RMP 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).

- BLM may not adopt numerous components of the Proposed RMP, including the monitoring framework, the adaptive management strategy, the density and disturbance caps, and the Required Design Features (RDFs).

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

- The science on which BLM bases the restrictions in the Proposed RMP is flawed.

- BLM improperly attempts to regulate air emissions.

STATEMENT OF PROTESTED ISSUES AND PROTESTED PARTS OF PLAN

I. The Proposed RMP is Inconsistent with the Montana Plan.

The Trades protest the significant inconsistencies between the Proposed RMP and the Montana Greater Sage-Grouse Habitat Conservation Strategy. *See* Montana Executive Order 10-2014 ("Montana 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 requirement for BLM to coordinate land use planning with state and local governments. The Proposed RMP 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 RMP, on the other hand, requires a three percent disturbance cap. Proposed RMP/Final EIS at 2-8, 2-52. 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 RMP imposes No Surface Occupancy (NSO) stipulations throughout PHMA and NSO restrictions within 0.6 miles around leks in general habitat, Proposed RMP/Final EIS at 2-47 – 2-48.

BLM's failure to identify and reconcile these inconsistencies in the Proposed RMP 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 RMP and state plan by replacing the three percent disturbance cap with the State of Montana's more reasonable five percent disturbance cap and replacing the Proposed RMP's buffers with the Montana Plan's more reasonable buffers tailored to particular habitat types.

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

Nevertheless, BLM has chosen to disregard the Montana Plan and impose uniform land use requirements throughout greater sage-grouse habitat in Montana. BLM's plan fails to take into account state and local needs and requirements and diverges from the Montana Plan in important respects. For example, the Montana Plan imposes a five percent disturbance cap within core areas. Montana Plan at 14, 17. The Proposed RMP, on the other hand, requires a

[1] The Trades did not comment on the inconsistencies between the Draft RMP and the Montana Plan because the Montana Plan was released in 2014, after the draft's publication but prior to release of the Proposed RMP.

three percent disturbance cap. Proposed RMP/Final EIS at 2-8, 2-52. 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 RMP imposes uniform 3.1 mile buffers around leks in all habitat, and NSO stipulations in Priority Habitat Management Areas (PHMAs) and Sage-Grouse Focal Areas (SFAs) with a 0.6 mile buffer around leks in General Habitat Management Areas (GHMAs), Proposed RMP/Final EIS at 2-7, 2-48, GRSG BUF-1 – BUF-2.

Indeed, conforming the Proposed RMP to the Montana Plan also makes practical sense, particularly with respect to greater sage-grouse land use restrictions. Unlike the top-down approach imposed by the Proposed RMP, the Montana Plan is the result of collaborative efforts between the state, landowners, industry, and other interested parties. These state and local stakeholders are better situated than BLM to strike a balance between conservation of the greater sage-grouse and promotion of economic development across the state, and the Montana Plan represents 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 RMP with instructions that the provisions of the Montana Plan be adopted and incorporated into the Final ROD and Approved Resource Management Plan.

II. BLM's Failure to Adopt the Montana Plan was Arbitrary and Capricious.

BLM's refusal to adopt the Montana Plan 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 BLM in Wyoming adopted in its 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. The BLM provided no explanation in the Proposed RMP for its choice to adopt these important provisions in the Wyoming Plan but failure to consider or adopt the same provisions in the Montana Plan.

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

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 RMP, BLM was required to provide a reasoned explanation of its choice to adopt the plan in Wyoming but not in Montana. BLM did not, however, provide an explanation for this choice. Instead, in its response to comments, BLM merely noted that it had "reviewed" the State of Montana's efforts in the preparation of the Proposed RMP. Proposed RMP/Final EIS at PUB-25. BLM did not explain why it 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. BLM's failure to adopt the Montana Plan is therefore arbitrary and capricious under the APA. BLM should eliminate the Proposed RMP's three percent disturbance cap and 3.1 mile lek buffers, Proposed RMP/Final EIS at 2-7, 2-48, GRSG BUF-1 – BUF-2, 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. BLM Must Conduct a Formal Rulemaking under the Administrative Procedure Act.

The Trades protest BLM's adoption of several elements of the Proposed RMP—specifically, the compensatory mitigation requirement, the "net conservation gain" standard, and conservation measures that include lek buffer distances, RDFs, and density and disturbance caps—because each constitutes a substantive rule that BLM cannot apply before it completes the formal rulemaking procedures required by the APA. *See* 5 U.S.C. § 553. Additionally, the Trades protest the limitations on modifications and waivers of NSO stipulations in PHMA 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 RMP are void until BLM adopts these rules in accordance with APA rulemaking procedures.

A. The Proposed RMP Announces Substantive, Legislative Rules.

The compensatory mitigation requirement, "net conservation gain" standard, lek buffer distances, RDFs, and density and disturbance caps, set forth in the Proposed RMP are substantive rules as defined by the APA.[3] 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.

[3] The Trades commented upon the Draft RMP's mitigation requirements and RDFs. Trade Comments at 5 – 7, 29 – 32. The Trades also commented on the science underlying these requirements, the density limitation, and the three percent disturbance cap. Trade Comments at 32 – 33. The Trades did not comment upon the net conservation gain standard or the lek buffer distances because they were not included in the Draft RMP.

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

Although it is difficult to draw a bright line to distinguish substantive rules from interpretive rules, courts have identified characteristics of substantive rules. Substantive rules grant rights, create new duties, or impose new obligations. *Coal. for Common Sense in Gov't Procurement v*, 464 F.3d at 1317; *Picciotto*, 875 F.2d at 347-48. Agencies announce substantive rules when they act legislatively by establishing limits or drawing lines—in other words, when agencies "make[ ] reasonable but arbitrary (not in the 'arbitrary or capricious' sense) rules that 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 BLM "shall promulgate rules and regulations to carry out the purposes" of the Act and that "[t]he promulgation of such rules and regulations shall be governed by" the rulemaking procedures set forth in the Administrative Procedure Act.[4] 43 U.S.C. § 1740 (citing 5 U.S.C. § 553(a)). Until BLM promulgates such rules and regulations, "such lands shall be administered under existing rules and regulations concerning such lands to the extent practical." *Id.*

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

The requirement that all lessees must provide compensatory mitigation for impacts to the greater sage-grouse and its habitat is a substantive rule. *See* Proposed RMP/Final EIS at 2-46. 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 RMP but appears in all of the land use plans BLM and the Forest Service 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"); Idaho and

[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.

Southwestern Montana Greater Sage-Grouse Proposed Land Use Plan Amendments and Final Environmental Impact Statement at 2-34, MIT-3 (June 2015) ("Idaho-SW Montana LUPA"); 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 RMP, Table 2-5 at 2-46; 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 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 RMPs as policy statements, *see Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 70-71 (2004), BLM's regulations direct that resource management authorizations such as approvals of Applications for Permit to Drill (APD) conform to and be consistent with the requirements of the RMP. 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 BLM. *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 BLM's, requires compensatory mitigation. *See id.*; 43 C.F.R. § 3101.1-2; 43 C.F.R. pt. 1600. The Proposed RMP's requirement to provide compensatory mitigation will alter the lessee's right to develop the oil and gas lease; the lessee's ability to exercise its contractual and property rights granted by the lease is now dependent upon it securing compensatory mitigation. Furthermore, the requirement to provide compensatory mitigation will create a new duty for lessees to provide resources—either monetary or in-kind—that they would not otherwise provide under the lease. Accordingly, the requirement that lessees provide compensatory mitigation directly alters the rights and obligations of existing oil and gas lessees and imposes a new duty on them.

Finally, with respect to BLM lands, the Proposed RMP's compensatory mitigation requirement does not derive from the language of FLPMA or BLM's implementing regulations and therefore cannot be characterized as an interpretation of existing law. Nothing in section 202 of FLPMA refers to BLM's ability to require, or land users' obligation to provide, compensatory mitigation or restoration of public lands. *See* 43 U.S.C. § 1712; *see also id.* §§ 1701, 1702. Unlike other provisions of FLPMA, section 202 does not use the terms "mitigate" or "restore." *Compare* 43 U.S.C. § 1712 *with id.* §§ 1783, 1785. Similarly, BLM land use planning

regulations and oil and gas leasing regulations do not refer to any ability of BLM to require that lessees mitigate impacts to resources or any obligation of permittees to provide such mitigation. *See* 43 C.F.R. pts. 1600, 3100. The regulations only address BLM's ability to require lessees to minimize impacts to resources. *See* 43 C.F.R. § 3101.1-2 (allowing BLM to require reasonable measures "to minimize adverse impacts to other resource values" (emphasis added)). Likewise, 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 RMP's requirement that lessees provide compensatory mitigation is a rule requiring compliance with the APA, including notice and the opportunity for public comment.

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

Just as the Proposed RMP's requirement to provide compensatory mitigation is a substantive rule, the requirement that mitigation achieve a "net conservation gain" is a substantive rule. Like the requirement to provide compensatory mitigation, this standard applies nationally to all land users in greater sage-grouse habitat because it appears in all of the land use plans BLM and the Forest Service 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; Idaho-SW Montana LUPA at 2-34, MIT-3; Lewistown RMP at 2-25 – 2-26, Action FM-1.2; Proposed 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 RMP/Final EIS, Glossary at GLO-23. 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 offset environmental losses." 33 C.F.R. § 332.3(a)(1) (emphasis added). Although the term "mitigation" does not appear in FLPMA or BLM's implementing regulations, the CEQ has defined mitigation as "[c]ompensating for the impact by replacing or providing substitute resources." 40 C.F.R. § 1508.20(e) (emphasis added). BLM NEPA regulations do not offer an alternative definition. *See* 43 C.F.R. § 46.30. BLM NEPA Handbook similarly defines mitigation as measures that can "reduce or avoid adverse effects to biological, physical, or socioeconomic resources." BLM Handbook H-1790-1 – National Environmental Policy Act at Glossary, pg. 133 (Rel. 1-1710 01/30/2008) (emphasis added). Even the Proposed RMP defines mitigation in the conventional sense as including measures "developed for the purpose of reducing or lessening the impacts of an action." Proposed RMP/Final EIS, Glossary at GLO-22 (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 BLM acted in a classically legislative fashion. "Net conservation gain" is an example of legislative line-drawing because it represents "an arbitrary choice among methods of implementation." *See Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010) (quoting *Hoctor v. USDA*, 82 F.3d 165, 170 (7th Cir. 1996)). Setting aside the limits of its statutory authority, *see* section IV.A, *infra*, BLM 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, BLM acted as a legislator. 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 RMP 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 or in all sage-grouse management areas in the planning area. Proposed RMP/Final EIS 2-8, 2-10, 2-46, 2-52. Furthermore, these same measures appear in all the RMPs and LUPAs outside of Wyoming that BLM and the Forest Service released on May 29, 2015 to protect the greater sage-grouse[5]; even the criteria BLM and the Forest Service 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; Idaho-SW Montana LUPA, app. DD at DD-2 – DD-3; Lewistown RMP, app. M at M-2; Proposed RMP/Final EIS 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,

[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.

