

**PRE-DECISIONAL ADMINISTRATIVE REVIEW AND OBJECTION PURSUANT TO
36 C.F.R. PART 219**

October 1, 2019

OBJECTOR

Coalition of Local Governments
925 Sage Avenue, Suite 302
Kemmerer, WY 83101
P: (307)877-2004
Email: kconnelly@lcwy.org

PROPOSED PROJECT

Idaho (Boise, Caribou-Targhee, Salmon-Challis, and Sawtooth National Forests and Curlew National Grassland); Nevada (Humboldt-Toiyabe National Forest); Utah (Ashley, Dixie, Fishlake, Manti-La Sal, and Uinta-Wasatch-Cache National Forests); Wyoming (Bridger-Teton National Forest); and Wyoming/Colorado (Medicine Bow-Routt National Forest and Thunder Basin National Grassland) Amendments to Land Management Plans for Greater Sage-Grouse Conservation

United States Department of Agriculture, U.S. Forest Service

RESPONSIBLE OFFICIALS

Nora Rasure
Regional Forester, Intermountain Region
Brian Ferebee
Regional Forester, Rocky Mountain Region

OBJECTION REVIEWING OFFICER

Chris French
210 14th Street, SW, EMC-PEEARS, Mailstop 1104, Washington, DC 20250

SUBMITTED VIA

<https://cara.ecosystem-management.org/Public/CommentInput?project=52904>

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
I. STATEMENT OF INTEREST.....	1
II. DESCRIPTION OF ASPECTS OF PROPOSED PROJECT ADDRESSED BY THE OBJECTION.	3
III. OBJECTION ISSUE 1: NO SURFACE OCCUPANCY STIPULATIONS.....	3
A. Description of Objection Issue in 2019 Draft ROD: No Surface Occupancy in Priority Habitat Management Areas.....	3
B. Link Between Prior Substantive Comments and Objection.....	4
C. Concise Statement of Objection: NSO Stipulations Are Arbitrary and Capricious and Not Adequately Explained.	4
D. Suggested Remedies To Resolve the Objection.	6
IV. OBJECTION ISSUE 2: COMPENSATORY MITIGATION STANDARD.	6
A. Description of Objection Issue in 2019 Draft ROD: Conservation Uplift and No Net Loss.....	6
B. Link Between Prior Substantive Comments and Objection.....	7
C. Concise Statement of Objection: Forest Service Lacks Authority to Require Any Mitigation.....	7
D. Suggested Remedies That Would Resolve the Objection.	8
V. OBJECTION ISSUE 3: GRAZING GUIDELINES.	8
A. Description of Objection Issue in 2019 Draft ROD: Livestock Grazing Permit Reductions and Habitat Objectives.	9
B. Link Between Prior Substantive Comments and Objection.....	9
C. Concise Statement of Objection: Grazing Guideline 35 Forces Grazing Permit Reductions When Grazing is Not a Significant Causal Factor and is Arbitrary and Capricious.	9
D. Suggested Remedies To Resolve the Objection.	10
VI. OBJECTION ISSUE 4: FAILURE TO ADDRESS SCIENTIFIC CONTROVERSIES IN 2019 FEIS. .	10
A. Description of Objection Issue in 2019 Draft ROD: National Technical Team Report and Monograph.	10
B. Link Between Prior Substantive Comments and Objection.....	11
C. Concise Statement of Objection: Forest Service Failed to Address Controversial and Flawed Science That Serve as Basis for Prescriptions in 2015 LUPA and 2019 Draft ROD.	11
D. Suggested Remedies To Resolve the Objection.	13
VII. CONCLUSION AND RELIEF REQUESTED.	14

TABLE OF AUTHORITIES

FEDERAL CASES

Center for Biological Diversity v. Forest Service, 349 F.3d 1157 (9th Cir. 2003). [11](#)

Citizens’ Comm. to Save Our Canyons v. Krueger, 513 F.3d 1169 (10th Cir. 2008). [6](#)

Utah Shared Access Alliance v. U.S. Forest Serv., 288 F.3d 1205 (10th Cir. 2002). [5](#)

Kern v. Bureau of Land Management, 284 F.3d 1062 (9th Cir.2002). [4](#)

Middle Rio Grand Conservancy Dist. v. Norton, 294 F.3d 1220 (10th Cir. 2002). [11](#)

Mountain States Legal Fndn. v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980). [5](#)

Mountain States Legal Fndn. v. Hodel, 668 F. Supp. 1466 (D. Wyo. 1987). [5](#)

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).. [8](#)

Utahns for Better Transp. v. U.S. Dep’t of Transp., 305 F.3d 1152 (10th Cir. 2002) as modified on reh’g, 319 F.3d 1207 (10th Cir. 2003). [11, 13](#)

W. Org. of Res. Councils v. Bureau of Land Mgmt., 591 F. Supp. 2d 1206 (D. Wyo. 2008), *aff’d sub nom. BioDiversity Conservation All. v. Bureau of Land Mgmt.*, 608 F.3d 709 (10th Cir. 2010). [4](#)

WildEarth Guardians v. Nat’l Park Serv., 703 F.3d 1178 (10th Cir. 2013).. [4](#)

Wyoming v. USDA, 570 F. Supp.2d 1309 (D. Wyo. 2008), rev’d on other grounds, 661 F.3d 1209 (10th Cir. 2011). [5](#)

FEDERAL STATUTES

5 U.S.C. §706(2)(a). [6](#)

16 U.S.C.A. § 475(a). [7](#)

16 U.S.C. §§ 528-531. [7](#)

16 U.S.C. § 1604(e). [7](#)

16 U.S.C. § 1607..	7
43 U.S.C. § 1714(c).	5
44 U.S.C. § 3516..	11

STATE STATUTES

Wyo. Stat. §11-16-103.	1
Wyo. Stat. §11-16-122.	1
Wyo. Stat. §18-5-102.	1

CODE OF FEDERAL REGULATIONS

36 C.F.R. Part 219.	1
36 C.F.R. § 219.54.	3
36 C.F.R. § 222.4(a)(8)..	9
36 C.F.R. § 228(e).	8
36 C.F.R. § 228.8.	7
40 C.F.R. § 1502.16	4
40 C.F.R. § 1502.24.	11
40 C.F.R. § 1503.4(a).	11
40 C.F.R. §§ 1505.2(c).	8
40 C.F.R. § 1505.3.	8
40 C.F.R. § 1508.8.	4

Pursuant to 36 C.F.R. Part 219, the Wyoming Coalition of Local Governments (“Objector” or “Coalition”) submits this objection to the Greater Sage-grouse Draft Record of Decision and Land Management Plan Amendment for National Forest System Land in Utah (“2019 Draft ROD”). Notice was published in the Salt Lake Tribune and Denver Post on August 2, 2019 with a 60 day objection period closing on October 1, 2019.

I. STATEMENT OF INTEREST

The Coalition is a voluntary association of local governments organized under the laws of the State of Wyoming to educate, guide, and develop public land policy in the affected counties. Wyo. Stat. §§11-16-103, 11-16-122, 18-5-201. Coalition members include Lincoln County, Sweetwater County, Uinta County, Sublette County, Lincoln Conservation District, Sweetwater County Conservation District, Uinta County Conservation District, Sublette County Conservation District, Little Snake River Conservation District, and Star Valley Conservation District. The Coalition serves its members to advocate for local government land management and planning. The plans adopted by the Coalition members provide for the protection of vested rights of individuals and industries dependent on utilizing and conserving existing resources and public lands, the promotion and support of habitat improvement, the support and funding of scientific studies addressing federal land use plans and projects, and providing comments on behalf of members for the educational benefit of those proposing federal land use plans and land use projects.

The county and conservation district members of the Coalition are local governments with special expertise and jurisdiction by law as set out in the CEQ regulations in a variety of different contexts. The county and conservation district members of the Coalition enjoy the authority to protect the public health and welfare of Wyoming citizens and to promote the management and protection of federal land natural resources. Wyo. Stat. §§18-5-102; Wyo. Stat. §§11-16-122. Given this statutory charge and wealth of experience in federal land matters, the Coalition members have participated as cooperating agencies on most Wyoming projects and land use plans and have coordinated efforts with BLM, U.S. Forest Service, and other federal, state, and local entities.

