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Comments: Attached is a formal Objection to the Amendments to Land Management Plans Regarding Sage-grouse Conservation submitted on behalf of the National Audubon Society, National Wildlife Federation, The Wilderness Society, Wyoming Outdoor Council, Colorado Wildlife Federation, Conservation Colorado, Western Values Project, Natural Resources Defense Council, Montana Wildlife Federation and Nevada Wildlife Federation.

Dear Reviewing Officer:

Pursuant to 36 C.F.R. Part 218, the National Audubon Society, National Wildlife Federation, The Wilderness Society, Wyoming Outdoor Council, Colorado Wildlife Federation, Conservation Colorado, Western Values Project, Natural Resources Defense Council, Montana Wildlife Federation and Nevada Wildlife Federation (collectively referred to as the "Objecting Parties") hereby object to the Greater Sage-grouse Draft Records of Decision (ROD), Proposed Land Management Plan Amendment and Final Environmental Impact Statement (EIS) for National Forest Service Land in Colorado, Idaho, Nevada, Utah and Wyoming.

DESCRIPTION OF THE OBJECTING PARTIES

On January 17, 2018, the Objecting Parties submitted scoping comments regarding the Forest Service's Proposed Land Management Plan Amendments and on December 10, 2018, the Objecting Parties submitted comments on the Proposed Land Management Plan Amendments and Draft Environmental Impact Statement. The Objecting Parties also actively participated in the creation of the 2015 Sage-grouse Plans.

The National Audubon Society's mission is to protect birds and the places they need to thrive today and tomorrow. The National Audubon Society is committed to protecting birds and their habitats throughout the Americas using science, advocacy, education and on-the-ground conservation. Audubon works proactively with all stakeholders, to ensure impacts to important avian habitats are avoided or minimized to the greatest extent possible. A long-standing focus has been on Greater Sage-grouse and the sagebrush ecosystem. Audubon members, including Chapter members, enjoy recreating on federally-managed lands. These lands represent a legacy to pass on to future generations.

The National Wildlife Federation (NWF), one of America's largest conservation organizations, has worked across the country to unite Americans from all walks of life in giving wildlife a voice for over eighty years. NWF has 51 state and territorial affiliates and more than 6 million members and supporters, including hunters, anglers, gardeners, birders, hikers, campers, 2

paddlers, and other outdoor enthusiasts. NWF programs work to protect the 600 million acres of public lands owned by all Americans and has a longstanding interest in ensuring these lands are managed properly for fish, wildlife, and communities. NWF and its affiliates care deeply about the conservation of the sage-grouse, and ensuring that the sage-grouse stays off the endangered species list. NWF is invested in protecting the millions of acres of sagebrush steppe that sustain not only the bird, but many of America's cherished species.

The Wilderness Society (TWS) has a long-standing interest in the management of Forest Service lands and engages frequently in the decision-making processes for land use planning and project proposals that could potentially affect wilderness-quality lands, wildlife habitat, and other natural resources managed by the Forest

Service, including in the West. TWS has been deeply involved in many aspects of Forest Service sage-grouse management and planning, including the 2015 plans and this effort to change the 2015 plans. TWS members and staff enjoy a myriad of recreation opportunities on lands managed by the Forest Service, including hiking, biking, nature-viewing, photography, and the quiet contemplation in the solitude offered by wild places. Founded in 1935, our mission is to protect wilderness and inspire Americans to care for our wild places.

Founded in 1967, the Wyoming Outdoor Council is the state's oldest and largest independent conservation organization. With a mission to protect Wyoming's environment and quality of life for present and future generations, the Wyoming Outdoor Council is dedicated to protecting greater sage-grouse and the habitat upon which this sensitive species depends. The Council's members use and enjoy the public lands encompassed by the proposed plan for a range of uses and activities such as hunting, hiking and camping, and would be adversely affected by the roll back of conservation measures contained in the 2015 plan amendments.

Colorado Wildlife Federation was founded in 1953 and has a long history of constructive involvement in wildlife, habitat and public lands management issues as an advocate for wildlife to be fully considered, addressed and safeguarded in planning, decision making and monitoring.

Members also highly value, use and enjoy the fish and wildlife supported by these lands.

Conservation Colorado is a grassroots advocacy organization working to protect Colorado's air, land, water, and people by mobilizing people and electing conservation-minded policy-makers. For over 50 years, we have fought to conserve Colorado's public lands and all the values that make those lands unique and irreplaceable, including preserving the wildlife habitat on those lands. In particular, we have a longstanding interest in protecting Greater sage-grouse habitat so that we might recover the species.

Western Values Project defends America's public lands through research and public education in order to hold policymakers and elected leaders accountable for jeopardizing the West's outdoor heritage.

Natural Resources Defense Council ("NRDC") is a non-profit environmental membership that uses law, science, and the support of more than three million members and activists throughout the United States to protect wildlife and wild places and to ensure a safe and healthy environment for all living things. Many of our members reside in the Western regions impacted 3

by this action. NRDC members use and enjoy public lands across the National Forest System, including the specific lands at issue, for a variety of purposes, including: recreation, solitude, scientific study, and conservation of natural resources. NRDC has a long established history of working to protect public lands and clean air managed by the U.S. Forest Service and addressing climate change by promoting clean energy and reducing America's reliance on fossil fuels. In particular, NRDC members have been historically invested in federal processes that concern the management and conservation of the Greater Sage-grouse, and the viability of the rangeland habitat that Greater Sage-grouse depend upon.

The Montana Wildlife Federation (MWF) is Montana's oldest, largest, and most effective conservation organization. MWF was founded in 1936 by hunters, anglers, landowners, and other conservationists who were concerned about the loss of Montana's healthy habitats, abundant wildlife, and access to public lands. Our dedicated staff maintains this legacy.

The Nevada Wildlife Federation is the oldest statewide conservation organization dedicated to sustaining Nevada's wildlife through conservation and education. Since 1951, the Nevada Wildlife Federation has fought to defend American public lands and the sagebrush steppe eco-system, ensure responsible management of Nevada's water, and advocated for habitat restoration and collaboratively-developed conservation policy solutions.

For the purposes of 36 C.F.R. [sect] 218.8(d)(1), the Objecting Parties may be contacted at the names, addresses, and telephone numbers indicated in the signature block. For purposes of 36 C.F.R. [sect] 218.8(d)(3), National Audubon Society is the "Lead Objector."

Overview

The Forest Service has defined the purpose of this effort to revise their sage-grouse management plans as "to incorporate new information to improve the clarity, efficiency, and implementation of the 2015 Greater Sage-Grouse Plan Amendments, including better alignment with BLM and state plans, in order to benefit greater sage-grouse conservation at the landscape scale." Proposed Amendments, p. 1-19. Based on the changes proposed, including those changes made since the Draft Amendments, it does not appear that the Forest Service's proposal will benefit the greater sage-grouse. Instead, it is likely that the proposed plans would undermine the survival of the greater sage-grouse and thus increase the likelihood of the need to list the species pursuant to the Endangered Species Act (ESA). In particular, the overall effect from removing protective designations and land subject to protections will undermine the strength of the current protections, which is concerning for the ultimate impact on conserving the greater sage-grouse.

