



COALITION OF LOCAL GOVERNMENTS

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

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Re: Livestock Grazing Authorization for the Sweetwater, Blucher Creek, and East
Squaw Creek Allotments Draft Environmental Assessment

Dear Rob and Dave:

The Coalition of Local Governments (“Coalition”) submits following comments on the U.S. Forest Service (“USFS”) Draft Environmental Assessment (“EA”) for the livestock grazing renewal on the Sweetwater, Blucher Creek, and East Squaw Creek Allotments.

The Coalition supports the Proposed Action. However, the USFS should closely consider the following comments and the issues identified in these comments to improve management and the analysis of the impacts of the Proposed Action and the durability and the Decision Memorandum. The Coalition incorporates by reference those comments submitted by the Wyoming Department of Agriculture and Sublette County Conservation District.

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 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.

The Coalition is currently involved in several projects on the Ashley National Forest and the Bridger-Teton National Forest (“BTNF”). The Coalition has closely reviewed and, in some instances, objected to grazing decisions on the BTNF. The Coalition, therefore, is significantly impacted by the Proposed Action and consequences of the analysis in the EA.

II. Sage-Grouse

A. *EA Fails to Disclose Application of Habitat Assessment Framework and Arbitrarily Applies Habitat Objective to Non-PHMA Without Disclosure*

The EA provides that “[i]n addition to the riparian stubble heights measure using the MIM protocol, the Pinedale RD also collects habitat assessment framework (HAF) data as part of habitat monitoring for greater sage-grouse. The HAF data collected in riparian areas and mesic meadow communities indicate that residual stubble heights were between 5 and 6 inches...” EA at 14. Later, the EA states that “[w]hile there is only categorized and mapped habitat on the Sweetwater allotment, there are also areas that *provide suitable habitat for sage-grouse on Blucher Creek and East Squaw Creek allotments, and sage-grouse sign was detected during site visits for this project.*” EA at 27 (emphasis added). Then, the EA states that “[t]he spatial extent of these areas in the project area grazing allotments is uncertain at this time.” *Id.* at 37. These three statements need to be reconciled. It appears from the language on page 14 that the USFS has not performed a full suitability analysis using the HAF. Later, on page 27, the USFS states that there is suitable habitat *despite* the fact that no tables, measurements, maps, ocular data, or other observations support that conclusion. Then on page 37, the USFS admits that the extent of the “suitable” habitat is unknown. The USFS may not offer unsupported conclusions, followed by contradictory admissions, in order to support the implementation of sage-grouse stipulations. Without any data, suitability determinations, and basic analysis, the USFS may not apply sage-grouse limitations as terms and conditions to a grazing permit without being arbitrary and capricious.

The Coalition disputes the credibility and utility of the HAF. First, Technical Reference 6710-1 was published in 2015 and thus the USFS has a maximum of four years of data that conform to the HAF which is not enough time to establish any trends, averages, or baseline conditions. Second, even assuming Proper Functioning Condition (“PFC”) directly bears on sage-grouse habitat, PFC cannot be established between one year of monitoring in 2006 and another in 2014. *See* EA at 7. Moreover, the EA never discloses to what extent, if at all, the USFS measured the other indicators provided in the HAF. *See* Technical Reference 6710-1 at Table 6. Use of the HAF in this EA is incomplete at best, fatal at worst. Indeed, Table 12 in the EA indicates the permittees should manage grazing in compliance with all of Table 2 of the 2015 Sage-Grouse Plans and yet there is no discussion of what allotments under what conditions can meet these values and if they can’t, what the impacts will be to the resources. Thus, the USFS has not made a capability determination but has made a suitability determination that includes terms and conditions for sage-grouse habitat under the 2015 Sage-Grouse Plans.

Moreover, allotments are not within mapped Priority Habitat Management Areas (“PHMA”) but are partially in General Habitat Management Areas.¹ The EA makes no mention of whether the allotments are within 5.3 miles of occupied leks, whether the areas are managed for breeding and nesting, or brood rearing and summer habitat. *See* 2015 USFS Wyoming Plan Amendment at 102-103. Habitat objectives do not apply to non-habitat **and** apply differently depending on the type of habitat. *Id.* The Proposed Action provides that grazing would occur beginning July 10. EA at 2. This is not breeding or nesting season, but is brood rearing and summer season. *See* 2015 USFS Wyoming Plan Amendment at 102-103. The EA does not state what sage-grouse habitat is on the allotments **and** the presence of sage-grouse scat is not sufficient under the 2015 Sage-Grouse Plans to designate habitat.

To correct this section, the USFS must identify what sage-grouse habitat is on the allotments, how that habitat was identified, and disclose how that designation will impact the Proposed Action.