- Sublette County supports a multiple-use policy on the lands within the county. Sublette County Comprehensive Plan, at 19, 62 (2005). It encourages and supports "maintaining wildlife populations that are in balance with available habitat and other uses," as well as supporting "wildlife management techniques that minimize conflicts with agricultural operations and/or practices." *Id.* at 18, 57. It is also Sublette County's goal to "balance between the conservation and the use of the County's natural resources." *Id.* at 44-45, 61. It is the County's policy to coordinate and cooperate with both state and federal entities to in planning efforts. *Id.* at 6.
- Sublette County Conservation District's objective is to "ensure public lands are managed for multiple use, sustained yield, and prevention of natural resource waste." Sublette County Conservation District Public Land Use Policies, at 5, 7-8 (2008). It is the District's position that "[f]orests, rangelands, and watersheds, in a healthy

condition, are necessary and beneficial for wildlife, livestock grazing, and other multiple uses." *Id.* at 16. Sublette County Conservation District's Long Range Plan identifies agriculture, vegetation, soils, forests, minerals and other resource areas of concern and emphasizes coordination and cooperation with the BLM and the USFS on planning efforts that may impact each of those areas. Sublette County Conservation District Long Range Plan at 15.

- Lincoln County also supports and depends on the multiple uses of the public lands and supports land uses that are consistent with "orderly development and efficient use of renewable and nonrenewable resources." Lincoln County Comprehensive Plan, at 7 (2006). It is Lincoln County's position that if forests, rangelands, and watersheds are maintained in a healthy condition, then it will benefit wildlife, livestock grazing, and other multiple-uses. Lincoln County Public Lands Policy, at 3-40. Lincoln Conservation District's objective is to "maintain a solid resource balance between wildlife, recreation and other land uses in the District." Lincoln Conservation District Land Use & Natural Management Long Range Plan, at 36 (2010-2015).
- Uinta County supports public land development and livestock grazing as critical economic and cultural drivers. Uinta County Comprehensive Plan at 21-23 (2011). The County supports use of maximum Animal Unit Months and opposes any relinquishment of livestock permits. *Id.* at 22. The County supports public land access and opposes the any use of the Endangered Species Act, or candidate species to restrict or curtail uses in the County. *Id.* Uinta County Conservation District seeks to "promote and protect agriculture, to provide leadership, information, education and technical assistance for the development and improvement of our natural resources, to protect the tax base and promote the health, safety and well being of Uinta County residents." Uinta County Conservation District Long Range Plan at 1 (2010-2015).
- Sweetwater County Conservation District commits to seeing that all natural resource decisions "maintain and revitalize the concept of multiple use on state and federal lands in Sweetwater County." SWCCD Land & Resource Use Plan & Policy at 8, 17, 29 (2005). It encourages the participation "in local plans for sage grouse management to ensure an effective balance between sagebrush habitat for sage grouse and grass vegetation for domestic and wild grazing animals." *Id.* at 55. It also looks to ensure "that wildlife management and habitat objectives reduce and/or avoid conflicts with other multiple uses," and that the "objective of maintaining healthy wildlife populations balance[] with resource carrying capacity and other land uses." *Id.* at 66-68.

The 2019 Draft ROD will greatly impair Coalition member interests because:

- The 2019 Draft ROD adopts No Surface Occupancy stipulations, noise limitations, and disturbance caps that limit energy development that decrease county revenues, injures the tax base, and destabilizes the economy of each county;
- The 2019 Draft ROD adopts a mitigation standard of “conservation uplift” to “improve” sage-grouse habitat against the Forest Service’s statutory authority which will chill energy development and other multiple uses;
- The 2019 Draft ROD creates a presumption that livestock grazing will cause a negative impact to sage-grouse habitat which will merit livestock grazing permit reductions;
- The 2019 Draft ROD relies on literature from the 2015 planning process that is not adequately explained or analyzed which is the subject of significant controversy and litigation and has been the basis of management actions that have directly impacted the Coalition’s economy, custom, and culture.

II. DESCRIPTION OF ASPECTS OF PROPOSED PROJECT ADDRESSED BY THE OBJECTION

Pursuant to 36 C.F.R. §219.54, the Objector includes the following:

1. A statement of the issues and/or the parts of the plan, plan amendment, or plan revision to which the objection applies;
2. A concise statement explaining the objection and suggesting how the proposed plan decision may be improved. If applicable, the objector should identify how the objector believes that the plan, plan amendment, or plan revision is inconsistent with law, regulation, or policy; and
3. A statement that demonstrates the link between prior substantive formal comments attributed to the objector and the content of the objection, unless the objection concerns an issue that arose after the opportunities for formal comment.

III. OBJECTION ISSUE 1: NO SURFACE OCCUPANCY STIPULATIONS

A. Description of Objection Issue in 2019 Draft ROD: No Surface Occupancy in Priority Habitat Management Areas

The 2019 Draft ROD includes a No Surface Occupancy (“NSO”) stipulation for unleased fluid minerals in priority habitat management areas (“PHMA”) that cannot be waived or modified. *See* 2019 Draft ROD at 59 (GRSG-M-FMUL-ST-065). Exceptions can be granted if, and only if: (1) there would be no direct, indirect, or cumulative effects to the greater sage-grouse or its habitat;

or (2) all impacts could be fully offset through mitigation and the exception will include appropriate controlled surface use and timing limitation stipulations. *Id.*

B. Link Between Prior Substantive Comments and Objection

The Coalition commented that Standard 74 (now Standard 65) should be deleted entirely because “mandatory NSO in PHMA results in a *de facto* withdrawal of the area from mineral development.” 081418 Utah USFS Final Comments at 10. If no surface disturbance is allowed, tens of thousands of acres will not – *and cannot* – be developed. *See id.* Moreover, the standard is not contingent on the actual presence of sage-grouse or sage-grouse leks. *See* 010319 Coalition Comment on FS Proposed LMPA at 9. The Forest Service *never* disclosed or analyzed these facts in the DEIS or FEIS.

C. Concise Statement of Objection: NSO Stipulations Are Arbitrary and Capricious and Not Adequately Explained

1. NSO Stipulations Effectively Close Tens of Thousands of Acres to Energy Development

NEPA requires the Forest Service to “consider the environmental impacts of their actions, disclose those impacts to the public, and then explain how their actions will address those impacts.” *W. Org. of Res. Councils v. Bureau of Land Mgmt.*, 591 F. Supp. 2d 1206, 1228–29 (D. Wyo. 2008), *aff’d sub nom. BioDiversity Conservation All. v. Bureau of Land Mgmt.*, 608 F.3d 709 (10th Cir. 2010). An EIS must assess and disclose direct and indirect effects, 40 C.F.R. §§ 1502.16, 1508.8, and consider “every significant aspect of the environmental impact of a proposed action.” *Kern v. Bureau of Land Management*, 284 F.3d 1062, 1066, 1073 (9th Cir.2002). The Forest Service must “articulate, publicly and in detail, the reasons for and likely effects of . . . decisions, and to allow public comment on that articulation.” *Id.* Failure to do so is fatal to the document. *WildEarth Guardians v. Nat’l Park Serv.*, 703 F.3d 1178, 1183 (10th Cir. 2013).

Under the 2015 Land Use Plan Amendment (“2015 LUPA”), Map 2-53 shows large areas of land will not be accessible for fluid mineral development but the 2015 FEIS *does not disclose* the number of Forest Service acres that are subject to NSO stipulations or their location to lands closed to energy development. The 2019 FEIS *does not correct this deficiency*. *See* 2019 FEIS (incorporating 2015 FEIS at 4-288 – 313). Careful study of Map 2-53, however, reveals that thousands of acres of lands which include NSO stipulations are adjacent to lands that are *closed* to oil and gas leasing. The 2015 FEIS did not disclose that the thousands of acres that were otherwise available for leasing *could not* be developed because of the relationship between an NSO stipulation and areas that were *closed* to mineral leasing. The possibility of additional lands being closed to mineral development was and remains a grave concern of the Coalition in both the 2015 and 2019 planning process. *See* 010319 Coalition DEIS Comments at 10-12.

The 2019 FEIS did not correct the failure in the 2015 FEIS to disclose and analyze the number of acres of Forest Service lands that include an NSO and where an NSO stipulation made it impossible to develop fluid minerals. The interrelationship between the “closed” acres and the “NSO” acres includes significant cumulative and connected impacts and the Forest Service has not explored that relationship and documented it in the FEIS. *Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d 1205, 1212 (10th Cir. 2002) (Agencies must consider synergistic interrelationship of management actions and their effects). The number of acres that cannot be developed will adversely affect the Coalition members economy, custom, and culture. The burdens on energy development also create a drag on other industries, such as well services, equipment sales, and finance in the Wyoming communities.

2. 2019 Draft ROD Illegally Withdraws Fluid Minerals

In order to withdraw minerals, the Secretary must notify both the House and Senate, *id.* at 1714(c)(1), provide Congress with exhaustive details on the public proceedings, need for, and cause of the withdrawal, *id.*, and upon which information the Congress may approve or reject the withdrawal.