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 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, BLM's 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 BLM. 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, BLM chose the thresholds from a range of options. For example, the study on which BLM based 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, BLM 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 BLM's and the Forest Serivce's 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 requires BLM 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, BLM had the discretion to establish other thresholds. Its selection of the thresholds and measures in the RMP reflects its legislative determination, and these determinations must be subject to notice and comment under the APA.

B. The Proposed RMP Improperly Amends BLM Regulations.

The Proposed RMP 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 RMP/Final EIS at 2-7. Similarly, the Proposed RMP provides that in PHMA, BLM will never modify or waive an NSO stipulation. Proposed RMP/Final EIS at 2-7. Furthermore, the

Proposed RMP provides that BLM may only grant a one-time waiver of an NSO stipulation (known as an exception) if the Montana Fish, Wildlife, and Parks Department, FWS, and BLM unanimously find that certain criteria are met. *Id.* at 2-7; 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 Montana Fish, Wildlife, and Parks Department find that an exception is warranted, the Proposed RMP 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 the 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 RMP's waiver and modification provisions are inconsistent with 43 C.F.R. § 3101.1-4. First, the Proposed RMP prohibits waivers and modifications despite the regulation's language that stipulations "shall be subject to modification or waiver." Second, the Proposed RMP expands decision-making authority on whether to grant an exception to parties beyond BLM to FWS and the Montana Fish, Wildlife, and Parks Department. These direct contradictions reflect that BLM is attempting to alter its regulations through the RMP.

BLM cannot finalize the provisions of the Proposed RMP prohibiting exceptions, modifications, and waivers in PHMAs 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 RMP 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 RMP 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.

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

Second, the public has not been afforded an adequate opportunity to comment on certain portions of the Proposed RMP that constitute legislative rules as required by 5 U.S.C. § 553(d). The APA allows for a comment period of "not less than" 30 days, *see* 5 U.S.C. § 553(d). In this case, because BLM introduced many rules in the Proposed RMP (rather than the Draft RMP)—including the lek buffer distances, the "net conservation gain" mitigation requirement, 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 RMP constituting legislative rules have not been subject to notice required by 5 U.S.C. § 553(b). Although notice of the Proposed RMP was published in the Federal Register, the notice only informed the public that BLM had revised the Miles City Resource Management Plan. The notice did not alert the public to the fact that BLM was establishing new legislative rules that would apply in all greater sage-grouse habitat nationwide. Likewise, the notice did not inform the public that BLM was altering its regulation at 43 C.F.R. § 3101.1-4. Accordingly, the public had every reason to believe BLM was only finalizing a land use plan, which is a statement of priorities to guide future actions, rather than a formal rule. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 70-71 (2004). Because the procedures associated with the Proposed RMP are not comparable to the formal rulemaking provisions of the APA, BLM may not implement the legislative rules set forth in the Proposed RMP until BLM completes the formal rulemaking process required by the APA.

Finally, by failing to characterize the mandates of the Proposed RMP as legislative rules, BLM skirts 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.* Given that the BLM's estimate that economic impacts from the oil and gas management decisions in the Proposed RMP would result in approximately 30,789 bbl less output per year and $1,180,000 less in annual earnings in the Planning Area alone, the nationwide economic impacts of the rules could be significant. BLM 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 RMP's requirement that mitigation yield a "net conservation gain."[6] First, violates FLPMA, which does not require that BLM 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 taking under the Fifth Amendment of the U.S. Constitution. 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" is Inconsistent with FLPMA.

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

FLPMA directs that the public lands be managed "on the basis of multiple use and sustained yield" and "in a manner which recognizes the Nation's need for domestic sources of minerals . . . from the public lands . . . ." 43 U.S.C. § 1701(8), (12); *see also id.* § 1732(a). When managing the public lands, BLM must prevent "unnecessary or undue degradation" of the public lands—a directive described as the "heart" of FLPMA. 43 U.S.C. § 1732(b); *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of the Interior*, No. 3:08-CV-00616-LRH-WVG, 2012 WL 13780, at *6 (D. Nev. Jan. 4, 2012). "This standard allows the Secretary to impose reasonable mitigating measures to protect environmental values on activities necessary to the exercise of valid existing rights." *Colo. Envt'l Coal*, 165 IBLA 221, 227 (2005). "Unnecessary or undue degradation" has been interpreted as "undue or excessive" and "something more than the usual effects anticipated" from a given land use. *Mineral Policy Ctr. v. Norton*, 292 F. Supp.2d 30, 41 (D.D.C. 2003); *Biodiversity Conservation Alliance*, 174 IBLA 1, 5-6 (2008). This standard must be applied "in light of [FLPMA's] overarching mandate that the [BLM] employ 'principles of multiple use and sustained yield.'" *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 76 (D.C. Cir. 2011).

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

[6] The Trades did not comment upon this standard because it was not included in the Draft RMP. The Trades did, however, express strong opposition to a compensatory mitigation requirement. Trade Comments at 5 – 7.

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 RMP imposes on land users to avoid and minimize impacts to the greater sage-grouse. The Proposed RMP already requires existing oil and gas lessees to attempt to site development 3.1 miles from a lek and adopt RDFs to minimize the impacts to the greater sage-grouse. *See* Proposed RMP/Final EIS at 2-17 – 2-18, 2-25 – 2-26. 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 RMP confirms that a "net conservation gain" is beyond BLM's authority under FLPMA. BLM does not assert that a "net conservation gain" is needed to avoid unnecessary or undue degradation. Rather, BLM asserts that the "net conservation gain strategy is in response to the overall landscape-scale goal which is to enhance, conserve, and restore [greater sage-grouse] and its habitat." Proposed RMP/Final EIS at 1-5. BLM's stated goal of "enhance, conserve, and restore" is beyond BLM's authority under FLPMA. BLM must revise the Proposed RMP 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 Create a Taking.

Although a "net conservation gain" is a laudable goal for the Proposed RMP, this standard may present constitutional hurdles. BLM may create a taking 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 RMP/Final EIS, Glossary at GLO-23. 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, BLM should revise the Proposed RMP to remove the requirement that mitigation produce a "net conservation gain."

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

Even if the "net conservation gain" standard 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 RMP 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 RMP/Final EIS, Glossary at GLO-3, GLO-23. 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, 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 BLM and land users with sufficient guidance about the amount of compensatory mitigation it requires.

V. BLM Must Comply with the National Environmental Policy Act Prior to Finalizing the Proposed RMP.

We protest the Proposed RMP because BLM has not yet complied with NEPA.[7] As BLM is aware, NEPA is a procedural statute intended to produce informed decision making by federal agencies. *United States Dep't of Trans. v. Public Citizen*, 541 U.S. 752, 756-57 (2004); *Lee v. United States Air Force*, 354 F.3d 1229, 1237 (10th Cir. 2004). The preparation of a land use plan, such as Proposed RMP, requires BLM to prepare an EIS. 43 C.F.R. § 1601.0-6. "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b) (emphasis added). BLM has not yet complied with NEPA because it must release a Supplemental Draft EIS for public review and comment before issuing a Record of Decision (ROD). Additionally, BLM failed to analyze a reasonable range of alternatives. BLM also must respond to comments on the Draft EIS. Furthermore, BLM failed to adequately assess the impacts of the Proposed RMP on oil and gas development. Finally, BLM failed to analyze the cumulative impacts of the oil and gas leasing and development decisions in the Proposed RMP with other land use plan amendments through greater sage-grouse range.

A. BLM Must Prepare a Supplemental Draft EIS.

1. BLM Must Prepare a Supplemental Draft EIS to Analyze New Components of the Proposed RMP.

The Trades protest substantial changes made between the Draft RMP and Proposed RMP without notice and an opportunity for public comment. In particular, the Trades protest the unexpected adoption of the wholly new Proposed RMP rather than one of the alternatives analyzed in the Draft EIS. Although BLM maintains that components of the Proposed RMP were analyzed in other alternatives, the combination of these components in the Proposed RMP

[7] The Trades commented upon the necessity of BLM to comply with NEPA. Trade Comments at 1 – 2.

creates a dramatically different alternative that requires notice and public comment. Furthermore, the Proposed RMP contains a number of significant elements that were not included in any of the alternatives analyzed in the Draft EIS, including the requirement that mitigation produce a net conservation gain, the lek buffer distances, and the adaptive management triggers and responses, as well as extensive revisions to the mitigation and monitoring plans. These proposed changes violate NEPA because they were not included in the Draft RMP and because BLM did not allow the public an opportunity to meaningfully comment on these provisions.

The CEQ regulations implementing NEPA state that "[a]gencies . . . [s]hall prepare supplements to either draft or final environmental impact statements if . . . [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns. . . ." 40 C.F.R. § 1502.9(c); *see also Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2439 (U.S. 2012) ("If the final action departs substantially from the alternatives described in the draft EIS, however, a supplemental draft EIS is required. . . ."). CEQ guidance states that no supplemental draft EIS is required where (1) the final proposed alternative is a "minor variation of one of the alternatives discussed in the draft EIS," or (2) the final proposed alternative is "qualitatively within the spectrum of alternatives that were discussed in the draft [EIS]." Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations [hereinafter "Forty Questions"], 46 Fed. Reg. 18,026, 18,035 (Mar. 23, 1981); *see also Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2439, 182 L. Ed. 2d 1063 (U.S. 2012); *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 705 & n. 25 (10th Cir. 2009); *In re Operation of Missouri River Sys. Litig.*, 516 F.3d 688, 693 (8th Cir. 2008*); Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1292 (1st Cir. 1996).