The 2015 Sage-grouse Plans were focused on avoiding the need to list the Greater Sage-grouse under the ESA through a landscape level approach, based on the best available science, prescribing the highest level of protection in the most important habitat and addressing threats identified by the U.S. Fish and Wildlife Service (FWS) in its initial finding that listing was warranted. As summarized in the Records of Decision for the 2015 Sage-grouse Plans: 4

In response to a 2010 determination by the US Fish and Wildlife Service (FWS) that the listing of the GRSG under the Endangered Species Act was "warranted, but precluded" by other priorities, the BLM, in coordination with the US Department of Agriculture Forest Service, developed a landscape-level management strategy, based on the best available science, that was targeted, multi-tiered, coordinated, and collaborative. This strategy offers the highest level of protection for GRSG in the most important habitat areas. It addresses the specific threats identified in the 2010 FWS "warranted, but precluded" decision and the FWS 2013 Conservation Objectives Team (COT) Report.

See, e.g., Record of Decision for the Rocky Mountain Region, p. S-1. The COT Report identified conservation objectives and measures for each of the key habitat threats identified across sage-grouse habitat, providing an important tool for measuring efficacy across the range. The stated goal of the plans was focused on measures to "conserve, enhance, and restore [greater sage-grouse] habitat by avoiding, minimizing, or compensating for unavoidable impacts."

The conclusions of both FWS and the Forest Service regarding the likely success of conservation measures and impacts of measures in the 2015 Sage-grouse Plans were based on best available science and the COT Report, but neither of these are carried through in the 2019 Proposed Amendments. We have also pointed this out to the Forest Service in connection with the viewpoint of leading sage-grouse scientists. See, e.g., October 2017 and June 2018 Sage-grouse scientists letters (attached as Exhibits 1 and 2). As emphasized in 2017 and 2018 letters from leading sage-grouse scientists to then-Secretary of the Interior Zinke, the weight of accepted research points to the need to sustain the direction in the 2015 Sage-grouse Plans, including maintaining a landscape-scale approach, retaining management area designations (including general habitat management areas) and prescriptions, and preserving protections from oil and gas development (including prioritizing leasing and development outside habitat).

We are also submitting and incorporating by reference a letter from Dr. Matt Holloran (attached as Exhibit 3) regarding the fundamental flaws in the Proposed Amendments and FEIS. Dr. Holloran emphasizes the

importance of maintaining protections for habitat at a landscape level, which includes general habitat management areas. Dr. Holloran also emphasizes the critical role that mitigation plays in these management plans and the fact that mitigation approaches must not only follow the mitigation hierarchy but also should have "empirically demonstrated that anthropogenic impacts to sage-grouse and their habitats have at a minimum been effectively, sustainably and entirely offset." Additional improvements are required to ensure the Proposed Amendments meet these standards.

The Forest Service is conducting its amendments subject to its planning rule, 36 C.F.R. 219, which imposes important, substantive requirements that obligate the agency to maintain strong plans to conserve the sage-grouse and its habitat. Applicable requirements include those pertaining to management of species of conservation concern, use of best available science, and maintaining ecosystem integrity, diversity and sustainability. The revisions to the 2015 Plans encompassed in the Proposed Amendments and Draft RODs do not comply with the requirements of the planning rule or best available science, and risk the overall goal of the 2015 Plans to avoid the need to list the species under the ESA. 5

STATEMENT OF ISSUES, INCONSISTENCY AND ILLEGALITY

This Objection addresses how the Greater Sage-grouse Draft RODs, Proposed Land Use Plan Amendments and Final EIS are inconsistent with law, regulation, and policy, then sets out our recommendations as to how the proposed decision can be improved through revisions.

We have highlighted eight specific areas in which the Proposed Amendments should be improved in order to address failures to comply with requirements of the National Environmental Policy Act (NEPA), National Forest Management Act, and the regulations implementing these acts pertaining to planning and management of species:

I. The Proposed Amendments Improperly Weaken or Eliminate Crucial Sage-Grouse Protections.

A. The Proposed Amendments Remove Designation of Sagebrush Focal Areas.

B. The Proposed Amendments Expand Waivers, Exceptions and Modifications to No Surface Occupancy (NSO) Stipulations in Oil and Gas Leases.

C. The Proposed Amendments Remove Designation and Management of General Habitat Management Areas in Utah.

II. The Proposed Amendments Change from a Net Conservation Gain Standard Will Cause an Unacceptable Loss of Habitat.

III. The Proposed Amendments Must Clarify the Compensatory Mitigation Standard.

IV. The Forest Service Did Not Consider a Sufficient Range of Management Alternatives.

V. The Forest Service Has Failed to Prioritize Leasing and Development Outside Sage-grouse Habitat.

VI. The Forest Service Has Not Met the Requirements Set Out in the Applicable Planning Regulations.

All of these issues were raised and discussed in detail in both our scoping comments and our comments on the Draft Land Use Plan Amendments and Draft EIS.

I. The Proposed Amendments Improperly Weaken or Eliminate Crucial Sage-Grouse Protections.

The Proposed Plan Amendments would reduce or eliminate sage-grouse protections in three important ways that we believe need to be reconsidered and changed. The Proposed Amendments: (1) remove Sagebrush Focal Area (SFA) designations and the heightened protections afforded to this critical habitat; (2) expand opportunities for waivers, exceptions, and modifications to no surface occupancy (NSO) stipulations for fluid mineral leases; and (3) eliminate General Habitat Management Areas (GHMA) in Utah. We urge the Forest Service to rethink these proposals—all of which push sage-grouse in the direction of an ESA listing—and

instead maintain SFA protections; require rigorous standards and protocols for invoking waivers, modifications, and exceptions to NSO stipulations; and maintain GHMA in Utah.

A. The Proposed Amendments Remove Designation of Sagebrush Focal Areas.

The Proposed Amendments would implement a wholesale elimination of SFAs, a key component of the current sage-grouse plans. SFAs are the most critical sage-grouse habitats, containing large, contiguous blocks of federal lands with high levels of population connectivity and high densities of breeding birds that help buoy the species' viability. Recognizing this, the 2015 plans established several protections within SFA—most importantly, mandating that NSO stipulations are not subject to waivers, exceptions, or modifications. The Proposed Amendments would reduce protection for all 865,700 acres of SFA habitat contained in the Forest Service plans—a proposal we firmly oppose due to the likely impacts from oil and gas development.

The importance of SFA habitat to sage-grouse viability is well established. As the 2015 Records of Decision described, SFAs "represent recognized [strongholds] for greater sage-grouse that have been noted and referenced as having the highest densities of greater sage-grouse and other criteria important for the persistence of the species." See, e.g., 2015 Great Basin ROD at 20. Recognizing these characteristics, "SFAs maximize protection from new surface disturbance, given that they contain high-quality sagebrush habitat, highest breeding densities, have been identified as essential to conservation and persistence of the species[hellip]." Id. at 21. Specifically, the ROD determined that SFA habitat would enjoy two key forms of protection: (1) NSO stipulations "with no exceptions for oil, gas, and geothermal development," and (2) a recommendation that BLM withdraw these areas from hardrock mineral entry. ROD at 21. In addition, the RODs provide for other protections, such as prioritizing other conservation and vegetation management actions in SFAs.