The NSO stipulation within PHMAs is the functional equivalent of a closure to oil and gas leasing regardless of whether there are active leks or sage grouse present in these habitat areas. No leasing on an area that exceeds 5,000 acres is a *de facto* withdrawal of PHMA from mineral development. 43 U.S.C. § 1714(c); 2015 LUPA Map 2-53. The Forest Service *does not* have unilateral authority to implement a *de facto* withdrawal of minerals in sage-grouse habitat without complying with the mandatory procedures of a withdrawal or land management decision, including full disclosure and analysis of the energy resources foregone.

Under the 2019 Draft ROD, production would be limited to the edges of PHMA because Forest Service lands designated as sage grouse habitat cannot be developed through horizontal or directional drilling. The Forest Service has not disclosed this fact nor weighed the merits of closing these lands to mineral development as required in FLPMA. 43 U.S.C. § 1714(c); *Mountain States Legal Fndn. v. Andrus*, 499 F. Supp. 383, 391 (D. Wyo. 1980); *Mountain States Legal Fndn. v. Hodel*, 668 F. Supp. 1466, (D. Wyo. 1987) *Wyoming v. USDA*, 570 F. Supp.2d 1309, 1350 (D. Wyo. 2008) (lack of surface access precludes oil and gas development), *rev'd on other grounds*, 661 F.3d 1209 (10th Cir. 2011). Thus, not only has the 2019 FEIS violated the basic procedures to complete a mineral withdrawal, but it has failed to disclose to the public in the 2019 FEIS of the impacts of the NSO stipulation.

3. Exceptions Without Waivers and Modifications is Arbitrary and Capricious

According to the 2019 Draft ROD, the NSO stipulation cannot be waived or modified. *See* 2019 Draft ROD at 59. Exceptions, however, can be granted if, and only if: (1) there would be no direct, indirect, or cumulative effects to the greater sage-grouse or its habitat; or (2) all impacts could

be fully offset through mitigation and the exception will include appropriate controlled surface use and timing limitation stipulations. *Id.*

The Forest Service does not explain how the exact same factors supporting an exception (*i.e.* no direct, indirect, or cumulative impacts to sage-grouse) are not equally valid for a waiver or modification. It is clear that the purpose of the exception is to prevent impacts and the purpose of a waiver or modification could also be to prevent impacts to sage-grouse. However, despite the analogous purpose, the Forest Service expects the public to accept the absurd proposition that waivers, modifications, and exceptions are somehow substantively different. Courts will set aside agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §706(2)(a). The duty of a court under this standard is to determine whether the Forest Service has demonstrated a rational connection between the facts found and the decision made. *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008). The Forest Service *has not* demonstrated how an exception is any different in purpose or effect from a waiver or modification and, therefore, fails to connect the decision to use only exceptions to reasonable facts that justify that decision.

D. Suggested Remedies To Resolve the Objection

The Coalition suggests that the following language correlates more closely with the Forest Service’s statutory authority.

GRSG-M-FMUL-ST-065-Standard - In PHMA, any new oil and gas leases or geothermal leases ~~must~~ may include a No Surface Occupancy stipulation only when the deciding officer determines that energy development would adversely affect sage grouse on the site and that mitigation measures would be insufficient. ~~There will be no waivers or modifications. An exception, after review by an interagency technical team, could be granted by the authorized officer if:~~

- ~~• There would be no direct, indirect, or cumulative effects to the greater sage-grouse or its habitat, or~~
- ~~• Impacts could be fully offset through mitigation; and~~
- ~~• The exception will include appropriate controlled surface use and timing limitation stipulations.~~

IV. OBJECTION ISSUE 2: COMPENSATORY MITIGATION STANDARD

A. *Description of Objection Issue in 2019 Draft ROD: Conservation Uplift and No Net Loss*

The 2019 Draft ROD changes the mitigation standard used in the 2015 LUPA from a “net conservation gain” threshold to a “no net loss” threshold. *Compare* 2015 LUPA at 18 *with* 2019 Draft ROD at 25 (discussing the rationale for the change). It appears, however, that the change is purely semantic – the 2019 Draft ROD mitigation standard provides “a clearer link to acres and equivalency or *uplift for the species* than the previous net conservation gain definition.” 2019 ROD at 20. According to the ROD, new surface disturbances will be allowed (above and beyond the density and disturbance caps) if, and only if, residual impacts are “fully offset by compensatory mitigation projects that result in no net loss, subject to existing rights, by applying beneficial mitigation actions.” 2019 Draft ROD at 52. The 2019 ROD language is at best ambiguous and retains the terms used in compensatory mitigation so as to negate the alleged change in policy.

B. *Link Between Prior Substantive Comments and Objection*

The Coalition commented that Forest Service does not have authority to require the complete mitigation or “uplift” of any and all impacts caused by a proposed project. NEPA does not require mitigation, let alone, complete mitigation and Forest Service statutes and regulations do not either. Thus, the Forest Service may not require an “improvement” or “uplift” standard in the 2019 Plan. *See e.g.*, 081418 Utah USFS Final at 8. The Coalition also commented that the Forest Service does not have authority to require any mitigation *regardless* of the standard. *See* 011918 Scoping Comments at 11. Despite these comments, the 2019 Draft ROD retains a mitigation standard that relies heavily on artifacts of the net conservation gain threshold and negates the purported change to “no net loss”. Needless to say the ROD language on mitigation is neither defensible or durable.

C. *Concise Statement of Objection: Forest Service Lacks Authority to Require Any Mitigation*

According to the 2019 FEIS and ROD, the new mitigation standard – no net loss – provides “a clearer link to acres and equivalency or *uplift for the species* than the previous net conservation gain definition.” 2019 ROD at 20; 2019 FEIS at 4-354. Thus, despite the textual change in the new plan, the Forest Service has apparently interpreted “no net loss” as accomplishing what the “net conservation gain” standard was intended to accomplish. Put another way, the Forest Service has *retained* the goal to provide an “uplift for the species” but has *changed* the name of the mechanism by which it accomplishes this uplift. The 2019 FEIS never discloses the Forest Service’s authority to require mitigation, regardless of the standard, for projects and operations that comply with the Forest Service statutory multiple use mandate.

No statute, rule, or policy requires the Forest Service to improve, benefit, or uplift any resource. *See* NFMA at 16 U.S.C. § 1604 (e), 1607; MUSYA, 16 U.S.C. §§ 528-531; Organic Act

16 U.S.C.A. § 475 (a)(the purpose of the forest is to “[secure] favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . .”). Indeed, the furthest extent of the Forest Service’s mitigation authority can be found in Forest Service rules which authorize “minimiz[ation of] adverse environmental impacts.” 36 C.F.R. § 228.8. Minimizing impacts is not the same as compensatory mitigation and the Forest Service may not conflate the two distinct terms. *Compare* 40 C.F.R. 1508.20(b) *with id.* at 1508.20(e); *see also* *Mercy Hosp., Inc. v. Azar*, 891 F.3d 1062, 1068 (D.C. Cir. 2018) (distinct provisions should not be read to produce surplus provisions). With regard to wildlife habitat, such as sage-grouse PHMA or GHMA, the Forest Service is only authorized to “maintain and protect” habitat that may be affected by operations on Forest Service lands. *Id.* at § 228(e). Providing “uplift for the species” therefore, is clearly beyond the pale of the Forest Service’s clear and unambiguous statutory grant of authority.

It is perhaps more telling that the policies upon which the “net conservation gain” standard were based have since been revoked. Authority for the net conservation gain standard relied on Secretary Order 3330 (Improving Mitigation Policies and Practices of the Department of the Interior) and the Presidential Memorandum issued on November 3, 2015 (Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment). Both the secretarial order and presidential guidance have been rescinded by the Executive Order 13783 (Mar. 28, 2017) and Secretary Order 3349. Thus, the Executive has already acknowledged that the Secretary of Agriculture lacks the authority to require any improvement above the original or baseline conditions. The 2019 ROD mitigation standard clearly fails to conform to the clarification provided by the President and Interior Secretary.

Similarly, NEPA does not require mitigation of *any type*. Rather, NEPA only requires that mitigation be *discussed* in terms of evaluating environmental impacts, but does not require proponents of a proposed action to mitigate the potential impacts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989) (“...it would be inconsistent with NEPA's reliance on procedural mechanisms – as opposed to substantive, result-based standards – to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.”). The 2019 FEIS could – and should – merely state “whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.” 40 C.F.R. §§ 1505.2(c); 1505.3. The FEIS must discuss potential mitigation, but, no law or rule requires that mitigation be adopted or enforced and certainly not mitigation that requires “uplift.”