In the present situation, the Proposed RMP does not constitute a minor variation to one of the alternatives in the Draft RMP, nor is the imposition of the Proposed RMP within the spectrum of alternatives analyzed in the draft. The Proposed RMP is a new alternative that was not analyzed in the Draft RMP. Although BLM maintains that components of the Proposed RMP were analyzed in other alternatives, the combination of these components in the Proposed RMP creates a dramatically different alternative that requires notice and public comment. BLM attempts to justify the adoption of the lek buffers, for example, by noting that it considered "closure to fluid minerals." Proposed RMP/Final EIS at 1-5. The BLM considered in Alternative B of the Draft RMP closing approximately 2,119,000 mineral acres to future fluid mineral leasing. Draft RMP at 2-83. In no way did consideration of making over two million acres unavailable for <u>future</u> leasing warn the public that BLM would choose instead to apply 3.1 mile lek buffers to <u>existing</u> oil and gas leases. The BLM did not provide adequate justification for its adoption of the Proposed RMP and should have prepared a supplemental Draft EIS.

Furthermore, the Proposed RMP also contains wholly new components. None of the alternatives presented in the Draft RMP included the requirements 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. BLM first presented the public with these components when it released the Proposed RMP.

Most troubling is the fact that the net conservation gain requirement, revised mitigation plan, revised monitoring plan, lek buffer distances, and adaptive management triggers and responses were not incorporated into the Proposed RMP and Final EIS in response to public comment on the Draft RMP/Draft EIS or in response to environmental impacts disclosed in the Draft EIS. *See* Forty Questions, 46 Fed. Reg. at 18,035 (explaining that agencies may adjust the alternatives analyzed in response to comments). Rather, BLM appears to have incorporated the net conservation gain requirement, revised mitigation plan, and revised monitoring plan to respond to national policies by BLM and FWS that were released after the Draft RMP/Draft EIS was published and that were never formally offered for public comment. *See* U.S. Fish & Wildlife Serv., *Greater Sage-Grouse Mitigation Framework* (2014); BLM, *The Greater Sage-Grouse Monitoring Framework* (2014). Similarly, the lek buffer distances and adaptive management triggers and responses appear to have been added to make the Proposed RMP 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, and adaptive management triggers and responses were not presented in the Draft RMP. Although the Draft RMP acknowledged that the Proposed RMP/Final EIS would include more details about the revised monitoring and mitigation plans, *see* Draft RMP at 2-9 – 2-11, these "placeholders" did not allow the public a meaningful opportunity to comment on the substance of the revised monitoring and mitigation plans.[8] The inclusion of the net conservation gain requirement, mitigation plan, revised monitoring plan, lek buffer distances, and adaptive management triggers and responses 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 RMP, BLM must provide a Supplemental Draft EIS with notice and an opportunity for comment in compliance with its NEPA obligations.

[8] Furthermore, commenters requested the opportunity to review and comment on these components of the plans. Trade Comments at 5-7, 33 – 34.

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

BLM must prepare a Supplemental Draft EIS to analyze the newly released Montana Plan to conserve the greater sage-grouse. 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 RMP was released, the state of Montana released the Montana Greater Sage-Grouse Habitat Conservation Strategy to conserve the greater sage-grouse. *See* Montana Executive Order 10-2014 ("Montana Plan"). 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 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 BLM must consider in a Draft RMP because it affects the analysis of the cumulative impacts of BLM's 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). BLM does not appear to have analyzed the cumulative impacts of the Montana Plan at all. Instead, BLM described the plan's basic provisions in less than a page and noted elsewhere that it would contribute to a "net conservation gain." Proposed RMP/Final EIS at 4-145, 4-154. Additionally, the management proposed under the Montana Plan presents another management alternative that BLM should consider adopting. Because the Montana Plan constitutes "significant new circumstances," BLM must prepare a Supplemental Draft EIS.

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

In an EIS, an agency must "[r]igorously explore and objectively evaluate all reasonable alternatives" to a proposed action. 42 U.S.C. § 4332(2)(C)(iii). The alternatives analysis is considered the "heart" of an EIS. 40 C.F.R. § 1502.14. An agency's purpose and need for the

proposed action defines the range of reasonable alternatives. *See* 40 C.F.R. § 1502.13; *.e.g.*, *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999). Although an agency need not analyze every conceivable alternative, *see Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 551 (1978), it must analyze "a reasonable spectrum of policy choices that meet the goals of the action." *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 241 (D.D.C. 2005); 40 Questions, 46 Fed. Reg. at 18,207.

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

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

1. Goal of Net Conservation Gain

The Final EIS does not analyze an alternative to the Proposed RMP's mitigation standard, which in all habitat except restoration areas is a net conservation gain.[9] Proposed RMP, Table 2-5 at 2-46. The Final EIS should have considered alternative, lesser mitigation standards for PHMA and GHMA, such as no net loss of greater sage-grouse.[10] Because the Proposed RMP defines its purpose and need as "incorporat[ing] appropriate conservation measures to conserve, enhance, and restore [greater sage-grouse] habitat by reducing, minimizing, or eliminating threats to that habitat," lesser mitigation standards that simply maintained current amounts of greater sage-grouse habitat would also achieve the purpose and need of the Proposed Action. *See* Proposed RMP ES-6. Furthermore, because the phrase "net conservation gain" is ambiguous and difficult to implement, an alternative mitigation standard such as no net loss would be easier for BLM to administer and would allow for easier compliance by land users.

[9] The Trades expressed opposition to any compensatory mitigation requirements in the Draft RMP. Trade Comments at 5 – 7.

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

Presumably, BLM incorporated the net conservation standard for PHMA and GHMA 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. In addition, that BLM considered a "no net loss" standard for restoration areas makes BLM's failure to consider the same standard for PHMA and GHMA even more inexcusable. BLM must analyze alternatives to this mitigation standard in PHMA and GHMA before BLM may adopt it in a ROD.

2. Monitoring Framework

The Proposed RMP includes a detailed monitoring framework that calls for monitoring habitats and evaluating the implementation and effectiveness of the greater sage-grouse planning strategy and the conservation measures in the RMP.[11] Proposed RMP/Final EIS at GRSG MON-1 – GRSG MON-30. The monitoring framework calls for monitoring to occur at broad and mid-scales and at fine and site-scales. *Id.* at GRSG MON-3. The details of the monitoring framework were first presented in the Proposed RMP; they appear to have been developed by BLM's Washington Office and integrated into all greater sage-grouse RMPs. *See* BLM, *The Greater Sage-Grouse Monitoring Framework* (2014).

BLM must analyze alternatives to the proposed monitoring framework because the monitoring components on their face cannot be implemented by BLM. In the Proposed RMP, BLM expressly recognizes that it will require "[a]dditional capacity or re-prioritization of ongoing monitoring work and budget realignment" to achieve half of the proposed monitoring commitments. Proposed RMP/Final EIS at GRSG MON-28. Specifically, BLM recognizes it lacks the capacity to monitor implementation of land use plan decisions, effectiveness of the planning strategy, and habitat at fine and site scales. *Id.*

The proposal to adopt a single monitoring strategy that BLM admits it lacks resources to implement is unreasonable. 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, BLM should have analyzed at least one alternative monitoring strategy that it has the resources to implement.

3. Adaptive Management Soft Triggers and Responses

The Proposed RMP outlines adaptive management responses that will affect management of the entire 2.75 million surface acres and 10.6 million mineral acres administered by BLM

[11] The Trades commented upon the lack of specific information regarding monitoring in the Draft RMP. Trade Comments at 34.

within the planning area.[12] BLM outlines a series of soft triggers that evaluate sage-grouse populations and habitat. Soft triggers include any negative deviation from normal trends in habitat or population in any given year, of if observed across two of three consecutive years. Proposed RMP/Final EIS at 2-12. If a soft trigger is reached, BLM will begin monitoring to determine causal factors, and may require curtailment of activities in the short- or long-term as allowed by law. Proposed RMP/Final EIS at 2-12. Depending on the cause, adjustments to management will be made at the project, state-wide, or other appropriate scale. Proposed RMP/Final EIS at 2-12. The Proposed RMP does not provide that an amendment to the RMP will occur, or that the public will be provided with notice or the opportunity to comment on adaptive management responses, before adaptive management soft trigger responses are implemented. Given the significant area and number of land users affected, BLM must examine alternatives to the adaptive management soft triggers and responses. Given that the adaptive management soft triggers do not adequately examine the effectiveness of BLM's planning strategy, as outlined further in section IX.B, *infra*, BLM should consider alternatives to these soft triggers. Similarly, BLM should consider alternatives to its soft trigger responses, which is to determine causal factors and implement some unspecified change in management.

4. Lek Buffers

In addition to the fact that BLM improperly adopted the 3.1 mile lek buffer distance for energy infrastructure, BLM did not analyze a reasonable range of alternatives to the buffers.[13] *See* Proposed RMP, Table 2-5 at 2-47 – 2-48. This buffer was adopted in response to the USGS Buffer Report. Proposed RMP/Final EIS at 1-5. BLM maintains that it analyzed a range of alternatives because the range of alternatives is "qualitatively within the spectrum of alternatives analyzed." *Id.* BLM ignores, however, that the USGS report identified a range of distances at which energy infrastructure is believed to impact the greater sage-grouse, including distances less than 3.1 miles. *See* Buffer Report at 7-8. 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 RMP would limit disturbance to one facility per square mile in PHMA, a buffer distance based on more dense development is unnecessary. Accordingly, BLM should analyze alternatives to the 3.1 mile buffer in the EIS.

5. Montana Executive Order 10-2014

BLM did not adequately analyze or consider the Montana Plan, which was released prior to the Proposed RMP. Montana Plan at 8. The Montana Plan presents a viable and state-specific alternative to the Proposed RMP. Like the Proposed RMP, 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

[12] The Trades commented upon the necessity for BLM to provide more detail concerning adaptive management. Trade Comments at 42, 43.

[13] The Trades did not comment upon the lek buffers because they were not available until 2014. The Trades did, however, comment upon the science BLM cited regarding buffers in the Draft RMP. Trade Comments at 43.

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 RMP, but BLM provided no justification whatsoever for failing to consider the Montana Plan as an alternative. Accordingly, BLM should analyze the Montana Plan as an alternative to the Proposed RMP.