III. Forage Utilization

A. *50% Does Not Conform to B-T Land Resource Management Plan*

The Forest Service must adhere to the BT-LRMP when "approving or disapproving particular projects, each of which must comply with the applicable forest plan." *Utah Env't'l Cong. v. Troyer*, 479 F.3d 1269, 1272 (10th Cir. 2007); *see* 16 U.S.C. §1604(i) ("Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands *shall be consistent with the land management plans.*" (Emphasis added)). The Forest Service

¹<https://usfs.maps.arcgis.com/apps/PublicInformation/index.html?appid=9f1cf6d8425e49949d0006a0ae574b84>

regulations are clear – "[e]very project and activity must be consistent with the applicable plan components. 36 C.F.R. § 219.15(d).

Plan Components include standards *such as forage utilization*. See 36 C.F.R. § 219.7(e) ("A standard is a mandatory constraint on project and activity decisionmaking, established to help achieve or maintain the desired condition or conditions, to avoid or mitigate undesirable effects, or to meet applicable legal requirements."); 36 C.F.R. § 219.10(a). Standards in a forest plan are a "mandatory constraint on project and activity decisionmaking" – the Forest Service may not ignore standards in the BT-LRMP which are "established to help achieve or maintain the desired condition or conditions, to avoid or mitigate undesirable effects, or to meet applicable legal requirements." 36 C.F.R. § 219.7(e). Unlike a forest guideline, a standard does not allow "departure from its terms..." *Id.* at § 219.7(e)(1)(iv).

The 1990 Bridger-Teton Land and Resource Management Plan ("BT-LRMP") as amended by the 2015 Sage-Grouse Land Use Plan Amendment ("2015 Amendment") provides that forage utilization on upland range sites in satisfactory condition is a maximum of 60% and forage utilization on upland range sites in unsatisfactory condition is a maximum of 50%. See 1990 BT-LRMP at 177. According to the EA "[s]pecific allowable use levels include *a maximum forage utilization of 50 percent* of key forage species in the uplands . . ." EA at 2 (emphasis added). The EA states that all of the allotments are meeting objectives and, therefore, are in satisfactory condition. See EA at 9.

The forage utilization standards in the EA *do not conform* to the forage utilization standard in the BT-LRMP. According to the BT-LRMP, forage utilization on upland range sites in satisfactory condition can be a maximum of 60%. BT-LRMP at 177. The EA, however, states that all allotments will have a maximum allowable use level of 50%. The EA shows that all of the allotments are meeting objectives and are therefore in "satisfactory condition." The EA, therefore, violates NFMA because the Forest Service has adopted a new standard on the allotments that directly conflicts with the BT-LRMP – a site in satisfactory condition is now held to a standard explicitly reserved for sites in unsatisfactory condition.

B. USFS Proposes to Amend 1990 BT-LRMP in Draft EA Without Following Plan Amendment Procedures

According to the plain language of NFMA, Forest Service regulations, and case law, all authorized uses and projects on the forest must be consistent with the existing land and resource management plan. 16 U.S.C. §1604(i); 36 C.F.R. §219.15(d); *Troyer*, 479 F.3d at 1272. If, however, the USFS desires to *change* a plan component, the USFS must amend the governing plan. See 36 C.F.R. §219.13 ("Except as provided by paragraph (c) of this section, *a plan amendment is required to add, modify, or remove* one or more plan components, or to change how or where one or more plan components apply to all or part of the plan area (including management areas or geographic areas)."). If the Proposed Action is not consistent with the BT-LRMP, the responsible

official must modify the decision document to make it consistent with the plan in place or amend the plan. *See* 36 C.F.R. §219.15(c) (1)-(4).

The BT-LRMP, includes two forage utilization standards – one for sites in satisfactory condition and a completely separate standard for sites in *unsatisfactory* condition. BT-LRMP at 177. The EA, however, requires *satisfactory* sites to meet the utilization standard for *unsatisfactory* sites. All of the allotments are in satisfactory condition. The EA, therefore, eliminates the 60% standard for satisfactory sites as set out in the BT-LRMP.

To eliminate a utilization standard, the USFS must go through all of the necessary steps to complete a forest plan amendment – including an identification of the need to change the standards, providing public notice of the need to change those standards, and evaluating if any substantive requirements of USFS planning rules are indirectly impacted by changing the standards. *See* 36 C.F.R. §219.13(b)(1)-(6). The USFS has *completed none of those steps* with regard to the allotments in question. The final decision, therefore, will violate binding USFS regulations, NFMA, and the corresponding case law.