D. Suggested Remedies That Would Resolve the Objection

The Coalition has long supported a “no net loss” mitigation standard, largely because it conforms to wetlands mitigation affirmed in the federal courts. The Coalition, however, strongly disagrees with any language that requires, implies, or otherwise opens to the door for mitigation to improve, benefit, uplift sage-grouse or its habitat. Thus, all “conservation uplift” or “improve” language should be deleted to match statutory authorities and Standard GRSG-GEN-ST-005 should

be deleted entirely as inconsistent with law. 2019 Draft ROD at 20 (“conservation uplift”), 53 (“beneficial mitigation actions”).

V. OBJECTION ISSUE 3: GRAZING GUIDELINES

A. *Description of Objection Issue in 2019 Draft ROD: Livestock Grazing Permit Reductions and Habitat Objectives*

The 2019 Draft ROD provides that “[i]n PHMA, if livestock grazing is limiting achievement of seasonal desired conditions, adjust livestock management, as appropriate, to address greater sage-grouse habitat requirements.” 2019 Draft ROD at 55 (GRSG-LG-GL-035-Guideline). The desired conditions are listed in Attachment E and include among others: (1) perennial grass height that will “[p]rovide overhead and lateral concealment from predators” in breeding and nesting habitat; (2) perennial grass canopy cover of greater than 8% in high elevation, 5% in low elevation and 4% in Parker sites in breeding and nesting habitat; and (3) perennial grass canopy cover of greater than 8% in high elevation, 6% in Parker, and 5% in low elevation sites in brood-rearing and summer habitat. *See* 2019 Draft ROD Attachment E at 90-91. By the language in the 2019 Draft ROD, if livestock grazing “limits achievement,” in any way to any degree, of these thresholds, livestock grazing will be adjusted to address cover, food, or shelter for sage-grouse.

B. *Link Between Prior Substantive Comments and Objection*

The Coalition has identified and explained the flaws in the grazing guidelines in the 2015 LUPA in its scoping comments and repeated these objections in the revision process. *See* 011918 USFS NOI Comments at 4-10. The Coalition exhaustively detailed the false assumptions upon which grass height objectives were based, *id.* at 5, that the Forest service’s claim that grazing permits would not be adjusted contradicted the plain language in the 2015 LUPA, *id.* at 4, and that the BLM, Forest Service, USFWS, and local governments do not have data to support habitat objectives across the Interior West. *Id.* at 7-9.

It also became clear during the 2018 planning process that the Forest Service had not fully disclosed how sage-grouse benefit from a particular range of canopy cover or grass height. 081418 Proposed Changes Comments at 4-6. The Coalition emphasized that Table 1 (Habitat Objectives) should be removed entirely as unsupported and lacking demonstrated benefit to sage-grouse, and because the “application of Table 1 leads, **invariably**, to decreased utilization on the Forest by livestock permittees when monitoring data, if any are available, just do not support decreases or adjustments. *Id.* at 5 (discussing GRSG-LG-GL-036-Guideline (requiring adjustments to livestock grazing if Table 1 objectives are not met)).

C. *Concise Statement of Objection: Grazing Guideline 35 Forces Grazing Permit Reductions When Grazing is Not a Significant Causal Factor and is Arbitrary and Capricious*

Pursuant to Forest Service regulations, the Forest Service may “[m]odify the seasons of use, numbers, kind, and class of livestock allowed or the allotment to be used under the permit, because of resource condition, or permittee request.” 36 C.F.R. § 222.4(a)(8). Resource objectives are set by the governing land use plan. *See* FSM 2230.2. The 2019 Draft ROD provides that “[i]n PHMA, if livestock grazing is limiting achievement of seasonal desired conditions, adjust livestock management, as appropriate, to address greater sage-grouse habitat requirements. 2019 Draft ROD at 55 (emphasis added).

Under the Forest Service rules and guidance, the 2019 Draft ROD *requires* changes if livestock grazing *limits* achievement of desired conditions to any extent whatsoever. By the very nature of livestock grazing, cattle and sheep will *necessarily*, limit the growth of grasses and forbs in both height and canopy cover at least on a seasonal basis. By way of comparison, the Wyoming Forest Service Draft ROD requires that livestock grazing be a “causal factor” – the Utah Draft ROD doesn’t even require causality. As a result, in Utah, every single cow or sheep on every single allotment is a factor “limit[ing] the achievement” of the habitat objectives in the 2019 Draft ROD. By way of example, if the Forest Service and permittees determine that 40% utilization is sufficient to provide “overhead and lateral concealment from predators” and big game populations constitute 30%, then even if cattle or sheep only use 10%, the 2019 Draft ROD would require grazing adjustments (*e.g.* reductions). Similarly, if grazing reduces canopy by a total of 5% such that total canopy cover falls below the indicator values (10% or 15%), then permittees will be punished *even though* their operation was not a **significant** causal factor in the allotment’s condition. The 2019 Draft ROD sets up every grazing permittee for failure with imprecise language that the Coalition identified in its comments and the Forest Service has failed to correct.

D. *Suggested Remedies To Resolve the Objection*

The objection could be resolved by the following language:

In PHMA, if livestock grazing **is a significant causal factor in** limiting achievement of seasonal desired conditions, adjust livestock management, as appropriate, to address greater sage-grouse habitat requirements **subject to local site capability**.

VI. **OBJECTION ISSUE 4: FAILURE TO ADDRESS SCIENTIFIC CONTROVERSIES IN 2019 FEIS**

A. *Description of Objection Issue in 2019 Draft ROD: National Technical Team Report and Monograph*

The 2019 Draft ROD includes several limitations, prescriptions, and management actions that are supported by the NTT Report, COT Report and other articles compiled into the USGS

Comprehensive Review of Ecology and Conservation of the Greater Sage Grouse: A Landscape Species and its Habitat (“Monograph”). The 2019 Draft ROD provides:

- In PHMA, do not issue new discretionary written authorizations unless all existing discrete anthropogenic disturbances cover less than 3% of the total greater sage-grouse habitat within the Biologically Significant Unit and the proposed project area, regardless of ownership, and the new use will not cause exceedance of the 3% cap. *See* 2019 Draft ROD at 52 (GRSG-GEN-ST-004-Standard).
- In PHMA, do not authorize new large scale infrastructure or facilities that create sustained noise levels of >10 dB above ambient baseline at the perimeter of an occupied lek during lekking (from March 1 to April 30) from 6 p.m. to 9 a.m. *Id.* at 53 GRSG-GEN-ST-006-Guideline).
- In PHMA, if livestock grazing is limiting achievement of seasonal desired conditions, adjust livestock management, as appropriate, to address greater sage-grouse habitat requirements. *Id.* at 55 (GRSG-LG-GL-035-Guideline).

The 2019 Draft ROD never discusses or analyzes the controversy surrounding the methodology, credibility, and unreliability of the Monograph as exposed by various reviewers that invalidate the suggested limitations within the Monograph.

B. Link Between Prior Substantive Comments and Objection

The Coalition provided extensive comments on each of these issues. In its scoping comments, the Coalition detailed flaws in the noise literature that is incorporated in the Monograph, credibility and methodological flaws in the 3% or 5% disturbance cap, and false assumptions regarding livestock grazing. 011918 NOIUSFS Comments at 5-16. The Coalition further developed these issues in its Supplemental NOI Comments. Exhibit (Ex.) 1, 081418 Supplemental NOI Comments at 1-2, 9-11, and then again in its comments to the DEIS. 010319 DEIS Comments at 3-5.

C. Concise Statement of Objection: Forest Service Failed to Address Controversial and Flawed Science That Serve as Basis for Prescriptions in 2015 LUPA and 2019 Draft ROD

CEQ rules require an FEIS to address scientific controversies. 40 C.F.R. §§ 1503.4(a); 1508.27(b)(4). An FEIS that does not, will be set aside. *Middle Rio Grand Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002) (disagreement as to quantity of water was a scientific controversy to be addressed in the FEIS); *Center for Biological Diversity v. Forest Service*, 349 F.3d 1157, 1168-69 (9th Cir. 2003) (responding generally to a disagreement is not sufficient.). By law, Interior must “ensure and maximize” the quality, objectivity, utility and integrity of information disseminated. 44 U.S.C. §3516. (*hereinafter* “IQA”). NEPA imposes an affirmative duty on federal agencies to “insure the professional integrity, including scientific integrity, of the discussions and

analyses in the environmental impact statements.” *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1181 (10th Cir. 2002) *as modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003) (quoting 40 C.F.R. § 1502.24). The Forest Service’s blind reliance on the NTT Report violates the basic tenant of NEPA that agencies must perform a hard look especially when comments reveal a persistent and significant scientific controversy.