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

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

With respect to the Proposed RMP, the Trades submitted extensive and detailed comments on the RDFs (called BMPs in the Draft RMP) listed in the Required Design Features Appendix. *See* Trade Comments at 25 – 28. BLM, however, did not make any substantive changes to the RDFs between draft and final. *Compare* Proposed RMP, GRSG Required Design Features Appendix, *with* Draft RMP, Best Management Practices Appendix. Additionally, BLM did not acknowledge the Trades' comments on the RDFs and did not "[e]xplain[ ] why the comments do not warrant further response." *See* 40 C.F.R. § 1503.4(a). In fact, although BLM listed several of the Trades' comments on RDFs in its public comment appendix, it provided nearly identical responses to each comment, which fail to address the comments and instead point the reader to the RDF Appendix. Proposed RMP/Final EIS PUB-76 – PUB-77. BLM also did not make any substantive changes to the RDF Appendix. *Compare* Proposed RMP/Final EIS GRSG RDF, *with* Draft RMP, Best Management Practices Appendix. Therefore, BLM has not provided the response to comments as required by the CEQ regulation.

The fact that BLM was responding to a large volume of comments does not excuse its failure to acknowledge the Trades' concerns. Given that the Proposed RMP addresses management of the greater sage-grouse on over 10 million mineral acres across the planning area, BLM should have expected a large number of comments and anticipated the difficulty of responding to so many. As one court chided the Forest Service for failing to adequately respond to comments on its Roadless Area Review and Evaluation (RARE II) process: "The difficulty of

considering each comment is a factor the Forest Service should have considered before it decided to determine three thousand allocations at once. The volume of response may well have been a message to the Forest Service that the scope of the RARE II process was too broad." *California v. Bergland*, 483 F. Supp. 465, 496-97 (E.D. Cal. 1980), *rev'd in part*, *California v. Block*, 690 F.2d 753 (9th Cir. 1982); *accord* BLM Handbook H-1790-1 – National Environmental Policy Act Handbook § 6.9.22 ("For proposals that may have a large number of comments, we recommend that you develop a systematic way to track substantive comments and BLM's response, such as in a searchable database."). BLM cannot justify its inadequate response to the Trades' comments. Accordingly, BLM cannot finalize the RMP until it responds to the Trades' comments on the environmental analysis as required by NEPA.

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

The Final EIS also does not adequately analyze the aggregated impacts of the Proposed RMP's leasing and development restrictions on oil and gas development.[14] The Proposed RMP discourages development on existing leases within buffer distances, discourages issuance of rights-of-way across 2,212,000 acres of lands, and imposes new compensatory mitigation requirements, new lek buffers, new density and disturbance caps, and new RDFs on existing leases. The measures, when combined with the extensive limitations on new leases, including NSO stipulations in PHMA and Controlled Surface Use (CSU) stipulations in GHMA, 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. BLM 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 FWS 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. BLM cannot condition permits on a requirement that land users cannot fulfill due to lack of mitigation. Accordingly, BLM must analyze the availability of compensatory mitigation in the Final EIS.

Finally, BLM has not adequately analyzed the impacts right-of-way avoidance and exclusion areas will have upon existing oil and gas leases. The Proposed RMP would designate 2,122,000 acres as right-of-way avoidance areas and 46,000 acres as right-of-way exclusion areas. Proposed RMP, Table 2-2 at 2-5. At the same time, the Proposed RMP states that 675,602 acres of public lands in the planning area are currently under lease for oil and gas. Proposed RMP, Table 3-20 at 3-60. To the extent individual leases, or even groups of leases or

[14] The Trades commented upon BLM's failure to adequately analyze the impacts of the alternatives in the Draft RMP. Trade Comments at 1 – 2.

potential development areas are isolated from roads or transportation infrastructure, lessees will be unable to develop the resources present. BLM must ensure that access is allowed to both existing and newly issued oil and gas leases in the planning area. Accordingly, BLM must analyze the impacts of the right-of-way avoidance and exclusion areas in the Proposed RMP.

E. The Final EIS Does Not Adequately Analyze the Cumulative Impacts of the Proposed RMP.

Finally, the Proposed RMP/FEIS does not adequately analyze the cumulative impacts of the Proposed RMP because it does not consider the impacts of the Proposed RMP together with the impacts of the at least 13 other greater sage-grouse RMPs. *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, BLM should have analyzed the cumulative impacts of the Proposed RMP with the other 13 RMPs. Clearly, development of the EISs was a coordinated national effort by BLM and the Forest Service. BLM and the Forest Service announced the RMPs 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 RMPs contain consistent—if not standardized—provisions, such as the monitoring framework, mitigation framework, and lek buffer distances. All of the RMPs 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."

BLM 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 RMP alone, 1,329,000 acres are designated for leasing subject to NSO. *See* Proposed RMP, Table 2-2 at 2-5. Nationwide, BLM and the Forest Service propose to designate an additional 31 million mineral acres as subject to NSO stipulations.[15] 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.[16] BLM has not, however, examined the

[15] 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.

[16] 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.

cumulative impacts of its management actions on federal oil and natural gas leasing and development. *See* Proposed RMP/Final EIS, Chapter 4. BLM must analyze these cumulative impacts in an EIS before it issues a ROD and Final RMP.

VI. The Proposed RMP Must Comply with FLPMA.

The Trades protest the Proposed RMP because BLM has not complied with FLPMA.[17] First, the public has not had a meaningful opportunity to comment on new elements of the Proposed RMP. Second, BLM must amend the RMP to implement any adaptive management responses.[18]

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

The Trades protest the inclusion of new components in the Proposed RMP not only as a violation of NEPA but also as a violation of FLPMA. BLM's introduction of new components in the Proposed RMP—including the requirement that mitigation produce a net conservation gain, the mitigation plan, the 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 RMP, BLM should have prepared and released for comment a supplement to the Draft RMP.

B. BLM Must Amend the RMP Before it May Implement Adaptive Management Soft Responses.

BLM must amend the RMP before it may implement the adaptive management responses identified in the Proposed RMP. The adaptive management strategy in the Proposed RMP calls for responses to "soft" triggers based on information collected through monitoring.[19] Proposed RMP/Final EIS at 2-12. The Proposed RMP does not, however, define specific responses to the soft triggers. Rather, the Proposed RMP calls for undefined changes in management. Soft triggers include any negative deviation from normal trends in habitat or population in any given

[17] The Trades commented upon BLM's failure to comply with FLPMA. Trade Comments at 5, 7.

[18] The Trades lacked the opportunity to comment on the adaptive management responses in their comments on the Draft RMP/Draft EIS because these issues did not arise in the draft documents. *See* Proposed RMP/Final EIS 1-5.

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

year, of if observed across two of three consecutive years. Proposed RMP/Final EIS at 2-12. If a soft trigger is reached, BLM will begin monitoring to determine causal factors, and may require curtailment of activities in the short- or long-term as allowed by law. Proposed RMP/Final EIS at 2-12. Depending on the cause, adjustments to management will be made at the project, state-wide, or other appropriate scale. Proposed RMP/Final EIS at 2-12. BLM cannot implement the Proposed RMP's "responses" to soft triggers without amending the plan.

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

Second, BLM cannot implement the "responses" to the soft triggers because there is nothing to implement. The Proposed RMP does not define any concrete actions that BLM will implement in response to the soft triggers. *See* Proposed RMP/Final EIS at 2-12. The planning regulations do not permit BLM to change the management prescriptions in an RMP 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 soft triggers because it did not consider any alternatives to the responses, or analyze the impacts of the responses, in the EIS accompanying the Proposed RMP. *See* Proposed RMP/Final EIS at 4-41. FLPMA and NEPA require BLM to consider management alternatives and analyze the impacts of these alternatives in the accompanying EIS. *See* 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 soft trigger responses and analyze their potential environmental impacts before it may implement them. Because BLM has neither analyzed alternatives to the soft trigger responses nor analyzed their potential impacts, BLM may not implement the soft trigger responses without amending the Proposed RMP.

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

The Trades protest BLM's decision to impose new restrictions on existing federal oil and gas leases. The Proposed RMP attempts to impose numerous restrictions on existing oil and gas leases. *See* Proposed RMP/Final EIS at 2-8 (three percent disturbance cap), 2-10 (required design features) 2-46 (compensatory mitigation that provides "net conservation gain"), 2-52 (lek buffers), GRSG DIST CAP-3[20]. Most concerning, BLM proposes to limit infrastructure, linear resources, and surface disturbance within lek buffer distances in PHMAs and PHMAs, to impose density and disturbance caps in PHMA, to impose Required Design Features (RDFs), and to require compensatory mitigation to offset impacts to greater sage-grouse to achieve a net conservation gain. *See id.* 2-8, 2-10, 2-46, 2-52. These conditions are new and were not attached as stipulations on oil and gas leases issued within the planning area.[21]

Federal oil and gas leases constitute valid existing rights. *Sierra Club v. Peterson*, 717 F.2d 1409, 1411 (D.C. Cir. 1983); Solicitor's Opinion M-36910, 88 I.D. 909, 912 (1981). As development operations are proposed in the future, BLM cannot attempt to impose stipulations or Conditions of Approval (COAs) on existing leases that are inconsistent with the contractual rights they grant. 43 C.F.R. § 3101.1-2. The Trades protest BLM's imposition of new restrictions that are inconsistent with existing leases.[22] First, BLM does not have the authority to impose new restrictions on valid existing leases under FLPMA. Second, BLM cannot unilaterally modify federal leases, which are valid existing contracts. Third, BLM cannot impose new restrictions on existing leases that render development uneconomic or impossible. Finally, the BLM may not impose uniform conservation measures on existing leases without site-specific information. The Trades encourage BLM to revise the Proposed RMP to recognize that it may not impose new development restrictions on existing leases.

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

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

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[20] BLM does not make clear in Chapter 2 if a well density limitation will apply to existing leases, but the Disturbance Cap Calculation Appendix indicates it will apply to existing leases.

[21] The Trades commented upon the Draft RMP's density and disturbance caps. Trade Comments at 30. The Trades also commented upon the RDFs. Trade Comments at 29 – 32. The Trades did not comment upon the "net conservation gain" standard because it was not included in the Draft RMP, but the Trades did express opposition to any compensatory mitigation requirement. Trade Comments at 5 – 7.

[22] The Trades commented on BLM's inability to modify existing lease rights through the land use planning process. Trade Comments at 4 – 5.