These heightened SFA protections factored into FWS's not-warranted decision in 2015:

Based on our recommendation to further protect sage-grouse population centers that have been identified in the scientific literature as critically important for the species and areas identified through our analysis as important for conservation, BLM and USFS designated areas as Sagebrush Focal Areas (SFA) and added protections that would further limit new, human-caused surface disturbance in SFAs.

80 Fed. Reg. 59,858, 59,875 (Oct. 2, 2015). Like the Forest Service, FWS recognized SFAs as "strongholds" for sage-grouse conservation that contain important connectivity habitat and high densities of breeding birds, meriting "the most conservative strategies to protect sage-grouse and habitat." Id. at 59,878. Importantly, the FWS noted that the importance of SFAs went well-beyond recommended mineral withdrawals by specifically citing the non-waivable NSO stipulations, as well as broader commitments to "prioritize management and conservation actions in SFAs. . . ." Id. at 59,878.

Yet, despite the recognized importance of SFAs and FWS's reliance on SFA protections, the Forest Service now proposes weakening its stewardship of this most critical habitat. The rationale for this decision is articulated in the Final EIS: 7

The removal of SFA designations would have no measurable effect on the conservation of greater sage-grouse because the management direction proposed for PHMA would remain in place and continue to protect greater sage-grouse habitat. SFA removal would add flexibility for responsible development with stringent requirements including mitigation to achieve a no net loss to greater sage-grouse habitat in PHMA. There is virtually no overlap of active oil and gas well development with the 2015 SFA designated areas, which indicates that the potential for development of oil and gas in the areas previously designated as SFAs is very low (Chambers et al. 2017). The change from NSO with no exception to NSO with limited exception should not result in increased habitat loss or degradation because the proposed exception criteria would require there be no direct, indirect, or cumulative impacts or impacts could be offset to achieve a no net loss (ID, UT, WY) or a net conservation gain (NV) to greater sage-grouse or its habitat.

Final EIS at 4-353.

Picked apart, this logic does not hold water. First, the Forest Service appears to be equivocating SFA and PHMA, acting as if the latter is a more or less equivalent substitute for the former. This logic is also reflected in the Forest Service's response to our and others' comments on the Draft Plan Amendments, which generally expresses that the mineral withdrawal component is the only meaningful difference between PHMA and SFA in the 2015 plans. See Final EIS at I-9–I-10 (including link to spreadsheet of specific responses). This overlooks what is actually the most important difference between SFA and PHMA: fluid mineral NSO stipulations are immune from waivers, exceptions, and modifications under SFA management, but not under PHMA management.

Second is the Forest Service's inexplicable statement that "[t]here is virtually no overlap of active oil and gas well development with the 2015 SFA designated areas, which indicates that the potential for development of oil and gas in the areas previously designated as SFAs is very low." Id. This reasoning, and the management approach it suggests, is exactly backward. Part of the reason SFAs are so special and so deserving of protection is precisely because they have not yet borne the impacts of oil and gas development, but that does not remotely imply that oil and gas development will not find them. The fact that they are relatively pristine does not give the Forest Service license to assume they will continue to be pristine; it demands the opposite: rigorous protection and the utmost effort to maintain these crucial habitats in their most unspoiled form.

Finally, the Forest Service punts on the likely impacts of eliminating SFAs. The Final EIS points to the 2015 planning process and 2016 SFA withdrawal process as the supposed source of NEPA analysis,¹ and it offers the conclusory claim that allowing exceptions to NSO stipulations "should

¹ This attempt to tier is inappropriate, as the BLM 2016 Sagebrush Focal Area Draft EIS does not assess the impacts of removing the no-NSO-exceptions protection. See 40 C.F.R. [sect] 1508.28 (defining when tiering is appropriate and stating that broader statements can only be used if they have coverage of the "general matters" that are under consideration). 8

not result in increased habitat loss or degradation because the proposed exception criteria would require there be no direct, indirect, or cumulative impacts or impacts could be offset to achieve a no net loss (ID, UT, WY) or a net conservation gain (NV) to greater sage-grouse or its habitat." Id. This is wrong for two reasons. First, the exceptions criteria that are actually proposed are far weaker than this passage suggests (see following section). Second, mitigation, regardless of the standard, cannot substitute for protecting SFAs. The Forest Service will not be able to offset the impact to SFAs because there is no additional SFA-caliber habitat to be found. In actuality, by not maintaining the highest quality habitats, the Forest Service is agreeing to the degradation of the best habitat and will actually be managing toward a net loss. This also stands in contradiction to the underlying structure of the 2015 Sage-grouse Plans to ensure the strongest protections for the best quality habitat.

Each component of the Forest Service's rationale—equivocating SFA and PHMA, taking

SFAs' pristine quality as license to shirk management responsibilities, and relying on offsite mitigation for irreplaceable habitat is illogical and contrary to the actual likely impacts.

To remedy this misstep, the Forest Service should take one of two paths: First, it could simply choose to keep the SFA designation and the protections it applies. This would be a straightforward way of righting the ship. Alternatively, the Forest Service could require that NSO stipulations not be subject to waivers, exceptions, and modifications anywhere within PHMA. This option would also ensure that the most sensitive lands are protected. Either way—and especially because, as described below, the Proposed Amendments would loosen the criteria for granting waivers, exceptions, and modification—it is doubly important that the best, most critical habitat enjoy full NSO protection safe from loopholes.

Recommended changes to improve the Proposed Plan Amendments: Given the importance of SFA to maintaining viable sage-grouse populations, and in light of the role SFA played in FWS's 2015 not-warranted determination, we believe it is irresponsible and risky to eliminate this highest tier of habitat protection. The absence of a mineral withdrawal does not obviate the need for protections from oil and gas surface occupancy, and the PHMA designation does not provide an equivalent level of protection. We request that the Forest Service take seriously its role in avoiding the need for a listing by maintaining SFAs, or else applying NSO stipulations free of waivers, exceptions, and modifications within PHMA.

B. The Proposed Amendments Expand Waivers, Exceptions and Modifications to No Surface Occupancy (NSO) Stipulations in Oil and Gas Leases.

Recent studies confirm that oil and gas development can harm both sage-grouse habitat and lifecycle activities, such as breeding.² Consequently, it is vital that protections associated with oil

² See, Green, A.W., Aldridge, C.L., and O'Donnell, M.S., 2017, Investigating impacts of oil and gas development on greater sage-grouse: *Journal of Wildlife Management*, v. 81, no. 1, p. 46–57 (Finding that oil and gas developments contributed to a 2.5 percent per year decline in lek attendance from 1980 to 2008.), available at: <https://doi.org/10.1002/jwmg.21179>; Juliusson, L.M., and Doherty, K.E., 2017, Oil and gas development exposure and conservation scenarios for greater sage-grouse—Combining spatially explicit modeling with GIS visualization provides critical information for management decisions: *Applied Geography*, v. 80, p. 98–111 (Although BLM land-use plans and the State of Wyoming Core Area Strategy vary in management actions, they may similarly reduce

risks to GRSG populations and breeding habitats from oil and gas development.), available at: <https://linkinghub.elsevier.com/retrieve/pii/S0143622817300917>.