1. 3% Disturbance Cap

Studies by Naugle, Doherty and Ramey, among others, do not recommend a 3% or 5% disturbance cap. The Forest Service may not selectively use literature to justify (or perhaps predetermine) a NEPA decision and the confusion in implementing such a cap impairs local government land management which was also not addressed. Alternative D of the 2015 FEIS considered a 9% disturbance cap and found that impacts to the economy would be much ameliorated while still preserving sage-grouse core habitat. *See* 2015 FEIS at 4-77. The Coalition prefers the 9% disturbance cap.

The 2019 FEIS also refers repeatedly to Hanser, et al. without explaining the limits of the USGS review or its inherent bias. The Coalition notes that Steve Hanser, the lead author of the 2014 USGS paper, also authored the 2018 review. Other authors for both include David Manier and Zachery Bowen. The Coalition has closely reviewed the Hanser, et al. (2018) report, which assumes that only if new literature refutes the previous literature, that the 2018 Management Actions must be revised to reflect the new literature. This is not what NEPA requires, especially because the 2015 LUPAs were based on several scientifically controversial principles that neither Interior nor the Forest Service ever addressed. The failure to address these controversies sparked litigation across the country.

2. 10 dB Noise Limitations

This limitation was based on the NTT Report. The NTT Report, however, overstates and misrepresents the conclusion of the literature it cites (*e.g.* Blickley (2012)). Blickley, however, found that sage-grouse tolerated, and even showed no signs of behavior variation, when noise levels were increased by 30 dBA. The noise levels of the studies relied on in the 2015 LUPA reached 70 dBA. *Utah Envtl. Cong.*, 479 F.3d at 1280 (Explanation for a decision "that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise" is arbitrary and capricious). 011918 USFS NOI Comments at 14.

The recommended noise levels are not based upon any standardized, repeatable data collection, or accepted methods of sound measurement. *See* Ramey, et al. *A Report on National Greater Sage-Grouse Conservation Measures Produced by the BLM Sage-Grouse National Technical Team*, at 33-39 (Dec. 21, 2011). No studies have been performed that determine which frequencies have more (if any) or less impact on sage-grouse. Therefore, the Forest Service must consider the noise limitations in the RMP amendments and consider all other studies and scientific information that is available. The Forest Service currently lacks the expertise, personnel or even

authority to implement this standard and has not addressed the controversy surrounding its implementation in the 2019 FEIS.

3. Livestock Grazing Does Not Threaten Sage-Grouse in Utah

No literature has been published on grazing that shows sage-grouse or its habitat are in jeopardy or are threatened by livestock grazing in Utah. Neither the 2015 FEIS nor the 2019 FEIS document habitat in Utah that is being impacted by livestock grazing to the detriment of sage-grouse. Moreover, the 2019 FEIS does not document whether livestock grazing in Utah, *or any state*, is negatively impacting the mortality rates of sage-grouse. Rather, the Forest Service relies on outdated and controversial literature to justify the management actions that *will be* used to decrease livestock grazing on Utah forests *without* explaining the impacts these decreases will have.

4. NTT Report, COT Report and Monograph Must be Fully Considered

NEPA imposes an affirmative duty on federal agencies to ‘insure the professional integrity, including scientific integrity, of the discussions and analyses in the environmental impact statements.’” *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1181 (10th Cir. 2002) *as modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003) (quoting 40 C.F.R. § 1502.24). The Forest Service’s blind reliance on the Monograph violates the basic tenant of NEPA that agencies must perform a hard look especially when comments reveal a persistent and significant scientific controversy. The Forest Service’s failure to use the ample means to address these problems (*e.g.* adding an appendix as the Coalition suggested) is inexcusable.

The 2019 FEIS does not discuss *any* of the problems that the Coalition identified in the NTT Report, the COT Report and the Monograph and, therefore, the Forest Service has committed the same error it made in 2015. As the Coalition commented, the NTT Report does not conform to the Information Quality Act. The NTT Report authors cite to authority that does not appear in the "Literature Cited" section. J.W. Connelly is cited 12 times in the Report but 25% of the time, there was no source available for review. B.L. Walker was also cited 11 times and 45% of the time there was no source available for review.

Sources often cited by the NTT Report do not directly support the assertions for which they were cited. For example, the NTT Report states that full reclamation bonds should be required to ensure full restoration in all priority GRS habitat. However, the source cited only recommends that breeding habitat should be restored to a condition that is once again suitable for breeding. NTT authors extended the recommendation regarding breeding habitat to all habitat, a fundamentally larger area not supported by any research.

Many of the authors of the NTT Report were biased. The authors cited each others work to the exclusion of other, often contradictory, literature. Many of the authors collaborated on other work that perpetuated certain positions, while, again, excluding other reasonable and often *more reasonable* positions. Three of the NTT authors are the three most cited sources throughout the NTT

Report. The NTT authors pushed their own perspective to the forefront and compromised the integrity and accuracy of the NTT Report itself.

D. Suggested Remedies To Resolve the Objection

The Coalition requests that the above cited 2019 Draft ROD language be revised as follows:

In PHMA, do not issue new discretionary written authorizations unless all existing discrete anthropogenic disturbances cover less than ~~3%~~ 9% of the total greater sage-grouse habitat within the Biologically Significant Unit and the proposed project area, regardless of ownership, and the new use will not cause exceedance of the ~~3%~~ 9% cap. See 2019 Draft ROD at 52 (GRSG-GEN-ST-004-Standard).

In PHMA, do not authorize new large scale infrastructure or facilities that create sustained noise levels of ~~>10~~ 30 dB above ambient baseline at the perimeter of an occupied lek during lekking (from March 1 to April 30) from 6 p.m. to 9 a.m. *Id.* at 53 GRSG-GEN-ST-006-Guideline).

~~In PHMA, if livestock grazing is limiting achievement of seasonal desired conditions, adjust livestock management, as appropriate, to address greater sage-grouse habitat requirements. *Id.* at 55 (GRSG-LG-GL-035-Guideline)~~

Finally, the Forest Service should, as the Coalition suggested, add an appendix to the 2019 FEIS that fully evaluates whether the Monograph is credible, reliable, and the best available information when the Monograph has been the subject of litigation regarding the significant data quality and integrity issues identified by multiple parties.

VII. CONCLUSION AND RELIEF REQUESTED

The Coalition appreciates the improvements made to the 2019 Draft ROD as compared to the 2015 LUPA and encourages the Forest Service to further improve the 2019 Plan with the corrections identified herein.

Respectfully submitted this 1st Day of October, 2019:

/s/ Kent Connelly

Kent Connelly, Chairman Wyoming Coalition of Local Governments

Attachment 1



COALITION OF LOCAL GOVERNMENTS

925 SAGE AVENUE, SUITE 302

KEMMERER, WY 83101

COUNTY COMMISSIONS AND CONSERVATION DISTRICTS FOR LINCOLN,
SWEETWATER, Uinta, LITTLE SNAKE, AND SUBLETTE - WYOMING

August 15, 2018

VIA: E-MAIL: comments-intermtnregionaloffice@fs.fed.us

John Shivik
Sage-grouse Amendment Comment
USDA Forest Service
Intermountain Region, Federal Building,
324 25th Street, Ogden, UT 84401
johnashivik@fs.fed.us

Re: Supplemental Notice of Intent To Prepare an Environmental Impact Statement
Concerning the Forest Service Greater Sage-Grouse Land and Resource
Management Plan Amendments – 83 Fed. Reg. 28608 (2018)

Dear Mr. Shivik:

The Wyoming Coalition of Local Governments (“Coalition”) submits the following comments regarding the Supplemental Notice of Intent (“SNOI”) to prepare an Environmental Impact Statement (“EIS”) regarding Greater Sage-Grouse plan amendments. The U.S. Forest Service is proposing to amend the land management plans that were most recently amended in 2015 (“2015 Sage-Grouse Plans”). The Coalition appreciates the opportunity to review the revised plans and issues and provide input from the perspective of local governments in the interior west.

The 2015 Sage-Grouse Plans were fatally flawed in a number of respects. Most of the failures of the 2015 Plans are the result of excessive pressure by the U.S. Fish and Wildlife Service (“USFWS”) on the Bureau of Land Management (“BLM”) and the U.S. Forest Service (“Forest Service”) to adopt additional conservation management actions. The Department of the Interior (“DOI”) produced self-serving reports to support the radical changes demanded by USFWS or Interior political appointees after the close of the comment period in March 2013. *See e.g., Greater Sage-Grouse: Additional Recommendations to Refine Land Use Allocations in Highly Important Landscapes* (October 27, 2014); Mainer et al., *Conservation Buffer Distance Estimates for Greater Sage Grouse—A Review: USGS Open File Report 2014-1239* (2014); United States Fish and Wildlife Service, *Greater Sage-grouse Range-Wide Mitigation Framework* (September 4, 2014). The latter reports and the dramatic changes in the 2015 Plans from draft to final had no public comment. It is hardly surprising that Judge Du remanded the plans to address the National

John Shivik
U.S. Forest Service
August 15, 2018
Page 2

Environmental Policy Act (“NEPA”) violations. *Western Exploration LLC v. Dep’t of the Interior*, 250 F. Supp.2d 718, 748 (D. Nev. 2017).