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 RMP prepared pursuant to FLPMA, after lease execution, is likewise subject to existing rights. *See Colo. Envt'l Coal., et al.*, 165 IBLA 221, 228 (2005). The Proposed RMP cannot defeat or materially restrain a federal lessee's valid and existing rights to develop its leases through unreasonable COAs or other means. *See id.* (citing *Colo. Envt'l Coal.*, *et al.*, 135 IBLA 356, 360 (1996), *aff'd, Colo. Envt'l Coal. v. Bureau of Land Mgmt.*, 932 F. Supp. 1247 (D. Colo. 1996)); *Mitchell Energy Corp.*, 68 IBLA 219, 224 (1982) (citing Solicitor's Opinion, M-36910, 88 I.D. 908, 913 (1981)).

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

With respect to the Proposed RMP, BLM's attempt to impose new conditions and measures on existing leases is inconsistent with valid existing rights. In particular, the Proposed RMP's provisions requiring application of lek buffer distances and evaluation of impacts on leks in PHMA and GHMA leave no room for consideration of valid existing rights. In PHMA, BLM may approve actions within the lek buffer distances "only if" a lek buffer distance other than the distance identified in the Proposed RMP offers the same or greater level of conservation. Proposed RMP/Final EIS at GRSG BUF-2. In GHMA, BLM may approve actions within the lek buffer distances under a broader set of circumstances[23]—but "only if" those circumstances apply. *See* Proposed RMP/Final EIS at GRSG BUF-1 – BUF-2. The Proposed RMP 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 RMP. For example, if BLM cannot identify a buffer distance in PHMA that offers the same or greater level of protection to greater sage-grouse and its habitat than the distance identified in the Proposed RMP, the Proposed RMP does not expressly allow BLM to authorize development when necessary to accommodate valid existing rights. *See* Proposed RMP/Final EIS at GRSG BUF-1 – BUF-2. BLM must revise the

[23] 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 RMP/Final EIS GRSG BUF-1 – BUF-2.

Proposed RMP to expressly allow BLM to authorize development to honor valid existing rights when application of the Proposed RMP otherwise would not allow development on existing leases.

B. BLM Cannot Unilaterally Modify Existing Contract Rights.

The imposition of new restrictions on existing leases is also inconsistent with the contractual rights conveyed to a federal oil and gas lessee. Oil and gas leases are real property rights. *Winkler v. Andrus*, 614 F.2d 707, 712 (10th Cir. 1980); *Union Oil v. Morton*, 512 F.2d 743, 747 (9th Cir. 1975). Further, leases are contracts that BLM cannot unilaterally modify. *See Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 620 (2000) (recognizing that federal oil and gas leases are contracts and that the federal government's breach of lessee's right to explore for and develop oil and gas entitles lessee to refund); *Oxy USA, Inc. v. Babbitt*, 268 F.3d 1001, 1006-7 (10th Cir. 2001) (noting that the Tenth Circuit has long held that federal oil and gas leases are contracts), *rev'd on other grounds, BP America Production Co. v. Burton*, 549 U.S. 84 (2006). Under well-established precedent, after BLM accepts a lease bid, the lessee fully pays for the lease, and a lease is issued, a contract exists between the lessee and BLM. This contract consists solely of those terms and conditions identified in the notice of competitive lease sale and the lease itself. *See, e.g., Coastal States Energy Co*., 80 IBLA 274, 279 (1984). BLM may not later amend the lease with terms not identified in the sale notice and not part of the contract subject to the bidding process. A retroactive amendment of lease terms by BLM would be a unilateral breach of the lease contract and would "violate the equal opportunity for all bidders to compete on a common basis for leases." *Anadarko Prod. Co.*, 66 IBLA 174, 176 (1982), *aff'd*, Civ. No. 82-1278C (D.N.M. 1983).

Moreover, the imposition of additional restrictions infringes on the lessee's right to conduct operations under the lease. A federal lease conveys the right to occupy the surface to explore for, produce, and develop oil and gas resources. *See Pennaco Energy v. 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, BLM's authority to impose restrictions on existing leases is particularly circumscribed

when it has already imposed protective stipulations on an existing lease. Section 3101.1-2, 43 C.F.R., states that BLM may impose "reasonable mitigation measures . . . to minimize adverse impacts . . . to the extent consistent with lease rights granted." BLM, however, has expressly recognized that this regulation does not allow 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 already stipulated to have a buffer." *Id.* (emphasis added). Any attempts by BLM to impose measures that expand express stipulations attached to leases are inconsistent with the leases' contractual terms.

The Proposed RMP attempts to impermissibly alter the contractual rights granted under oil and gas leases by imposing a variety of measures on existing leases. Proposed RMP/Final EIS at 2-8, 2-10, 2-46, 2-52. 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 RMP because the density or disturbance caps have been reached. Finally, the Proposed RMP'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 RMP suggests compensatory mitigation may be required whenever development will impact the greater sage-grouse.[24] Clearly, the Proposed RMP requires compensatory mitigation to develop within lek buffer distances in GHMA and to develop existing leases in PHMA when the density and disturbance caps have been exceeded. Proposed RMP/Final EIS at GRSG BUF-1 – BUF-2, 2-8, 2-52.

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.[25] *See* 43 C.F.R. pts. 1600, 3100. Moreover, no BLM

[24] The Trades expressed opposition to any compensatory mitigation requirement in their comments on the Draft RMP. Trade Comments at 5.

[25] 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

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 RMP's requirement that lessees provide compensatory mitigation to provide a net conservation gain.

Furthermore, an attempt by BLM to require compensatory mitigation would be patently inconsistent with the terms of its oil and gas leases.[26] 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 RMP states that lessees must first minimize their impacts and then mitigate impacts that cannot be minimized, Proposed RMP, Table 2-5 at 2-45, 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

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U.S. 332, 352 (1989). Furthermore, the CEQ regulations do not provide agencies to require mitigation measures that are outside of their existing regulatory authority. Finally, the CEQ regulations do not contemplate that mitigation provide a "net conservation gain." Rather, the CEQ regulations only contemplate that mitigation may include providing substitute resources that compensates for the impact, *see id.* § 1508.20(e)—not mitigation that goes beyond offsetting the impact and produces an "actual benefit or gain above baseline conditions," *see* Proposed RMP/Final EIS Glossary, GLO-23.

[26] 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).

requirement that compensatory mitigation result in an improvement to greater sage-grouse or its habitat by producing a "net conservation gain" is not contemplated anywhere within a federal oil and gas lease. Because compensatory mitigation that yields a net conservation gain is inconsistent with the terms of existing oil and gas leases, BLM cannot require such mitigation without breaching or repudiating its oil and gas leases. *See Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604 (2000); *Amber Res. Co v. United States*, 538 F.3d 1358 (Fed. Cir. 2008).

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

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

The Proposed RMP directs BLM to defer approvals of permits to drill. First, prior to approving development in PHMA, the 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 anthropogenic disturbance within a biologically significant unit (BSU) and proposed project area is less than three percent and total disturbance is less than five percent. Proposed RMP/Final EIS at GRSG DIST CAP-3. If either density or disturbance exceeds these caps, BLM must "defer the project." *Id.* The Proposed RMP 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 GRSG DIST CAP-4.

The Proposed RMP should clarify that BLM may not defer oil and gas activities on leases that were issued before approval of the Proposed RMP. The Energy Policy Act of 2005 requires BLM to approve applications for permits to drill if the requirements of the National Environmental Policy Act (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 RMPs 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 RMP to clearly state that BLM may not defer or deny development on oil and gas leases issued prior to approval of the Proposed RMP.

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

The Proposed RMP outlines a variety of measures that will apply to existing oil and gas leases. Most significantly, the Proposed RMP's requirement that lessees site development outside of lek buffer distances in PHMA 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 Controlled Surface Use (CSU) stipulations attached to existing leases within the planning area. Currently, leases within the Miles City Field Office contain a stipulation prohibiting surface occupancy and use within 0.25 miles of sage-grouse leks. Proposed RMP/Final EIS at MIN-38. Existing leases contain larger, two mile buffers during nesting season, from March 1 to June 15. Proposed RMP/Final EIS at MIN-43. The Proposed RMP, by contrast, imposes year-round 3.1 mile buffers on these existing leases. Proposed RMP/Final EIS at GRSG BUF-1. 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 RMP 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 RMP may not constrain restrictions on the exercise of existing oil and gas leases that defeat or materially restrain existing rights."); *Colo. Open Space Council*, 73 IBLA 226, 229 (1983) (holding that regulation of existing oil and

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

The Proposed RMP will impose a variety of restrictions on development of existing leases. The cumulative burden of these restrictions will render development uneconomic or impossible throughout greater sage-grouse habitat and particularly in PHMA. The Proposed RMP proposes to discourage siting development in GHMA and PHMA, impose lek buffer distances and density and disturbance caps, impose RDFs on existing leases, and require compensatory mitigation to produce a net conservation gain. *See* Proposed RMP/Final EIS at 2-8, 2-10, 2-46, 2-52. 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 RMP 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 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 RMP. 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 applications for permits to drill (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 RMP are not based on site-specific information. They categorically apply in all PHMA and/or all GHMA. To the extent BLM will consider site-specific information, it is to justify an exception to the lek buffer distances. 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 RMP/Final EIS at GRSG BUF-1. 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 RMP/Final EIS at GRSG RDF-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 RMP.

VIII. The Proposed RMP is Inconsistent with Federal Law.

The Trades protest the Proposed RMP 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 RMP improperly cedes authority over species that are not listed as threatened or endangered under the Endangered Species Act (ESA) to FWS. Second, the Proposed RMP is not in accordance with EPAct because it proposed to adopt lease stipulations that are more restrictive than necessary to protect the greater sage-grouse.

A. The Proposed RMP Improperly Cedes Authority Over Oil and Gas Operations on Federal Leases to the U.S. Fish and Wildlife Service.

The Trades protest the Proposed RMP's requirement that FWS find certain criteria met before BLM can grant an exception to an NSO stipulation in PHMA.[27] This provision improperly cedes management authority over development of federal oil and gas leases to FWS.[28]

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.[29] *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 lands.

[27] On BLM lands, the BLM will grant an exception to the NSO stipulation if the BLM, FWS, and 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 RMP/Final EIS 2-7.

[28] The Trades did not comment upon this aspect of the Proposed RMP because FWS approval was not required for NSO stipulation exceptions in the Draft RMP. Draft RMP at MIN-48.

[29] 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).