The EA does not include an adaptive management section. The Coalition supports a pasture-by-pasture adaptive management process that will allow the authorizing officer to adjust utilization rates through the AMP or Annual Operating Instructions (“AOI”) process if objectives are not being met as demonstrated by cooperative monitoring data. For example adjusting utilization levels should be done at the AMP level to allow for seasonal differences, variable precipitation models, and fluctuating wildlife numbers.

IV. 20% STREAM BANK ALTERATION LIMITATIONS

The Proposed Action requires “a minimum 4-inch stubble height retention along the greenline **and/or** a maximum of 20 percent streambank alteration in riparian areas.” EA at 2 (emphasis added). Later the EA states that streambank alteration provisions in the EA are “guidelines” and, therefore, “flexible by definition and [] meant to generally constrain organizational actions or define desired resource conditions (Forest Service 2015).” EA at 6.

A. *The BT-LRMP Does Not Include Streambank Alteration Limitations*

Despite the assurance in the EA that the 20% stream bank alteration “maximum” is a guideline, it is clear that any hard line “maximum” is a “mandatory constraint[] on project and activity decisionmaking” – *which is legally unenforceable* if that standard is not present in the forest plan. *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1034, fn. 5 (9th Cir. 2011) (J. Thomas *concurring*) (finding that Grizzly Bear mortality standards were absent in forest plan and therefore *could not be enforced* by the Forest Service). Courts will set aside agency action that is contrary to the clear language of a forest plan. *Native Ecosystems Council v. U.S. Forest Serv.*, 418

F.3d 953, 962 (9th Cir. 2005) (“An agency's position that is contrary to the clear language of a Forest Plan is not entitled to deference.”).

The BT-LRMP provides that “[l]ivestock grazing in riparian areas will be managed to protect stream banks. This may be achieved through the use of gravel crossings, tree debris barriers, fencing, riparian pastures, development of alternate watering sites out of the riparian area, longer allotment rests, or improved livestock distribution.” BT-LRMP at 177-78. The BT-LRMP also includes a stream bank stability guideline which provides that “vegetation should be maintained to 80 percent of its potential natural condition or an HCI rating of 85 or greater.” *Id.* at 158. The BT-LRMP, however, *does not contain either a standard or a guideline* for a 20% stream bank alteration standard.²

The EA’s statement that a “maximum” is a “guideline” is disingenuous. In fact, a “maximum” threshold operates to absolutely preclude alterations beyond 20%. It is, in other words, a mandatory constraint on livestock grazing across all of the allotments that is not found in the BT-LRMP. The Forest Service may not implement this standard without amending the BT-LRMP. 36 C.F.R. §219.13 (“Except as provided by paragraph (c) of this section, a plan amendment is required to add, modify, or remove one or more plan components, or to change how or where one or more plan components apply to all or part of the plan area (including management areas or geographic areas).”). Just like the utilization standards discussed *supra*, if the stream bank alteration limit is not consistent with the forest plan, the responsible official must modify the decision document to make it consistent with the plan in place or amend the plan. 36 C.F.R. §219.15(c) (1)-(4).

B. Stream Bank Alteration is a MIM Indicator, Not a Management Standard

According to the EA, the Forest Service evaluated stream bank alteration using methods identified in *Streambank Stability Guideline: Streambank alteration measurement and implementation*, (Simon, 2008) at sites selected pursuant to the Multiple Indicator Monitoring (“MIM”) protocol. EA at 6, 37, 38. In previous projects, the USFS has stated that the reason stream bank alteration is used is because that indicator would be triggered before a stubble height measurement. *See* Upper Green River Final Environmental Impact Statement at 252. Thus, it is clear that the Pinedale Ranger District intends to use stream bank alteration precisely because it is constraint on livestock grazing. A brief review of the MIM – the protocol used to measure stream bank alterations and incorporated into the EA – reveals that “stream bank alteration is an annual or *short-term indicator* of the effect of grazing impacts on long-term stream bank stability.” MIM at 27 (emphasis added).

²The BT-LRMP does provide that stream bank stability and trampling are key indicators of health of aquatic ecosystems with regards to cutthroat trout, but, again, no numerical standard is adopted. BT-LRMP at 424.

The Coalition would suggest that stream bank alteration “guideline” be revised to “considered as a short-term use indicator in conjunction with other long-term indicators.” This will allow ample flexibility, and accountability, to manage livestock grazing in riparian areas.

V. CONCLUSION

The Coalition appreciates the opportunity comment. The Proposed Action should be revised according to the above and further supported and developed in the record to ensure a defensible and durable decision.

Yours truly,

/s/ Kent Connelly
Kent Connelly, Chairman
Coalition of Local Governments