³ Though perhaps technically inapplicable here, we encourage the Forest Service to follow the guiding principle behind Section 7 of the Endangered Species Act—the "heart of the ESA." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011). Section 7 "requires federal agencies to ensure that none of their activities, including the granting of licenses and permits, will jeopardize the continued existence of listed species or adversely modify a species' critical habitat." *Karuk Tribe of Cal. v. United States Forest Serv.*, 681 F.3d 1006, 1019–20 (9th Cir. 2012) (citing *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 692 (1995) (in turn citing 16 U.S.C. [sect] 1536(a)(2))). The purpose of this consultation is "to obtain the expert opinion of wildlife agencies to determine whether the action is likely to jeopardize a listed species or adversely modify its critical habitat." *Id.* at 1020. Here, as noted above, exceptions to NSO stipulations have the potential to harm sage-grouse habitat, making informal "consultation" with FWS and other agencies a prudent policy. Especially for a species teetering on the brink of an ESA listing, the Forest Service would be wise to maximize, not minimize, input from the wildlife experts within FWS and other wildlife agencies.

and gas development are reliably applied. NSO stipulations provide one such critical protection for sage-grouse,

especially within PHMA, so it is imperative that waivers, exceptions, and modifications to NSO stipulations be granted in only the narrowest of circumstances, if at all. This is especially so given the proposed elimination of SFAs, as discussed above. We are therefore disappointed that the Proposed Amendments take sage-grouse management in the wrong direction by making these loopholes easier to obtain, with less input from expert agencies.

Under the 2015 plans, exceptions could be granted in Colorado, Idaho, Nevada, and Utah only with unanimous consent from the Forest Service, Fish and Wildlife Service (FWS), and state wildlife agency. See Final EIS at 2-69, 2-115, 2-170, 2-213 (No Action Alternative). In contrast, the Proposed Amendments eliminate this cooperative approach and place the decision purely in the hands of the "authorized officer," without regard for the opinions of the FWS or states. See *id.* State wildlife agencies and the FWS have valuable expertise and should be provided the opportunity to submit information for consideration prior to the Forest Service granting exceptions to NSO stipulations.³ We recognize that, in practice, the authorized officer may consult with these agencies regardless of what the plans say, but informal practice is not a substitute for enforceable procedural requirements. To be clear, we are not requesting that FWS or state wildlife agencies be granted veto power over these decisions; rather, we simply request an explicit commitment by the Forest Service to consult with these agencies before granting exceptions to NSO stipulations.

In addition to consulting with other agencies, we believe the Forest Service should consult with the public through a notice and comment process. The BLM does this for NSO waivers in Colorado under its 2019 BLM plan amendments, which require the BLM to hold a 30-day public notice and comment process before granting such a waiver. See BLM RMPA Final EIS at 2-6[mdash]2-8. The public may have information and insight that is additive to what the Forest Service, FWS, and state wildlife agencies provide, and we encourage the Forest Service to take advantage of this resource before setting aside NSO stipulations.

Besides eliminating the consultation commitments from the 2015 plans, the Proposed Amendments seek to eliminate several important criteria from the Draft Amendments in Colorado, Idaho, Nevada, and Utah. The following changes were made between the Draft Amendments and the Proposed Amendments, all of which weaken the NSO stipulations by loosening the criteria for exceptions: 10

? Colorado: eliminated considerations dealing with anthropogenic disturbance caps and removed the limitation for Northwest Colorado that there may be only one disturbing activity within 640 acres. Compare Draft EIS at G-3 with Final EIS at G-2.

? Idaho: eliminated the requirement that the population must be stable or increasing over the last three years and that adaptive management triggers must not be engaged. Compare Draft EIS at G-6 with Final EIS at G-5.

? Nevada: eliminated the requirement that habitat suitability must be determined by a "qualified biologist with Greater Sage-Grouse experience." Compare Draft EIS at G-4 with Final EIS at G-3.

? Utah: eliminated the requirement that any exception must include provisions for controlled surface use and timing limitations. Compare Draft EIS at G-5 with Final EIS at G-4.

The Draft Amendments already took NSO exceptions criteria in the wrong direction, and the Proposed Amendments not only adopt these negative changes but go a step further by making the changes listed above. We urge the Forest Service to keep not only the 2015 plans' consultation requirements but also the heightened protections that were put forth in the Draft Amendments and then removed in the Proposed Amendments.

The points discussed above deal with the criteria in Colorado, Idaho, Nevada, and Utah. The waiver, exception, and modification criteria for Wyoming have their own set of problems. First, and most concerning, the Proposed Amendments would allow waivers and modifications to NSO stipulations in Wyoming, when these were not previously allowed under the 2015 plans. See Final EIS at G-12[mdash]G-19. Second, the Proposed Amendments appear to completely eliminate Stipulation WY2 (anthropogenic disturbance over 5%) from the Draft Amendments. Compare Draft EIS at G-13 with Final EIS at G-12[mdash]G-19. Moreover, while the criteria for exceptions was already weak and vague under the 2015 plans, the Proposed Amendments do nothing to improve them. Thus, for many reasons, NSO stipulations in Wyoming need to be strengthened and clarified.

Finally, as an across-the-board improvement, it is critical that the Forest Service track all waivers, exceptions and modifications requested and granted, and make that information available to the public. These records will provide important insight into how the stipulations are being applied and the potential impact of waivers, exceptions and modifications on the overall function of the plans. This information will also allow the Forest Service to determine if the availability of or criteria for granting waivers, exceptions and modifications needs to be further narrowed in order to ensure sufficient protection for sage-grouse habitat.

Recommended changes to improve the Proposed Plan Amendments: As noted in our scoping comments and comments on the Draft Amendments, the Forest Service should take this opportunity to update and strengthen the requirements in the 2015 plans regarding applications of waivers, exceptions and modifications. The Proposed Amendments do not take this opportunity, instead moving these requirements in the wrong direction. To correct this, we request the following changes be made to the Proposed Amendments: 11

? The Forest Service should commit to consultation with the U.S. Fish and Wildlife Service and state wildlife agencies before granting NSO exceptions;

? The Forest Service should hold a 30-day public notice and comment period before granting NSO exceptions;

? The criteria for granting exceptions should be tightened and strengthened, to at least the same level as in the Draft Plan Amendments;

? Waivers and modifications should not be allowed under the Wyoming plan, and the missing stipulation (Stipulation WY2 in the Draft Amendments) should be included in the Proposed Amendments;

? A public database should be created to track all requests and approvals of NSO exceptions, waivers, and modifications.