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 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 RMP; 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 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 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 Montana Fish, Wildlife, and Parks Department on any proposal to grant an exception to an NSO stipulation in PHMA. The Trades recognize that Congress has repeatedly affirmed that states have primacy over unlisted wildlife on public and National Forest System lands. *See* 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 Montana Fish, Wildlife, and Parks Department's expertise in managing the greater sage-grouse, BLM would benefit from input from the Montana Fish, Wildlife, and Parks Department when making these decisions.

The provision of the Proposed RMP 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, BLM must revise the Proposed RMP to remove the requirement that FWS consent to exceptions to NSO stipulations in PHMA.

B. The Proposed RMP is Inconsistent with the Energy Policy Act of 2005.

The Trades protest the Proposed RMP because it is inconsistent with EPAct.[30] 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. BLM could have required lessees to mitigate impacts to avoid unnecessary or undue degradation, *see* 43 U.S.C. § 1732(b). Though inconsistent with FLPMA, BLM did not even consider requiring that mitigation achieve "no net loss" of greater sage-grouse habitat in PHMA and GHMA. Because the requirement that mitigation achieve a "net conservation gain" is inconsistent with EPAct, BLM must revise the Proposed RMP 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, BLM did not analyze whether alternative buffer distances would offer substantially similar protection to the greater sage-grouse. *See* Proposed RMP/Final EIS at 4-105 – 4-131. Because the lek buffer distances are unnecessarily restrictive, BLM must revise the Proposed RMP to identify measures that comply with the directives of EPAct.

IX. Protests of Specific Elements of the Proposed RMP

A. Monitoring Framework

The Trades protest several components of the monitoring framework.[31] First, and most significant, the Trades protest BLM's proposals to monitor implementation and effectiveness of the Proposed RMP, as well as seasonal habitat, connectivity at the fine scale, and habitat conditions at the site scale. *See* Proposed RMP/Final EIS at GRSG MON-28. The Trades do not necessarily object to the substance of what will be monitored, but rather object to BLM's proposal to monitor these elements even though it expressly recognizes that this monitoring will require "[a]dditional capacity or re-prioritization of ongoing monitoring work and budget." Proposed RMP/Final EIS at GRSG MON-28. Presently, BLM is lacking the resources to meet

[30] The Trades commented on the relationship between the Draft RMP and the EPAct. Trade Comments at 8.

[31] The Trades did not comment upon the monitoring framework because it was not available in the Draft RMP. The Trades did comment upon the necessity of BLM providing detail as to monitoring. Trade Comments at 34.

its 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). BLM should not tax its limited resources and commit to additional obligations knowing that it lacks the resources necessary to fulfill these obligations. Moreover, BLM may expose itself to lawsuits alleging that it has failed to implement the Proposed RMP if it cannot secure the funding or resources necessary to implement the monitoring framework. Therefore, BLM should revise the monitoring framework and only commit to implement measures that BLM has the funding and resources to implement.

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

Finally, the Trades protest the requirement that BLM separately monitor density of energy and mining (Measures 3). *See* Proposed RMP/Final EIS at GRSG MON-18 – MON-19. It is unnecessary and arbitrary for BLM to single out and monitor energy density over other land uses. The Proposed RMP directs that BLM monitor habitat degradation generally (Measure 2), which accounts for energy impacts. *See id.* GRSG MON-14 – MON-17. Given that BLM's resources are already limited, and impacts from energy development will be evaluated through habitat degradation monitoring, BLM should revise the Proposed RMP to remove the commitment to separately monitor density of energy and mining.

B. Adaptive Management Strategy

In addition to their position that BLM may not implement the adaptive management framework without amending the Proposed RMP, *see* section VI.B, *infra*, the Trades protest the substance of the adaptive management provisions in the Proposed RMP 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, BLM must more clearly articulate responses to soft triggers. Finally, the RMP should allow adaptive management changes that reduce burdens on lessees.

[32] The Trades did not comment upon the adaptive management strategy because it was not included in the Draft RMP.

1. The Adaptive Management Strategy Must Articulate Factors BLM 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 RMP as arbitrary because the adaptive management strategy does not describe the factors BLM will consider when assessing the "causal" factors of triggers being reached. Soft triggers include any negative deviation from normal trends in habitat or population in any given year, of if observed across two of three consecutive years. Proposed RMP/Final EIS at 2-12. Hard triggers are reached when the number of active leks, acres of available habitat, or population trends based on annual lek counts exceeds 60 percent of normal variability for a BSU in a given year, or if any of the three metrics exceeds 40 percent of normal variability for a three-year period within a five-year range of analysis. Proposed RMP/Final EIS at 2-12. If a soft trigger is reached, BLM will begin monitoring to determine causal factors, and may require curtailment of activities in the short- or long-term as allowed by law. Proposed RMP/Final EIS at 2-12. Depending on the cause, adjustments to management will be made at the project, state-wide, or other appropriate scale. Proposed RMP/Final EIS at 2-12. If a hard trigger is reached, BLM will review the data to determine causal factors and implement a strategy. Proposed RMP/Final EIS at 2-12.

The purpose of adaptive management is to adjust management decisions to respond to information learned regarding uncertainties in the management strategy. The Proposed RMP defines adaptive management as "[A] decision process that promotes flexible 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 RMP/Final EIS at 2-11. Guidance from the Department of the Interior reinforces 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).

The adaptive management strategy may not implement responses when a trigger is reached for reasons other than BLM's management decisions. The adaptive management strategy must recognize that external factors beyond BLM's management may influence sage-grouse populations and habitat, such as wildlife and disease. Conceivably, a natural event could cause significant declines in sage-grouse habitat or populations. Although it may be appropriate for BLM to adjust its management to this event, such adjustments cannot be characterized as "adaptive management" because the need for the adjustment is unrelated to the management decisions made in the Proposed RMP. In other words, the cause of the trigger—wildfire or disease—is not related to BLM's management decisions.

Similarly, the triggers and responses must account for prior management decisions that may influence populations and habitat. Restoration of greater sage-grouse habitat following disturbance takes at least three to five years. Scott M. Lambert, *Seeding Considerations in Restoring Big Sagebrush Habitat*, *in* Sage-Grouse Habitat Restoration Symposium Proceedings,

at 79 (USDA Forest Service Proceedings RMRS P 38, Nov. 2005) (recommending that big sagebrush restoration sites be rested from grazing three to five years after seeding to allow vegetation to become fully established), Attachment 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 RMP may impact greater sage-grouse populations in the coming years, even if BLM's management under the plan improves the status of the greater sage-grouse. The triggers and their responses, however, do not account for the effects of prior actions. BLM must revise the Proposed RMP to require a relationship between a triggering event and management actions taken under the RMP before it will implement the response.

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

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

BLM's response to soft triggers includes no specific management responses, and does not specify how BLM will quantifiably measure the success (or lack thereof) of any management adjustments made. Proposed RMP 2-12. BLM provides no detail as to how its team will determine the causal factors leading to a soft trigger breach, or what types of alternative management actions may be considered in response to different causes. Further, BLM does not provide any follow up strategy to measure the success of alternative management actions.

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

The Proposed RMP potentially allows for adaptive management changes to increase oil and gas restrictions in the face of new information but does not reciprocally allow adaptive management changes to decrease oil and gas restrictions. The Proposed RMP sets forth triggers to adjust management of the greater sage-grouse to respond to habitat loss or population declines. Proposed RMP/Final EIS at 2-12. The Proposed RMP does not, however, identify any

triggers that, if met, will ease regulatory burdens on oil and gas lessees. It is possible that 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 BLM believes, the Proposed RMP should allow BLM to adjust these measures through adaptive management. Likewise, BLM 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. BLM should revise the Proposed RMP 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.[33] Although the Trades view the density and disturbance caps as unnecessarily restrictive given the other management prescriptions set forth in the Proposed RMP, 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, BLM must revise the west-wide habitat degradation data layers set forth in Table 1. *See* Proposed RMP, Table 1 at GRSG DIST CAP-2. 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.

Furthermore, development on private lands should not be included toward density and disturbance limitations because BLM has 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

[33] The Trades commented upon the Draft RMP's density and disturbance caps. Trade Comments at 30.

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, BLM cannot accurately calculate disturbance amounts on private lands because they can only rely on aerial or satellite imagery.

Moreover, the Proposed RMP should define a "facility" for purposes of applying the density cap. The Proposed RMP 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, BLM states that 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 RMP/Final EIS at GRSG DIST CAP-1. 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. Required Design Features

The Trades protest the RDFs listed in the Greater Sage-Grouse Required Design Features Appendix of the Proposed RMP. Although the Trades extensively commented on the RDFs in the Draft RMP, BLM did not adjust any of the RDFs in response to the Trades' comments. Furthermore, as explained in section V.C above, BLM did not respond to the Trades' comments as required by 40 C.F.R. § 1503.4(a). Accordingly, the Trades reassert their objections to the RDF set forth in their comments on the Draft RMP.

E. Withdrawals of Lands from Mineral Leasing

The Trades protest BLM's proposal to prioritize oil and gas leasing outside of PHMAs and, if leasing occurs, only lease PHMA areas with NSO stipulations without the possibility of waiver or modification.[34] *See* Proposed RMP/Final EIS at 2-7. It appears that PHMAs can range from tens of thousands to nearly two million contiguous acres. Proposed RMP, Table 3-19 at 3-59. The significant size of the PHMAs 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 PHMA, it may be unable to obtain a right-of-way across federal lands to access the well locations because the PHMA is designated a right-of-way avoidance area. By prohibiting surface occupancy across such large swaths of land, BLM effectively removes the PHMAs from future leasing for oil and gas exploration and development.

[34] The Trades commented upon the unreasonableness of the NSO stipulations in the Alternative B of the Draft. Trade Comments at 21.

The decision to effectively remove PHMAs from future leasing is significant. The Proposed RMP designates 1,329,000 of mineral acres within the planning area as subject to NSO stipulations. 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 RMP's proposal to prioritize leasing outside of PHMA and to make PHMA 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 from mineral leasing.

F. Right-of-Way Avoidance and Exclusion Areas

1. BLM Has Not Justified the Proposal to Designate All PHMA as Right-of-Way Avoidance Areas

BLM has not adequately explained or justified the proposal to designate all PHMA as right-of-way avoidance areas. Lessees' ability to develop their leases could be significantly impacted if BLM inappropriately limits access to these leases. BLM must be willing to work with oil and gas lessees and operators to design access routes to proposed oil and gas development projects. If reasonable access is denied, operators cannot develop their leases and significant resources will be lost, in turn, hurting the local economy and federal treasury. While the issuance of 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). BLM 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.