Other flaws are traced to the NTT Report [*A Report on National Greater Sage-Grouse Conservation Measures* BLM, December 21, 2011 (“NTT Report”)] or the COT Report [*Greater Sage-grouse Conservation Objectives: Final Report*, United States Fish and Wildlife Service, February 2013 (“COT Report”)]. Any amendments to the 2015 Plans must begin with the studies and literature cited to support those plans. Without adequately dealing with the scientific controversies and the analysis said to support the 2015 Plans (however flawed), the Forest Service risks a NEPA challenge and a second judicial remand. The Coalition has attached and incorporated by reference, the Coalition’s comments to the 2018 BLM sage-grouse DEIS. Also attached are materials cited in those comments.

Below are the Coalition’s discrete suggestions and comments to the Forest Service’s proposed changes. The Coalition encourages the Forest Service to seriously consider the recommended revisions and incorporate the Coalition’s suggestions into a third alternative to be reviewed in the Draft Environmental Impact Statement (“DEIS”). The Coalition previously submitted scoping and interim comments which are incorporated by reference and attached to ensure their inclusion in the record.

I. STATEMENT OF INTEREST

The Coalition is a voluntary association of local governments organized under the laws of the State of Wyoming to educate, guide, and develop public land policy in the affected counties. Wyo. Stat. §§11-16-103, 11-16-122, 18-5-201. Coalition members include Lincoln County, Sweetwater County, Uinta County, Sublette County, Lincoln Conservation District, Sweetwater County Conservation District, Uinta County Conservation District, Sublette County Conservation District, Little Snake River Conservation District, and Star Valley Conservation District. The Coalition serves many purposes for its members, including the protection of vested rights of individuals and industries dependent on utilizing and conserving existing resources and public lands, the promotion and support of habitat improvement, the support and funding of scientific studies addressing federal land use plans and projects, and providing comments on behalf of members for the educational benefit of those proposing federal land use plans and land use projects.

Both county and conservation district members of the Coalition enjoy the authority to protect the public health and welfare of Wyoming citizens and to promote the management and protection of federal land natural resources. Wyo. Stat. §§18-5-102; Wyo. Stat. §§11-16-122. Given this statutory charge and wealth of experience in federal land matters, the Coalition members have participated as cooperating agencies on most Wyoming projects and land use plans and have coordinated efforts with BLM, U.S. Forest Service, and other federal, state, and local entities. The

John Shivik
U.S. Forest Service
August 15, 2018
Page 3

counties and districts have jurisdiction over the National Forest System lands, including the Ashley National Forest, Flaming Gorge National Recreation Area and the Bridger-Teton National Forest.

II. FOCUSING DISTURBANCE OUTSIDE OF PHMA AND GHMA

The Coalition recommends that GRSG-GEN-DC-002-Desired Condition pushing development and land uses to areas outside priority habitat management areas (“PHMA”) and general habitat management areas (“GHMA”) be deleted.

According to GRSG-GEN-DC-002-Desired Condition “[a]nthropogenic disturbance is focused in non-habitat areas outside of priority and general habitat management.” The Coalition fully understands the difference between a standard, objective, and desired condition in Forest Plans, but *no other plan* – whether federal or state – requires “focusing” human disturbance outside of PHMA and GHMA. For example, the BLM plan for Utah completely eliminates any “prioritization” of leasing outside of PHMA and the Wyoming BLM completely eliminates General Habitat Management Areas along with limitations and management prescriptions in GHMA. The State of Wyoming’s Core Area Strategy does not include any “focus” requirement and certainly does not identify “GHMA.” Thus, it is unclear what plans the Forest Service is attempting to conform to with this desired condition. The differences among the state plans and the state resources as well as land management agencies are not based on actual differences in habitat or sage-grouse. The failure to adopt consistent or similar management cannot be justified and will be costly.

It is also unclear what anthropogenic disturbances, the Forest Service anticipates. Aside from mining, the Forest Service has closed much of the National Forest System to mineral development. The Bridger-Teton approved few, if any, lease sales in the past 20 years. *See e.g.* 81 Fed. Reg. 91169 (Dec. 21, 2016) (Bridger-Teton National Forest January 17, 2017 Record of Decision that did not approve the sale of any parcels in the Wyoming Range). The Ashley National Forest has no mineral development and ensured that the Gateway South and TransWest Express transmission line routes avoided the National Forest System lands. Other than the National Grasslands where oil and gas development was well-established, there are no large surface-disturbing projects on the National Forest System lands subject to this plan revision.

This desired condition standard will have unintended consequences as well. If the development is concentrated outside priority habitat, this will reduce forage for big game, which will move into the priority habitat. Reduced forage in non-habitat will also encourage livestock to move into priority habitat (as permitted). As for livestock, the policy will reduce forage in many allotments without considering the secondary impacts to other uses in non-priority areas – primarily wildlife habitat and livestock grazing.

The 2015 administrative record proves that the Forest Service used the 2015 Plan to continue its efforts to remove livestock grazing. Much of the anti-grazing language came from Region 4

John Shivik
U.S. Forest Service
August 15, 2018
Page 4

without any underlying scientific support. With the virtual end to vegetation treatments and the extent of the fuel loads, grazing is perhaps the only land use that will reduce fine fuels. The management criteria ignores the largest and most destructive anthropogenic disturbance, wild fire. By not managing vegetation and putting in place management criteria that prohibit vegetation management (logging, grazing etc), wildfire is a logical consequence. Wildfire is almost always a large and destructive force that destroys habitat and kills wildlife. The small scale and lengthy delays in Region 4 vegetation project approvals mean that the currently pending projects are insufficient to reduce fuel loads or restore the forest systems to health.

The Forest Service does not document what the desired condition would achieve. Sage grouse are still hunted and hunting is an anthropogenic disturbance. The Forest Service also assumes only beneficial impacts will occur by *focusing* disturbance outside of PHMA. Does the Forest Service propose to close these lands to hunting, when it lacks jurisdiction to do so? If hunting is not a threat to the desired condition, then what is.

Finally, the Coalition vigorously objects to the identification of, and need for, General Habitat Management Areas (“GHMA”). Neither the BLM nor the State’s plan recognize “general” habitat or limit uses or fuel treatments in non-PHMA/core. The NTT Report even states that “[g]eneral habitat conservation areas were not thoroughly discussed or vetted through the NTT...” NTT Report at 5. Instead, the NTT Report offered conceptual “sub-objectives” for the designation of general habitat including assessing “general sage-grouse habitats to determine potential to replace lost priority habitat” and “[e]nhance general sage-grouse habitat such that population declines in one area are replaced elsewhere within the habitat” without any analysis of whether general habitat is necessary in Utah. Id. at 9-10. Thus, General Habitat Management Areas should be deleted from this Guideline as well as throughout the proposed changes.

III. TABLE 1 DESIRED CONDITIONS

The Coalition supports deletion of Table 1 entirely.

According to GRSG-GEN-DC-003-Desired Condition, Table 1 includes

[specific desired conditions for the greater sage-grouse based on seasonal habitat requirements . . . The values in the tables should be considered as initial references and do not preclude development of local desired conditions or utilizing other indicators/values, based on site selection preferences of the local population and ecological site capability of sagebrush communities.

See also GRSG-GRSGH-GL-033-Guideline; GRSG-GEN-GL-008-Guideline. The Coalition appreciates the qualifying language that values in Table 1 will be considered as initial reference points and should be further refined to reflect local conditions, but that clarification does not resolve

John Shivik
U.S. Forest Service
August 15, 2018
Page 5

the inherent problems with selecting a full *set* of values or indicators in the first place. In the field, Forest Service management implements a guideline with the same vigor as a standard.

The variability of factors that affect rangelands, (*i.e.* soils, timing and intensity of local precipitation, temperature fluctuations, wind, aspect, present or absence of seasonal/year long use by insects/other grazers, etc.) makes it nearly impossible to credibly offer as a management trigger or threshold *any single value for any single habitat component*. Even at a site scale (*i.e.* local level) it is extremely difficult to offer a credible science-based objective or desired condition that the value could be achieved in any following year. Attempts to extrapolate from site-scale assessments on rangelands have very little credibility because sample size has to be exceptionally large to obtain any statistical reliability. Almost all rangeland ecological sites are actually complexes of all kinds of variables. Thus, the only assessment tool that may actually yield flexible and credible desired conditions is monitoring data developed over the course of several years (*i.e.* greater than 5 years).