C. The Proposed Amendment Would Remove Designation and Management of General Habitat Management Areas in Utah.

There are 28,100 acres of GHMA on Forest Service lands in Utah that would no longer be subject to any management prescriptions related to energy development, rights-of-way, travel management or other provisions specifically related to greater sage-grouse under the Proposed Amendment. Utah Draft ROD, Table 1-2, p. 12. Eliminating GHMA is contrary to the best available science and would undermine the survival of the sage-grouse. In both our scoping comments and comments on the Draft Plan Amendments, we urged the Forest Service to maintain the designation and management of GHMA in Utah.

As a preliminary matter, eliminating the GHMA designation makes the Utah plan inconsistent with the plans for other states, undermining the rangewide approach that committed management of all habitat.

The Forest Service acknowledges that "[a] recently-released study (Cross et al. 2018)" identified the importance of GHMA for connectivity in Utah, but claims that translocated birds can make up for this function. Proposed Amendment, pp. 4-351 [ndash] 4-352. While the Forest Service claims this is now somehow the best available science, it does not cite any analysis or studies regarding such conclusions. In fact, long-term success of translocation programs in increasing population viability has had varying success at best and cannot justify abandoning management of these lands. See, Augmenting Sage-Grouse Populations Through Captive Breeding and Other Means Western Association of Fish and Wildlife Agencies, Sagebrush Initiative (attached as Exhibit 4; see, also, Musil, D. D., et al., Survival, and Reproduction of Sage Grouse Translocated into Central Idaho, The Journal of Wildlife Management, Vol. 57, No. 1 (Jan., 1993), pp. 85-91; Schroeder, M.A., et al., Distribution of Sage-Grouse in North America, The Condor, Vol. 106, No. 2, (May 1, 2004), pp. 363[ndash]376. And, as noted in the June 2018, letter to Secretary Zinke expressing concerns with changes to the 2015 sage-grouse conservation plans, the best available science indicates that there is a need to manage sagebrush habitats holistically and collectively and "all sage-grouse habitats regardless of designation [should] remain an integral component of that management approach." See Exhibit 2. "Amendments proposed to the LUPs reducing or eliminating management options in designated habitats[mdash]particularly proposed amendments in GHMA[mdash]limit the ability of agencies to manage at scales necessary to maintain these connections." Id. The scientists also made the importance of this type of management clear in 12

their letter October, 2017, stating: "The research is unequivocal that those developing management approaches should view the landscape holistically from the need to provide large, functional, connected habitat patches that include the diversity of resources sage-grouse require seasonally and annually." Exhibit 1, p. 3

Moreover, maintaining GHMA is important to provide agencies with flexibility to manage habitat as populations shift over time, including in the face of climate change. Further, as the 2015 Sage-grouse Plans acknowledged, it is important to ensure that seasonal habitats not included in Priority Habitat Management Areas receive some protection, and to allow for expansion of recovering populations into newly restored areas. In addition, GHMAs can serve as a location for compensatory mitigation offsets and restoring degraded habitat. See, Record of Decision for the Rocky Mountain Region, p. 1-25.

Nowhere in the Proposed Amendment and FEIS has the Forest Service conducted a thorough analysis to justify its conclusion that designating and managing GHMA is not important or necessary. As discussed in detail in scientific comments prepared by Dr. Matt Holloran (Exhibit 3): "The scientific literature unequivocally supports the conclusion that increased disturbance in general habitats could negatively impact priority sage-grouse populations presently and into the future." The Forest Service should not be risking populations by removing management from this entire classification of habitat.

Recommended changes to improve the Proposed Plan Amendments: We recommend that the Forest Service maintain GHMA in Utah.

II. The Proposed Amendments[rsquo] Change from a Net Conservation Gain Standard Will Cause an Unacceptable Loss of Habitat.

The Plan Amendments change the "net conservation gain" standard for compensatory mitigation to a "no net loss" standard in all states except Nevada. As we noted in our comments, this change will result in an unacceptable loss of habitat, and it will result in a mitigation program that does not actually mitigate harm. See comments at 17 (Dec 10, 2018).

The Forest Service appears to see the change in standard as mostly meaningless. However, a close inspection of the two standards reveals fundamentally different visions of not only mitigation, but sage-grouse management writ large.

In the FEIS, the Forest Service states:

Biologically, there is no measurable effect on the conservation of greater sage-grouse in changing from net conservation gain to no net habitat loss, in part because of the wide definition of net conservation gain in the 2015 GRSR ROD. Specifically, the definition of net conservation gain was, "the actual benefit or gain above baseline conditions," which translated to an uncertain degree of improvement, which could be a minimal number of acres, but is not necessarily tied to habitat. The use of no net habitat loss, defined as, "retaining an equivalent amount of sage-grouse habitat after a 13

proposed action that is equal to or above baseline conditions that existed before the proposed action," is consistent with the purpose and need in that it provides a clearer link to acres and equivalency or uplift for the species than the previous net conservation gain definition.

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Even by the Forest Service's own definitions of "net conservation gain" and "no net loss" it is illogical to conclude that this change results in "no measurable effect" on the conservation of greater sage-grouse. Essentially, the no net loss standard as proposed by the Forest Service facilely equates mitigation with acres of habitat: "retaining an equivalent amount of sage-grouse habitat." Id. This sole focus on acreage misunderstands the basic concept of mitigation, which must be geared toward the quality and functionality of habitat, and how that habitat sustains a robust, viable population. By contrast, the net conservation gain standard includes a focus on the ecological functionality of habitat and how it contributes to carrying capacity: "[t]he actual benefit or gain above baseline conditions," which . . . is not necessarily tied to habitat." Id.

Inherent in the definition of net conservation gain, but not no net loss, is a recognition that mitigation has transaction costs, and that these costs must be accounted for. There are inefficiencies in destroying habitat here while creating habitat there. For example, cheatgrass has thwarted many attempts to preserve and generate suitable sage-grouse habitat, and a net conservation gain standard would require that cheatgrass (and other complicating factors) be accounted for when evaluating the actual impacts of a mitigation effort on the species. As sage-grouse scientists warning against amendments undercutting key components of the 2015 Sage-grouse Plans warned, "the literature suggests that a tremendous amount of uncertainty exists as to the vegetative and sage-grouse population outcomes of manipulations intended to restore, create or enhance sagebrush habitats," and "[a] net conservation gain standard is necessary to allay the inherent spatial and temporal risk associated with compensatory mitigation projects." Exhibit 1 (Letter 10/2017), p.4

The net conservation gain standard also inherently requires a contextualized understanding of overall population status in a way that no net loss does not. As numerous reports have recently noted, sage-grouse populations across the west continue to decline at alarming rates, leaving these birds in peril of extinction. Based on recent state-level reporting, since 2016 sage-grouse populations in Idaho have dropped by 52%, in Montana by 40% in Wyoming by 21% and in Colorado by 38%. These losses in population are compounded by destruction and degradation of sage-grouse habitat. While the "no net loss" standard may account for habitat loss due to development, it does not account for loss due to natural causes such as fires. For example, between 2017 and 2019 over 4 million acres of sage-grouse habitat was burned in fires.⁴ Under a "no net loss" standard there are no measures in place to ensure that vital habitat is restored. This means the habitat baseline, by which the "no net loss" standard is measured, is continually shifting downward. In contrast, a "net conservation gain" standard would help to counteract these significant losses. For there to be "actual benefit or gain" above the downward-trending baseline, mitigation must do more than simply replace acres of destroyed habitat.