2. BLM Should Clarify the Standard for Development in Rights-of-Way Avoidance Areas and State That New Collocated Rights-of-Way are Allowed in Avoidance Areas.

The Proposed RMP states that major rights-of-way "would avoid" GHMAs and that both major and minor rights-of-way "would avoid" PHMAs. Proposed RMP/Final EIS at 2-47, 2-51. The Trades appreciate the clarification in the definition of "avoidance areas" which now states that right-of-way development in avoidance areas will be "strongly discouraged" but "may be available for location of rights-of-way with special stipulations/mitigation." Proposed RMP/Final EIS at GLO-3. This definition is a significant improvement from that contained in the draft, but could be further clarified.

The RMP should expressly state that line officers must consider economic considerations in determining whether right-of-way development in avoidance areas is appropriate. And the RMP should recognize that an alternative route may actually have greater impacts, although technically feasible. For example, an avoidance area could be bypassed via a route that is circuitous and significantly longer. This longer route may cause significantly more surface disturbance and overall impact to resources. In these circumstances, the RMP should give line officers flexibility to approve development in the avoidance area if the route is preferable based on the totality of the circumstances.

Most significantly, the RMP should recognize that rights-of-way, if collocated with existing rights-of-way, may be developed in avoidance areas. For example, the Final EIS for the RMP states: "It is assumed that new major rights-of-way will be located within or next to compatible existing major rights-of-way, for example within or next to the Bison Pipeline Right-of-Way area, the Butte-Bridger Pipeline Grasslands Pipeline Rights-of-Way area in Carter County or a State Highway." Proposed RMP/Final EIS at 4-305 – 4-306. The Bison Pipeline traverses a right-of-way avoidance area, so the assumptions built into the EIS already consider new right-of-way collocated with the Bison Pipeline across avoidance areas. Collocation provides many benefits by limiting new disturbance and concentrating development in previously disturbed areas. Although the RMP declines to adopt right-of-way corridors, it should recognize that collocation provides similar policy benefits to corridors and should expressly state that collocated rights-of-way are appropriate in avoidance areas.

3. Collocated Rights-of-Way Should be Exempt From GRSG Disturbance Limits.

The Proposed RMP imposes a three percent anthropogenic disturbance cap in a given BSU within greater sage-grouse PHMAs. Proposed RMP/Final EIS at 2-53 – 2-54. The RMP should exempt collocated rights-of-way from this three percent limit. By definition, collocated right-of-way is located in an area of prior disturbance. The Proposed RMP and Final EIS support collocation. See GRSG DIST CAP-3; MMCCAA-6. Other BLM RMPs support

collocation by exempting collocated rights-of-way from greater sage-grouse disturbance limits. For example, the Proposed RMP for the Buffalo Field Office states at page 190 that "Buried utilities located within designated utility corridors would not require a [Density and Disturbance Calculation Tool] be conducted." The RMP should adopt a similar exemption for collocated rights-of-way.

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

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

The stipulations, restrictions, and conservation measures in the Proposed RMP are largely based on the U.S. Fish and Wildlife Service's (FWS) *Greater Sage-Grouse (Centrocercus urophasianus) Conservation Objections: Final Report* (Feb. 2013) ("COT Report") and the 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. BLM should remove from the Final ROD all references to these reports and any conservation measures that rely upon them, such as the three percent disturbance cap and most of the required design features.[35]

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

[35] The Trades commented on BLM's inappropriate reliance upon these reports in the DLUPA/Draft EIS. *See* Trade Comments at 32 – 33. 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.

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). 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.[36] *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.[37]

For example, at least one reviewer has noted numerous technical errors in the NTT Report, including use of citations that are not provided in the "Literature Cited" section. Megan Maxwell, *BLM's NTT Report: Is It the Best Available Science or a Tool to Support a Pre-determined Outcome?*, p. 13-14 (May 20, 2013) ("NWMA Review"), Attachment 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,

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

[37] 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).

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 RMP. 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. Conservation measures based upon "professional judgment" and flawed studies do not constitute the best available science, and BLM should not have relied upon these studies or the NTT Report in the Proposed RMP.

Finally, the NTT Report failed to cite or include numerous scientific papers and reports on oil and gas operations and mitigation measures that were available at the time the report was created. *See* NTT DQA Challenge, Exhibit C. For example, the NTT Report failed to cite a 2011 paper (which was made available to the NTT authors) that discusses the inadequacy of the research relied upon by the NTT Report in light of new technologies and mitigation measures designed to enhance efficiency and reduce environmental impacts. *E.g.*, 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. BLM should not rely on the NTT Report when forming oil and gas stipulations and conservation measures in the Proposed RMP, because the NTT Report does not represent the best available science.

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

indication that any quantitative, verifiable methodology was used in assigning these ranks. *See* COT Report at 16 – 29, tbl. 2. Absent a quantifiable methodology, these rankings are subjective and BLM should not rely upon any conservation measures derived from them.

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

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

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

The COT Report's errors, as described above, include reliance upon flawed studies, selective citation to some literature while ignoring other literature,[38] and failure to address known

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

and significant threats to sage-grouse while exaggerating the impact of hypothetical threats. Due to these errors and similar errors in the NTT Report, the COT Report and NTT Report are not the best available science and BLM's reliance upon these documents in the Proposed RMP was in error. BLM should remove all references to these reports and all conservation measures derived from them in the Final ROD.

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. 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. BLM should not have relied upon the NTT Report or the COT Report due to their biased presentation of information.

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

BLM should remove all references to the NTT and COT reports and any conservation measures derived from these reports in the Final 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. BLM 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. BLM 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.

BLM relies upon a recent report from the U.S. Geological Survey (USGS) to impose uniform buffer distances for anthropogenic disturbance across the planning area. Proposed RMP/Final EIS at 1-5; *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, BLM has chosen to implement buffers from linear features and energy development at 3.1 miles from active leks. Proposed RMP/Final EIS at GRSG BUF-1. These buffer restrictions are problematic for two reasons.[39] First, they do not 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," BLM makes the buffer distances mandatory in general habitat subject to two limited exceptions and mandatory in priority habitat subject to one limited exception. For general habitat, the Proposed RMP 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 RMP/Final EIS at GRSG BUF-1 – BUF-2. For priority habitat, only the first exception criterion applies. Proposed RMP/Final EIS at GRSG BUF-2. In both cases, it is hard to imagine that what BLM considers

[39] The 3.1 mile buffer was not in the Draft RMP because the USGS study was not released until 2014. *See* Proposed RMP/Final EIS 1-5. In their comments on the Draft RMP, the Trades generally commented on the flawed science underlying the Draft RMP and objected to the buffers analyzed in that document. *See* Trade Comments at 32 – 33, 43.

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*. BLM's version of "best available science" will likely more often lead it 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), Attachment 12. 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 13. 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). 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.

BLM's 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). BLM virtually dismisses 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 BLM should remove them from the Final ROD.

XI. BLM Improperly Attempts to Regulate Air Emissions

The Trades protest BLM's Goals and Objectives for air quality identified on Table 2-5, page 2-27 of the Proposed RMP because they are potentially illegal and are beyond BLM's jurisdiction and authority. Additionally, the Trades protest BLM's adoption of the Air Resource Management Plan, Proposed RMP, Air Resources & Climate Appendix, because it exceeds the BLM's authority to regulate air emissions.[40]

BLM improperly, and potentially illegally, attempts to regulate air quality and air emissions in the Proposed RMP. BLM lists as one of its goals in the Air Quality section of the Proposed RMP to "[m]aintain existing air quality and air quality related values (AQRVs) in the planning area and at sensitive areas (e.g., Class I areas) in and near the planning area." Proposed RMP, Table 2-5 at 2-27. To further this goal, BLM states that it will conduct air resource monitoring and modeling and impose emission reduction measures. Proposed RMP, Table 2-5 at 2-27. BLM also states that, upon any exceedance of 85 percent of a National Ambient Air Quality Standard (NAAQS) in the Planning Area, it will impose "enhanced mitigation measures," including electric drill or natural gas fired drill and completion rigs, electrification of compressors and pumpjacks, selective catalytic reduction, and "reduced emission completions beyond those required by USEPA regulations." Proposed RMP, Air Resources & Climate Appendix, Air Resource Management Plan at ARMP-21 (ARMP). BLM also proposes to add a CSU stipulation to all leases subjecting surface use to a requirement that diesel-fueled non-road engines with greater than 200 horsepower meet EPA Tier 4 emission standards for NO_x. *See* Minerals Appendix at MIN-83. BLM does not, as a matter of clear and unequivocal Federal law, have the authority to impose air emissions standards, ensure that air quality standards are maintained, or protect visibility within the Miles City Field Office.

BLM does not have direct authority over air quality or air emissions under the Clean Air Act (CAA). 42 U.S.C. §§ 7401 – 7671q. Under the express terms of the CAA, EPA has the authority to regulate air emissions. In Montana, EPA has delegated its authority to the Montana

[40] The Trades commented on the air quality portion of the Draft RMP. *See* Trade Comments at 12 – 16.

Department of Environmental Quality (MDEQ). *See* 42 U.S.C. §§ 7401 - 7671q; 40 C.F.R. pts. 50 - 99; 40 C.F.R. § 52.1370 – 52.1397 (Montana's State Implementation Plan); Mont. Code Ann. §§ 75-2-201 – 75-2-234 (2014); Mont. Admin. R. Title 17, Ch. 8. The Secretary of the Interior, through the Interior Board of Land Appeals (IBLA), has determined that, in states such as Montana, the state, and not BLM has authority over air emissions:

> In Wyoming, ensuring compliance with Federal and State air quality standards, setting maximum allowable limits (NAAQS and WAAQS) for six criteria pollutants CO (carbon monoxide), SO_2 (sulfur dioxide), NO_2, ozone and particulate matter (PM_{10} and $PM_{2.5}$), and setting maximum allowable increases (PSD Increments) above legal baseline concentrations for three of these pollutants (SO_2, NO_2, and PM_{10}) in Class I and Class II areas is the responsibility of WDEQ, subject to EPA oversight.