Table 1 (the Forest Service analog to BLM's Table 2-2) merely offers numbers that were said to have been based in literature. The citations have since been exposed as not supporting the numbers in the table. The hard numbers in Table 1 are therefore "imprecise" and, in the case of mandatory 6 inches, totally manufactured. These numbers have never been ground-truthed to specific areas in Utah or Wyoming or Nevada and evaluated as part of an unbiased monitoring program.

Moreover, the Forest Service, and the BLM for that matter, have not fully disclosed how sage-grouse will benefit from a numerically specific canopy cover or grass height. While there may be logic to the principle that hiding cover provides some protection from predators, there is no support for four inches versus six or seven inches of grass. Indeed, there is other evidence that brush, bushes, or other vegetation provide equal protection. The much-cited Connelly article hypothesized that a range of four to seven inches would be beneficial. Connelly, et al. 2000. Advocates pushed for the higher number on the assumption that current grazing could not meet that but without grazing the grass height would be seven inches in a single year. Attach 7., AR-WO-0000883 (Iverson email to J. Lyons ("Then I assume for those not meeting Land Health Standards, (if they adopt 7" and 4" for perennial grasses – does anyone suppose that ANY allotment is currently meeting that standard?) they will initiate a NEPA process – perhaps an EA (2-3 years) or an EIS (3-5 years)")).

Finally, reliance on NRCS Ecological Site Descriptions contribute almost nothing of value to this subject because they still do not contain much, if any, data on the subjects in Table 1. As a result, ESD's do not change the original values in Table 1 much, if at all, and district rangers and range conservationists end up using Table 1 values as hard and fast "standards." Put simply, Table 1 leads, invariably, to decreased utilization on the National Forest System land by livestock permittees when monitoring data, if any are available, just do not support grazing decreases or adjustments. *See* GRSG-LG-GL-036-Guideline (requiring adjustments to livestock grazing if Table

John Shivik
U.S. Forest Service
August 15, 2018
Page 6

1 objectives are not met).

The Coalition objects to the numerical objectives in Table 1 when used in conjunction with HAF as an “assessment” tool. Past experiences in North Dakota and South Dakota, where the Forest Service also adopted vegetation objectives, reduced grazing but yielded little, if any, increase in bird populations. The Forest Service adopted habitat suitability index model for the Fort Pierre National Grassland to apply a 3.5 visual obstruction rating to assure cover for the sharp-tailed grouse. Based on the model, the Forest Service reduced livestock grazing by 27%. *Central South Dakota Grazing Coop. v. Forest Service*, 266 F. Supp.2d 889 (2001) (affirming dismissal for lack of standing). Fifteen years later, the sharp-tailed grouse numbers have increased by less than 0.26%, suggesting that the model and VOR were based on a flawed assumption that livestock grazing correlated inversely to sharp-tailed grouse numbers. The Forest Service’s mistake cost several ranches their livelihood, but did not lead to significantly higher bird numbers.

Undeterred by an outpouring of scientific criticism, in 2001 the Forest Service pursued similar visual obstruction rating (VOR) mandates for short-grass prairie habitat in North Dakota. *See* Dakota Prairie Grasslands Land & Resource Management Plan 2001, Grazing Record of Decision 2005. The consistent expert opinion concluded that the Forest Service had not documented the premise that the North Dakota prairie could produce vegetation with a 3.5 obstruction rating. Scientific Review Team Report (2007). The Forest Service financed and approved research by North Dakota State University to verify the VOR standard. The research concluded that North Dakota soils and climate **could not** produce a 3.5 VOR at the end of the grazing season, even in abnormally wet years. Sedivec, K. *North Dakota Vegetation Baseline Study* NDSU (2011). Faced with the irrefutable evidence discrediting the VOR standard in large part due to the omission of senescence, the Forest Service “disagreed” and has continued to adopt grazing plans to sharply reduce grazing in northern South Dakota and North Dakota. Like central South Dakota, grouse numbers have not noticeably increased, even during the abnormally wet years of 2008 to 2015. BBS Trend Estimates 2015 (sharp-tailed grouse). If grazing was the causal factor in grouse population changes, then reductions should show a sharp improvement. Instead, these experiences suggest that the numerical vegetation standards do not directly correlate to grouse success and there is a pressing need to explore other theories that are not based on anti-grazing sentiment. In both cases the Forest Service hostility to livestock grazing associations was well known and documented. As then Supervisor Mary Peterson wrote on May 31, 1996 “[t]he cowboys in ND have big ‘cow chips’ on their shoulders. They are still afraid (and probably justifiably so) that their numbers will be reduced.”

The Coalition recommends that Table 1 be removed from the 2015 Plan entirely or, in the alternative, moved to an Appendix and identified as a field reference that **is** refined by **at least** five years of monitoring data before it is applied to livestock grazing or any other program.

IV. PLAN REVISION MUST INCORPORATE ROLE AND IMPACTS OF PREDATORS ON SAGE-

GROUSE

Inexplicably, the 2015 Plans completely ignored the more significant aspect of the problem, *which is the increasing population of predators in the first place*. BLM and Forest Service have long-standing authority to manage predators under the Animal Damage Control Act. 7 U.S.C. §§ 8351-8354. This authority allows these agencies to ameliorate threats posed by the increasing abundance of ravens, foxes, badgers, and coyotes. Completely absent from Table 1 is any mention of the number of corvid nests that should be allowed or removed, the approximate number of coyote dens, or other habitat “objectives” that would limit predation on sage-grouse, their nests and chicks. New literature published less than a year ago shows that ravens and coyotes are the greatest contributor to nest failure in Northwestern Wyoming and other studies in Colorado document the profound impact coyotes have on leks in the 3-corners area. *See Taylor, et al. Greater sage-grouse nest survival in Northwest Wyoming* (June 14, 2017); Final Environmental Assessment for Predator Damage Management in Colorado (2017) (available at https://www.aphis.usda.gov/wildlife_damage/downloads/nepa/2017%20Final%20Colorado%20Predator%20EA.pdf). These same predators have increased steadily over the past two decades. *See e.g.* BBS Trend Estimates 2015 (ravens).

The Forest Service errs when it argues that such predator objectives are impossible to develop. The USDA Wildlife Services in conjunction with state agencies routinely establish predator objectives. In fact, these agencies have the best information about predator populations.

The Forest Service and BLM develop vegetation objectives with less information or research to support how much of a forb community either helps or harms sage-grouse chicks post hatch or how many, and what kind of insects help chick survival. The oft-cited literature for stubble height, as we now know, just does not support a positive correlation between a particular number and a particular benefit to sage-grouse. And, on riparian areas, grouse prefer a mosaic of ecological conditions, (they love dandelions, a non-native species), not climax conditions and native plant communities as defined by the NRCS. Thus, as one objective falls for lack of actual data, so must they all.

The important role of predators should not be ignored either. Wyoming and Sublette County animal damage boards initiated raven control several years ago with visible results. The northern spotted owl is also a significant lesson in the cost of ignoring predators. When the northern spotted owl listing rule was first proposed, two researchers identified the immigration of barred owls into the Pacific Northwest and the possible correlation to population declines. USFWS promptly dismissed this theory, 55 Fed. Reg. 26114, 27173, 26189, 26181 (1990) (admitting that the impact of the barred owl expansion was unresolved but the impacts of logging in old-growth timber was well documented). In 2009, USFWS proposed the removal (shooting) barred owls to address the significant threat to the northern spotted owl. 74 Fed. Reg. 65546 (2009); 78 Fed. Reg. 45588 (2013). From 1990 to 2009, the logging program in the Pacific Northwest dropped to about five

John Shivik
U.S. Forest Service
August 15, 2018
Page 8

percent of what it was in 1989. Since 2000, wildfire has burned a significant percent of the designated spotted owl critical habitat adopted in 1992. USFWS issued a rule expanding critical habitat to replace lost habitat, 77 Fed. Reg. 71876 (2012), as the northern spotted owl numbers continued to decline. Much of the economic and environmental harm could have been avoided, if Forest Service and USFWS had not dismissed predators as a significant threat to the spotted owl.

V. NET CONSERVATION GAIN

The Coalition recommends deletion of Net Conservation Gain.

It appears that the Net Conservation Gain has been eliminated only partially from the 2015 Plan. *Compare* GRSG-GEN-ST-004-Standard *with* GRSG-GEN-ST-005-Standard. Standard 005 provides that

[i]n priority habitat management areas, *only allow* new authorized land uses if after avoiding and minimizing impacts, any remaining residual impacts to the greater sage-grouse or its habitat are *fully offset* by compensatory mitigation projects that provide a *net conservation gain* to the species . . .