⁴ https://www.nifc.gov/fireandsagegrouse/docs/SG_SMA_Jurisdictional.pdf 14

In other words, the difference between the two standards is not, as the Forest Service seems to believe, that no

net loss means maintaining baseline acreage while net conservation gain means baseline acres plus one. Rather, no net loss means maintaining baseline conditions (which translates to a trajectory of loss), while net conservation gain means an actual improvement in landscape-level habitat functionality that boosts carrying capacity and population viability

Despite the concerns we have raised, The Forest Service has failed to provide any analysis as to the impacts of changing the "net conservation gain" standard to the "no net loss" standard. Instead, the Forest Service simply responded by providing a definition of "compensatory mitigation and noting that: "[t]he decision for each state as to have net conservation gain remain or change to no net loss was done to align with the respective state plan." See comment matrix. This response is completely inadequate and fails to provide any meaningful explanation as to why the Forest Service believes the change from "net conservation gain" to "no net loss" will result in only minimal impacts.

The desire to align Forest Service plans with state plans does not absolve the Forest Service of its obligations to analyze the impacts of these changes. Nor does it absolve the Forest Service of its regulatory obligations under the 2012 Forest Planning Act which requires that plans "contribute to the recovery of federally listed threatened and endangered species, conserve proposed and candidate species, and maintain a viable population of each species of conservation concern within the plan area." 36 CFR 219.9 (b). As discussed above, the change from "net conservation gain" to "no net loss" will not lead to the maintenance of a viable population of sage-grouse, but will instead further endanger the bird.

Recommended changes to improve the Proposed Plan Amendments: We recommend that in Colorado, Wyoming, Utah, and Idaho the Forest Service reinstate the "net conservation gain" standard for compensatory mitigation, recognizing that this standard encompasses a holistic vision of sage-grouse management centered on improving carrying capacity and viability.

III. The Proposed Amendments Must Clarify the Compensatory Mitigation Standard.

In describing the proposed action with respect to compensatory mitigation, the Proposed Amendment states: "The compensatory mitigation framework, including the use of no net loss or net conservation gain elements, will be changed in order to promote landscape-scale effectiveness by aligning the FS framework with state-based compensatory mitigation systems." Proposed Amendment, pp. 1-19. While the Forest Service can seek alignment with state-based programs, these are, ultimately, plans to govern lands managed by the Forest Service that will be implemented and enforced by the Forest Service. As a result, the Forest Service is accountable for achieving the net conservation gain and/or no net loss standard that is set out in these Plan Amendments, and the Plan Amendments cannot cede this responsibility or authority to the states.

We appreciate that the Forest Service acknowledges its authority and states its continued commitment to incorporate, implement, and enforce sage-grouse mitigation programs. In general, we are pleased with the Forest Service's efforts to align its compensatory mitigation framework with those of the states. In particular, we support the Forest Service's continued

commitment, in the Proposed Amendment and each state-specific appendix, to use the mitigation hierarchy, which requires Forest Service management actions and authorized third party actions that result in habitat loss or degradation to be mitigated by first avoiding the authorization of actions in sage-grouse habitat altogether, then by minimizing the effects of authorized actions on habitat, and finally by providing compensatory mitigation where avoidance and minimization are either not selected or fail to ensure against net loss or degradation to habitat. See, e.g., Draft Northwest Colorado ROD, p. 20. We also appreciate the level of detail incorporated into the compensatory mitigation strategies for the Northwest Colorado and Nevada plans.

We repeatedly raised the importance of explicitly stating the Forest Service's authority for and commitment

to enforcing compensatory mitigation, as well as the key elements of compensatory mitigation programs, in both our scoping comments and comments on the Draft Plan Amendments.

We are concerned that the Proposed Plan Amendments need stronger language to ensure that compensatory mitigation will be implemented where Forest Service management actions or authorizations of third party actions result in habitat loss and degradation. Although the state-specific appendices (and the corresponding attachments in the Draft RODs⁵) discuss, to varying degrees, the goals and processes of implementing compensatory mitigation under the mitigation hierarchy, they do not include binding language that requires the Forest Service to implement or direct compensatory mitigation where avoidance and minimization are insufficient.

5 For convenience, in this section of the Objection, we will refer to the Appendices to the Proposed Amendment and Final EIS.

For example, the Northwest Colorado appendix states that "[t]he Forest Service may, in accordance with relevant plan components and in alignment with state-based compensatory mitigation efforts, require mitigation that provides no net loss to the greater sage grouse[...]" Northwest Colorado Mitigation Strategy Management Approach, Appendix B, p. B-3. Each of the state appendices contains similar language that fails to clearly mandate compliance with procedures necessary to achieve the mitigation hierarchy's requirements to avoid, minimize, and compensate for habitat loss or degradation. See, e.g., Idaho Mitigation Strategy Management Approach, Appendix C, p. C-4 ("Mitigation actions ought to account for any uncertainty associated with the effectiveness of such mitigation [...]") (emphasis added); Nevada Mitigation Strategy Management Approach, Appendix D, p. D-9 ("Application of the mitigation hierarchy and the development of compensatory mitigation would be done in close coordination with the project proponent, cooperating agencies, [...] and interested stakeholders in a transparent manner, based on the best available science [...]") (emphasis added); Utah Mitigation Strategy Management Approach, Appendix E, p. E-4 ("Compensatory mitigation projects may account for the risk that the mitigation may fail or not persist for the full duration of the project it is intended to offset") (emphasis added); Wyoming Mitigation Strategy Management Approach, Appendix F, p. F-3 ("The Forest Service may [...] require mitigation that provides no net loss to the greater sage grouse") (emphasis added). In short, the discretionary language used in those appendices does not provide sufficient certainty that compensatory mitigation will be enforced or that it will be enforced consistently. 16

This is concerning because the enforcement of compensatory mitigation is crucial to achieving the "net conservation gain" and "no net loss" standards adopted by the Plan Amendments and the state plans. The "no net loss" standard, which is the less stringent of the two, requires the Forest Service to ensure that actions authorized by the agency do not result in a net loss of sage-grouse habitat. Without explicitly mandating the use of compensatory mitigation, which is intended to serve as a backstop to avoidance and minimization, it is not clear how the Forest Service's proposed plan would meet these standards or enable the Forest Service to meet its stated purposes to align its compensatory mitigation framework with those of the states and conserve the greater sage-grouse.