Wyoming Outdoor Council, et al., 176 IBLA 15, 26 (2008). Decisions of the IBLA are binding upon BLM and have the same force and effect of a Secretarial decision. 43 C.F.R. § 4.1 (noting that the Office of Hearings and Appeals, which includes the IBLA, may decide matters as fully and finally as the Secretary of the Interior); *see also IMC Kalium Carlsbad, Inc. v. Interior Bd. of Land Appeals*, 206 F.3d 1003, 1009 (10th Cir. 2000) (holding that IBLA has *de novo* review authority over the decisions of subordinate agencies such as BLM). Given previous determinations by the Secretary, before issuing the Final Record of Decision and Approved Resource Management Plan, BLM must revise the objectives included in the Proposed RMP to recognize MDEQ's, and not BLM's, authority over air quality and air emissions in Montana. BLM does not have the authority to impose regulations or mandate control measures on emission sources, including oil and gas operations, within Montana. *Wyoming Outdoor Council, et al.*, 176 IBLA at 26.

With respect to potential visibility impacts, BLM's authority is also limited by existing federal law. Under the CAA, a federal land manager's authority is strictly limited to considering whether a "proposed major emitting facility will have an adverse impact" on visibility within designated Class I areas. 42 U.S.C. § 7475(d)(2)(B). Oil and gas operations do not meet the definition of a major emitting facility.[41] Further, under the CAA, the regulation of potential impacts to visibility and authority over air quality in general rests with the MDEQ. 42 U.S.C. § 7407(a). The goal of preventing impairment of visibility in Class I areas will be achieved through the regional haze federal implementation plan (SIP) that was recently approved. 42 U.S.C. § 7410(c); 77 Fed. Reg. 57,863 (Sept. 18, 2012). Although federal land managers with jurisdiction over Class I areas may participate in the development of regional haze SIPs, BLM has no such jurisdiction in Montana because it does not manage a Class I area in the State. 42 U.S.C. § 7491; *see also* Mont. Code Ann. §§ 75-2-201 – 75-2-234 (2014). Accordingly, BLM has no authority over air quality and cannot impose emissions restrictions, either directly or

[41] Major emitting sources are those that emit or have the potential to emit 250 tons per year of any regulated pollutant, or any of the 28 listed industrial sources that have the potential to emit 100 tons per year of any regulated pollutant. 42 U.S.C. § 7479(1); 40 C.F.R. §§ 51.166(b)(1), 52.21(b)(1).

indirectly, on oil and natural gas operations in Montana, particularly if the overall goal is to reduce potential visibility impacts.

BLM should also recognize that the agency does not have the authority to implement, regulate, or enforce the PSD increment. BLM's lack of authority regarding PSD increment analysis was recently recognized in the Memorandum of Understanding (MOU) issued by the Department of the Interior, Department of Agriculture, and the EPA which indicates that BLM NEPA documents relating to oil and gas activities will model PSD increment consumption for informational purposes only. *See* Memorandum of Understanding Among Department of Agriculture, Department of the Interior and the EPA Regarding Air Quality Analyses and Mitigation for Federal Oil and Gas Decisions Through the National Environmental Policy Act Process (EPA MOU), Section V.G (June 23, 2011). Montana's PSD program currently controls Wyoming's enforcement of the PSD program within the State of Montana. 80 Fed. Reg. 4793 (Jan. 29, 2015); 76 Fed. Reg. 40,237 (July 8, 2011); 71 Fed. Reg. 40,922 (July 19, 2006); 71 Fed. Reg. 3776 (Jan. 24, 2006); 71 Fed. Reg. 3770 (Jan. 24, 2006); 66 Fed. Reg. 42,427 (Aug. 13, 2001). There is no justifiable or legal support for BLM's alleged authority over PSD analysis. Given the limits on BLM's authority, and the fact a well-defined regulatory scheme exists to control visibility and PSD increment analysis, BLM must revise the objectives set forth in the Proposed RMP regarding visibility and PSD consumption.

Further, contrary to BLM's representations in its Air Resources and Climate Appendix ("Air Appendix"), BLM is not authorized or required by FLPMA to regulate air quality. *See* Proposed RMP, Air Appendix, pg. ARMP-9. Section 202(c)(8) of FLPMA does not require or authorize BLM to enforce air quality controls. Instead, the cited section of FLPMA provides: "In the development and revision of land use plans, the Secretary shall— . . . (8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementations plans." 43 U.S.C. § 1712(c)(8). The language of the statute demonstrates BLM is required to "provide for compliance," not independently regulate air emissions. *Id.* So long as the Proposed RMP does not interfere with the enforcement of state and federal pollution laws, BLM has satisfied its obligations under FLPMA. FLPMA does not authorize BLM to independently regulate air quality control measures such as those imposed in the Proposed RMP.

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

Dep't of the Interior, 377 F.3d 1147, 1150 (10th Cir. 2004). Accordingly, NEPA provides no basis for BLM to regulate air quality or impose air emissions regulations.

Given these limitations, BLM lacks authority to impose any of the emission control measures in Table 2-5 or the ARMP. For example, BLM proposes to add a CSU stipulation to all leases subjecting surface use to a requirement that diesel-fueled non-road engines with greater than 200 horsepower meet EPA Tier 4 emission standards for NO_x. *See* Proposed RMP, Minerals Appendix, pg. MIN-83. This stipulation is inappropriate and beyond BLM's authority. Under the CAA, the regulation of reciprocating internal combustion engines and other mobile sources is exclusively within the jurisdiction of EPA, not BLM. *See* 42 U.S.C. §§ 7522, 7523, 7524, 7525, 7541, 7542, 7543, 7547, 7550, 7601. EPA, using its authority under the CAA, has specifically issued regulations regarding non-road diesel engines and fuels such as those typically used for drilling and development operations. 69 Fed. Reg. 38958 (Jun. 29, 2004); 69 Fed. Reg. 33474 (Jun. 15, 2004). Further, BLM suggests that it will consider emission reduction mitigation measures and conservation actions at the project level, and directs readers to its Mitigation Measures Appendix for a list of measures. *See* Proposed RMP, Table 2-5, pg. 2-27. In the ARMP, BLM provides a list of mitigation actions that apply to project activities upon issuance of the ROD, including a requirement that diesel engines with greater than 200 horsepower meet Tier 4 standards and that operators use green completions. Proposed RMP, Air Resources and Climate Appendix, pg. ARMP-18. EPA regulates reciprocating internal combustion engines, as discussed above. 69 Fed. Reg. 38958 (Jun. 29, 2004); 69 Fed. Reg. 33474 (Jun. 15, 2004). In addition, EPA already regulates green completions. 40 C.F.R. § 60.5375. Rather than attempting to regulate air quality or air emissions, BLM should defer to the expertise of the proper regulatory authorities, the MDEQ and EPA, and presume that air quality will meet the applicable standards, or that MDEQ will take appropriate action to ensure that its air quality standards are met. From a NEPA perspective, BLM should simply inform the public that MDEQ will monitor and enforce air quality standards in Montana, and that BLM will assist with MDEQ actions to the extent permitted by law.

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

Department of Agriculture, and the EPA. Any deviation from this national MOU should be eliminated in the Proposed RMP.

Second, the language in the ARMP also impermissibly attempts to require monitoring and modeling in the area as if the Planning Area had been designated as non-attainment under the CAA. In fact, only a portion of the Planning Area is currently in or predicted to be in a non-attainment status. Thus, all of BLM's language requiring "enhanced mitigation" if a project is expected to result in "potential future impacts to NAAQS," or if, on a Planning Area-wide basis, an exceedance of NAAQS occurs prior to BLM's completion of photochemical grid modeling, or if BLM-calculated design value exceeds 85% of a NAAQS after BLM's completion of photochemical grid modeling, should be limited to activities in that area. Proposed RMP, ARMP, pg. ARMP-20 – 21. Further, BLM must remove all references to the 85% standard because such a standard has no basis or support in an air quality context. BLM should very carefully review the proposed air resources plan and remove, in consultation with the MDEQ, the provisions that do not comport with existing law relative to air quality or the existing qualitative data.

Moreover, the "enhanced mitigation measures" BLM intends to impose on oil and gas operations are unlawful. BLM includes as potential "enhanced mitigation measures" electric or natural gas-fired rigs, "reduced emission completions beyond those required by USEPA regulations," well pad density limitations, and reduction in number of drill rigs operating simultaneously. Proposed RMP, ARMP, pg. ARMP-20 (emphasis added). Given BLM's lack of authority over air quality, it is inappropriate for the agency to impose emissions or mitigation measures on oil and gas operations at all, especially when a project proponent has already agreed to mitigation in full compliance with state and federal requirements. Instead, emission controls should only be imposed by agencies with expertise and authority over air quality in Montana, which, according to the Secretary of the Interior, is MDEQ. *See Wyoming Outdoor Council, et al.,* 176 IBLA at 26. BLM should not attempt to control emissions on oil and gas operations within the State of Montana.

Given the express and unequivocal language from the Secretary of the Interior that MDEQ, not BLM, has authority to regulate air quality in Montana, BLM should remove the language in Table 2-5 and the ARMP providing for imposition of emission controls and restrictions from the Final Record of Decision and Approved Resource Management Plan.

XII. Additional Comments

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

1. BLM Should Not Adopt Alternative B

Although the Trades disagree with BLM's decision to adopt the Proposed RMP, the Trades maintain that BLM should not adopt Alternative B.[42] As detailed in the Trades' comments on the Draft RMP, these alternatives are unnecessarily restrictive and will stymie oil and gas exploration and development on the public lands.

2. BLM Should Not Adjust Fluid Minerals Management in Response to Reaching a Hard Trigger.

The Trade Associations agree with the Proposed RMP's provision relating to responses to hard triggers and fluid minerals management. Proposed RMP/Final EIS at 2-14. Specifically, the Trade Associations agree with the proposal not to adjust fluid minerals management in response to a hard trigger. *See id.* Given the extensive and onerous prescriptions relating to fluid minerals in the Proposed RMP, BLM correctly concluded that additional restrictions not yield benefits to the greater sage-grouse. *See id.*

CONCLUSION AND REQUEST TO MEET WITH BLM TO DISCUSS THE PROPOSED RMP

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

Sincerely,

Dave Galt Executive Director Montana Petroleum Association	Richard Ranger, Esq. Senior Policy Advisor, Upstream American Petroleum Institute	Kathleen M. Sgamma Vice President of Government & Public Affairs Western Energy Alliance

[42] The Trades commented upon the unreasonableness of Alternative B. Trade Comments at 21.