Abandoning the Net Conservation Gain standard in Standard 004 but failing to remove that standard from 005 is facially inconsistent and *per se* arbitrary and capricious. This is especially true when none of the governing laws authorize compensatory mitigation to off-set residual impacts. *See* NFMA at 16 U.S.C. §§ 1604 (e), 1607; MUSYA, 16 U.S.C. §§ 228-231; Organic Act 16 U.S.C.A. § 475(a)(the purpose of the forest is to “[secure] favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . .”). NEPA, 40 C.F.R. § 1502.14(f) (must discuss possible mitigation). NEPA does not mandate mitigation. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989).

The Interior Department’s return to the legally supported scope of mitigation negates any claimed authority to impose the Net Conservation Gain standard. The BLM and the U.S. Fish and Wildlife Service have explicitly disclaimed any authority, or need, to manage or mitigate impacts to produce a net conservation gain. *See* BLM Instruction Memorandum No. 2018-093 (July 24, 2018); *see also* *USFWS Endangered and Threatened Wildlife and Plants; Endangered Species Act Compensatory Mitigation Policy*, 83 Fed. Reg. 36469 (2018). The BLM acknowledged that FLPMA’s unnecessary or undue degradation (“UUD”) standard *does not require* any net benefit and that, actually, the UUD standard does not “prevent[] all adverse impacts upon the land.” Similarly, the U.S. Fish and Wildlife Service found that:

Compensatory mitigation requirements in particular raise serious questions of whether there is a sufficient nexus between the potential harm and the proposed remedy to satisfy constitutional muster. Further, because by definition compensatory

mitigation does not directly avoid or minimize the anticipated harm, its application is particularly ripe for abuse. These concerns are particularly acute when coupled with a net conservation gain standard, which necessarily goes beyond mitigating actual or anticipated harm to forcing participants to pay to address harms they, by definition, did not cause.

Id. (citing *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)). The USFWS goes on to conclude that “it is no longer appropriate to retain references to or mandate a net conservation gain standard in the Service’s overall mitigation planning goal within each document,” *id.* and that “[i]n light of the *Koontz* case and any other relevant court decisions, the Service, in using its previous policies (e.g., 1981 Policy), will make sure that any statutorily authorized mitigation measures will have a clear connection (i.e., have an essential nexus) and be commensurate (i.e., have rough proportionality) to the impact of the project or action under consideration.” *Id.* at 36470.

Nothing in NFMA, 16 U.S.C. §1604 supports a different outcome. Management is assure that land uses “will not produce substantial and permanent impairment of the productivity of the land.” 16 U.S.C. § 1604(f)(3)(C). Like undue and unnecessary degradation, NFMA’s direction permits some impairment that is temporary. NFMA does not authorize the mitigation mandates previously adopted.

The new direction revoking the underlying authority for net conservation benefit when viewed in the context of case law strongly counsels the Forest Service to, like the BLM and the USFWS, abandon the Net Conservation Gain standard in favor of a No Net Loss standard like that in the BLM plans or, as the Supreme Court held, a “rough proportionality” test. *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013) (applying takings analysis to scope of permissible mitigation). Regardless, the Forest Service must carefully consider the legal policy and case law, analyze them against the 2015 Plans, the analysis in the 2015 FEIS and explain what standard is appropriate in the new plan.

VI. FLUID MINERAL LEASING

A. No Surface Occupancy

The Coalition recommends deletion of GRSG-M-FMUL-ST-074-Standard.

According to GRSG-M-FMUL-ST-074-Standard, in PHMA, new oil and gas leases must include a No Surface Occupancy stipulation. Moreover, that NSO stipulation could not be waived or modified. A one-time exception could be granted if (1) there would be no direct, indirect, or cumulative effects to the greater sage-grouse or its habitat; or (2) impacts could be fully offset through mitigation.

This provision has multiple problems. First, mandatory NSO in PHMA results in a *de facto* withdrawal of the area from mineral development. If no surface use is permitted then oil and gas production cannot occur. Production would be limited to the edges of PHMA in Utah or Wyoming on forest lands *cannot be developed* without some surface occupancy, and, a temporary exception will not remove that impossibility. Oil and gas production requires ongoing occupancy not a one-time exception.” The alternative to an exception is open-ended mitigation, a term recently revised. Nor is it clear that the Forest Service has adequately considered the extent of the threat that surface occupancy would pose with various Controlled Surface Use (“CSU”) stipulations including timing and location. On forest lands in Utah and in Wyoming, there is great fluid mineral potential. In many cases, the quality and quantity of sage-grouse habitat on these lands is substantially less. The Forest Service has not disclosed this fact nor weighed the merits of closing these lands to mineral development as required in FLPMA. 43 U.S.C. § 1704(c); *Mountain States Legal Fndn. v. Andrus*, 499 F. Supp. 383, 391 (D. Wyo. 1980); *Mountain States Legal Fndn. v. Hodel*, 668 F. Supp. 1466, (D. Wyo. 1987) *Wyoming v. USDA*, 570 F. Supp.2d 1309, 1350 (D. Wyo. 2008) (lack of surface access precludes oil and gas development), *rev'd on other grounds*, 661 F.3d 1209 (10th Cir. 2011). Wyoming has allowed development in PHMA, where sage grouse numbers continue to climb.

Moreover, as mentioned above, the Forest Service has no authority to require that impacts must be “fully offset.” The BLM and the USFWS have disclaimed that proposition and there is no statutory authority nor case law interpreting those statutes to give the Forest Service greater authority to mitigate impacts than the BLM and the U.S. Fish and Wildlife Service have found.

B. *3% Disturbance Cap – GRSG-GEN-ST-004-Standard*

The EIS needs to address the science that discredits a three or five percent cap. The Wyoming Plan's adoption of a five percent cap was made 13 years ago. It has largely created a market for substitute habitat in lieu of actually limiting development. The fact that grouse numbers have increased in the same PHMA areas suggests a need to reexamine this quantified guideline.

Regardless, the best available science does not support a three or five percent disturbance cap. Because it is adopted as mitigation for energy development, the FS and BLM must reconsider this cap in light of the return to mitigation based on NEPA and case law. See IM 2018-093; 83 Fed. Reg. 36472 (July 30, 2018) .

The NTT Report recommends a three percent disturbance cap citing Holloran in 2005. NTT Report at 7. Holloran’s study suffers from the fact that BLM waived protective stipulations on the Pinedale Anticline to assess the impacts to sage-grouse *without* these stipulations. Attach. 5, Ramey et al. at 27. *Utahans for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1181 (10th Cir. 2002) *as modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003) (NEPA imposes an affirmative duty on federal agencies to ‘insure the professional integrity, including scientific integrity, of the discussions and analyses in the environmental impact statements.’” (quoting 40

John Shivik
U.S. Forest Service
August 15, 2018
Page 11

C.F.R. § 1502.24.)); *see also Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 374 (1989); *Johnston v. Davis*, 698 F.2d 1088, 1094–95 (10th Cir. 1983) (disapproving of misleading statements resulting in “an unreasonable comparison of alternatives” in an EIS).

The NTT Report also used Walker, *et al.* (2007) but Walker did not actually test *disturbance caps* but instead used a model to predict sage-grouse lek attendance based on *distance* from potential sources of disturbances. Attach. 5, Ramey et al. at 28, 30. The Monograph relied on Aldridge and Boyce (2007) to support the claim of sage grouse mortalities and avoidance/abandonment of habitat near oil and gas fields. Attach. 3b, WSI at 115. However, it ignored the other facts that habitat protection around leks may not ensure the viability of sage grouse populations and that 60 percent of the study area was low occurrence/noncritical habitat. *Id.* The Monograph also misrepresents Lyon and Anderson (2003) to support the statement that sage grouse abandon leks due to noise and human activity associated with oil and gas development. *Id.* at 116.

Studies by Naugle, and Doherty also do not recommend a five percent disturbance cap. *Id.* at 115-117, 123-129; Attach. 5, Ramey et al. at 41-42. Furthermore, 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 2015 Plan. *See* NTT Report at 7, n. iii

VII. CONCLUSION

The Coalition hopes the USFS will finally address these issues in the DEIS to ensure a durable and defensible document while abiding by federal laws and standards binding on the USFS. The Coalition looks forward to reviewing the Preliminary Draft Environmental Impact Statement.

Sincerely,

/s/ Kent Connelly

Kent Connelly, Chairman

Coalition of Local Governments

John Shivik
U.S. Forest Service
August 15, 2018
Page 12