To ensure that the Plan Amendments's no net loss and/or net conservation gain standards are met, it is critical that the agency's compensatory mitigation programs follow commonly recognized principles, such as those laid out by The Nature Conservancy in its 2015 report, *Achieving Conservation and Development: Applying the Mitigation Hierarchy*. McKinney and Wilkinson. *Achieving Conservation and Development: Applying the Mitigation Hierarchy* (April 2015), <https://www.conservationgateway.org/Documents/TNCApplingTheMitigationHierarchy.pdf> Those principles include: application of the mitigation hierarchy in a landscape context; policy goals that support conservation and drive accountability; inclusion of stakeholder engagement practices; long-term, durable options; additionality, equivalence, and protection against temporal losses. While the state appendices discuss several of those principles, the fundamental issue lies in the fact that the application of those principles, and of compensatory mitigation more broadly, must not be seen as discretionary, because that would undermine the agency's

commitment to ensure against net loss or for net gain.

For the same reasons, the Proposed Amendments are also inconsistent with the broader purpose of the 2015 Sage-grouse Plans, which were prepared to avoid the necessity of listing the sage-grouse under the ESA. See, e.g., Record of Decision for the Rocky Mountain Region, p. S-1. The Fish and Wildlife Service's determination that listing was "not warranted" was based on the conclusion that the terms of the 2015 plan provided sufficient protections for the sage-grouse. U.S. Fish & Wildlife Service 2015 Endangered Species Act Finding: Frequently Asked Questions, <https://www.fws.gov/greatersagegrouse/findings.php>. Importantly, that conclusion was based in part on the expectation that the Forest Service would enforce the mitigation hierarchy, including its requirement for compensatory mitigation where avoidance and minimization were insufficient to meet the former "net conservation gain" standard:

All of the Federal Plans require that impacts to sage-grouse habitats are mitigated and that compensatory mitigation provides a net conservation gain to the species. . . Any compensatory mitigation will be durable, timely, and in addition to that which would have resulted without the compensatory mitigation.

80 Fed. Reg. 59,858, 59,881 (Oct. 2, 2015) (emphasis added). Unlike the proposed state appendices, the 2015 provisions contained concrete and enforceable language that mandated the use of compensatory mitigation.

It is also worth emphasizing that the previous standard for compensatory mitigation, which required a "net conservation gain," set a higher bar than the "no net loss" standard proposed in 17

most of the state appendices. In light of the reduction of that standard, the enforcement of compensatory mitigation becomes more important, not less, calling for stricter policies that prevent the reduction and degradation of sage-grouse habitat. In sum, a discretionary policy for compensatory mitigation would erode the very protections upon which the decision not to list the sage-grouse was based and increase the likelihood that the species will require the protections of the Endangered Species Act in the future.

Recommended changes to improve the Proposed Plan Amendments:

General:

We recommend that the Forest Service add language to clarify that compensatory mitigation is mandatory where Forest Service management actions or authorizations of third party actions result in sage-grouse habitat loss and degradation.

At the outset, in any overarching planning document that will apply to all five states, we recommend the Forest Service include language stating clearly the agency's commitment to the mitigation hierarchy and use of compensatory mitigation. We propose incorporation of language similar to that appearing in the state-specific draft RODs stating:

The Forest Service will require mitigation that provides habitat equivalency (i.e., no net habitat loss) and/or net conservation gain, aligned with state-based compensatory mitigation programs and strategies as appropriate, for the greater sage-grouse when undertaking Forest Service management actions, and consistent with existing rights and applicable law, in authorizing third party actions that result in greater sage-grouse habitat loss and degradation. This will be achieved by avoiding, minimizing, and compensating for impacts by applying beneficial mitigation actions. Mitigation will follow the regulations from the White House Council on Environmental Quality (CEQ) (40 CFR 1508.20) and the steps of avoid, minimize, and compensate, hereafter referred to as the mitigation hierarchy. If impacts from Forest Service management actions and authorized third party actions, which result in habitat loss and degradation that would otherwise not be allowed, remain after applying avoidance and minimization measures (i.e., residual impacts), then compensatory mitigation will be used to provide a no net

habitat loss or net conservation gain to the greater sage-grouse. Mitigation actions should account for any uncertainty associated with the effectiveness of such mitigation. Any compensatory mitigation will be durable, timely, and in addition to that which would have resulted without the compensatory mitigation. Forest Service mitigation policy and CEQ regulations will serve as a framework for developing and implementing the compensatory mitigation.

To this end, we also recommend replacing the first three paragraphs of the Idaho, Nevada, Utah, and Wyoming appendices with the first three paragraphs of the Northwest Colorado appendix, with the modification that the word "may" in each of those paragraphs from the Northwest Colorado plan be replaced by the word "will." Additionally, for the Nevada appendix, the 18

language requiring a "net conservation gain" standard should not be replaced by Northwest Colorado's distinct "no net loss standard." These modifications would provide greater consistency across state plans and clarify that use of the mitigation hierarchy is mandatory, which is consistent with the stated intent of those plans to follow CEQ's regulations regarding mitigation and essential to meeting both the "no net loss" and "net conservation gain" standards adopted by the states.

Northwest Colorado:

We recommend that the Forest Service insert the word "will" in place of the words "may" in the fourth paragraph ("FS may review"), "would" in the seventh paragraph ("official would use the following steps"), "would" ("team would evaluate") and "should" ("applicant should be informed") in the eighth paragraph, "should" ("deciding official should evaluate") and "would" ("project would be deferred") in the tenth paragraph, and "would" ("official would analyze;" "analysis would include") in the twelfth paragraph. These changes would provide stronger language to confirm that the mitigation hierarchy process is mandatory, which would ensure that the information-gathering and decisionmaking steps involved in that process are consistently applied without opportunity for bias. Although the Forest Service's ultimate course of action may require discretion, the process itself should be objectively applied.

Nevada:

We recommend that the Forest Service insert the word "will" in place of the word "would" in the "Compensation" section ("compensatory mitigation would be considered"). This change would provide stronger language to confirm that the mitigation hierarchy process is mandatory, which would ensure that the information-gathering and decisionmaking steps involved in that process are consistently applied without opportunity for bias. Although the Forest Service's ultimate course of action may require discretion, the process itself should be objectively applied.

Idaho:

We recommend that the Forest Service insert, before the fourth paragraph (which begins "In 2015"), provisions that provide greater detail describing how the compensatory mitigation process will be implemented. Specifically, the Forest Service should insert the "Mitigation Principles and Guidance" section from the Nevada plan. This change would reinforce the Forest Service's duty to use compensatory mitigation as required under the mitigation hierarchy while also providing a thorough, flexible framework from which the agency could implement the requirement. More detailed guidance such as Nevada's requirement that: "For any compensatory mitigation project, the investment must be additional (i.e., additionality means the conservation benefits of compensatory mitigation are demonstrably new and would not have resulted without the compensatory mitigation project)," would reinforce the Forest Service's duty to use compensatory mitigation and provide examples of how the Forest Service can tailor its mitigation project to meet the needs of the state of Idaho. The change would also leave room for Idaho to adapt its upcoming mitigation framework to include or improve upon the

Nevada provisions. 19

Utah:

We recommend that the Forest Service change the title of the "Process and Coordination" section to "State Coordination Process" and insert the "Mitigation Principles and Guidance" section from the Nevada plan below that section. While the addition of that section would serve the same purpose identified in the Idaho recommendations above, the modification to the title would emphasize that, while coordination with state processes may be advantageous, ultimately, the Forest Service is responsible for implementing its own federal standards (i.e. "no net loss," "net conservation gain") regardless of whether those standards comply with state standards. This change would demonstrate that, while Utah may adapt more stringent standards for compensatory mitigation that apply within the state, Utah is still bound to meet the minimum federal standards that apply to Forest Service lands.

Wyoming:

We recommend that the Forest Service, beginning with the fifth paragraph ("The deciding official may"), entitle that section "State Coordination Process" and insert the "Mitigation Principles and Guidance" section from the Nevada plan below that section. These changes would reflect the same advantages articulated in the Utah recommendations-namely emphasizing that, regardless of whether state coordination is achieved in the process of implementing compensatory mitigation, meeting the Forest Service's federal standards is mandatory. While discretion would be acceptable in this process for state coordination, discretion should not be allowed in meeting minimum federal standards.

IV. The Forest Service Did Not Consider a Sufficient Range of Management Alternatives.

The Forest Service has not met its fundamental duty under NEPA to consider reasonable alternatives. 40 C.F.R. [sect] 1502.14. Consideration of alternatives is the "linchpin" of an Environmental Impact Statement (EIS). *Dubois v. Dept. of Agriculture*, 102 F.3d 1273, 1286-87 (1st Cir. 1996) (internal citations omitted). Indeed, the existence of a "viable but unexamined alternative renders the environmental impact statement inadequate." *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999). In the Final EIS, there is no analysis or consideration of a range alternatives that would be both more environmentally protective and still consistent with the agency's planning regulations. See, e.g., *Union Neighbors United v. Jewell*, 831 F.3d 564, 576-78 (D.C. Cir. 2016) (holding that the Fish and Wildlife Service violated NEPA by failing to examine an economically viable alternative that would have avoided adverse environmental effects). The Forest Service wrongly seeks to rely on alternatives from the 2015 Amendments, ignores viable proposed alternatives, and fails to provide a legitimate reason for its rejection of reasonable alternatives.

A. The Forest Service Must Consider Alternatives that Align with the Proposed Amendment's Purpose and Need.

Instead of developing a range of alternatives that address the purpose and need of the 2019 Proposed Amendments, the Forest Service continues to justify its lack of alternatives by 20

incorporating the analysis of the alternatives in the 2015 Amendments by reference. Given the change in the purpose and need between the 2015 and the 2019 Amendments, this incorporation cannot be justified.

As we noted in our scoping comments and comments on the Draft EIS, the purpose and need of the Proposed Amendments represent a drastic shift from the purpose and need of the 2015 amendments. Proposed Amendments, p. ES-2. An agency, in developing an EIS, is required to develop reasonable alternatives that follow from the stated purpose and need. *Cal. ex rel. Lockyer v. U.S. Dep't of Agriculture*, 459 F.Supp.2d

874, 905 (N.D. Cal. 2006) ("Failure to consider reasonable alternatives thwarts the goals of informed decision-making and meaningful public comment before the environmental die is cast."). Put differently, the "goal of a project necessarily dictates the range of [reasonable] alternatives." *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). Reviewing courts will thus measure the adequacy of the considered alternatives against the EIS's purpose and need section. See, e.g., *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 709 (10th Cir. 2009) (reasonableness of alternatives is judged with reference to the agency's objectives); *Lockyer*, 459 F.Supp.2d at 905-06 (noting a "basic disconnect" between the purposes and needs of two rules that the agency claimed to be the same). As in *Lockyer*, there is a "basic disconnect" between the purpose and need in the Proposed Amendments and in the 2015 Amendments. 459 F.Supp.2d at 905-06. This disconnect compels the Forest Service to analyze a new range of alternatives, distinct from those analyzed for the 2015 Amendments.

Despite our comments, the Forest Service continues to rely on the 2015 alternatives analysis and fails to provide any sort of explanation as to why it believes this analysis is appropriately incorporated into the 2019 FEIS. Instead, the agency simply responds to our comments with regulatory definitions, noting that: "the purpose and need statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives (36 CFR 1502.13). Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review. The subsequent document shall state where the earlier document is available (36 CFR 1502.20)." See comment matrix. This can hardly be considered a response to our comments. We are not arguing the regulatory definition of purpose and need, nor are we questioning NEPA regulations concerning tiering, we are instead noting that as the Forest Service changed its purpose and need in the Plan Amendments, it can no longer incorporate by reference the 2015 analysis. Instead of simply quoting from CEQ regulations, the Forest Service must provide a reasoned explanation as to why the 2015 analysis is sufficient and why this analysis obviates any need for alternatives that align with the 2019 Amendments's purpose and need.

Furthermore, incorporation by reference of the 2015 analysis is not, contrary to the Forest Service's assertion, an appropriate exercise of an agency's ability to tier to progressively more narrow environmental analyses:

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basin wide program statements 21

or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. 40 C.F.R. [sect] 1508.28.

See also Proposed Amendments, Comment/Response no. 24. Though styled as amendments intended to improve the implementation of the 2015 Amendments, the Proposed Amendments differ greatly in their approach to land management and greater sage-grouse protection in the planning area. The agency must analyze a reasonable range of alternatives in this NEPA process that addresses the newly stated purpose and need.

B. The Forest Service Must Acknowledge and Respond to Alternatives Proposed During the Comment Period.

The Forest Service's NEPA-mandated consideration of alternatives should include significant and viable alternatives that were suggested by the public during the comment period. *Wilderness Workshop v. Bureau of Land Mgmt.*, 342 F. Supp. 3d 1145 (D. Colo. 2018) (holding that BLM violated NEPA by failing to consider "significantly distinguishable" alternatives). The alternatives that were proposed by the undersigned organizations are both within the Forest Service's statutory mandate and meet the stated needs for the Proposed Amendments. See comments at 12. Among the alternatives recommended, we noted that the Forest Service

must consider an alternative that is more environmentally protective than the Proposed Action. See comments at 12. An alternative that is more protective aligns with the Forest Service's regulatory obligations to manage for species of conservation concern and to maintain ecosystem integrity and ecosystem diversity. See 36 C.F.R. [sect] 219.9. Given recent reports of continuing decline in sage-grouse populations,⁶ and in the face of BLM amendments, policy changes and actions that seriously undercut sage-grouse protections, the Forest Service can arguably only meet these obligations through a more protective alternative, rather than one that seriously reduces 2015 protections.

6 Montana Greater Sage-grouse Population Report, MONTANA FISH, WILDLIFE & PARKS (Sept. 3, 2019), <https://leg.mt.gov/content/Committees/Interim/2019-2020/EQC/Meetings/Sept-2019/sage-grouse-2019.pdf>. Studies by state wildlife officials across the West have found that sage grouse populations in Montana, Oregon, Idaho, Nevada, and Wyoming have all declined over the past three years. Sage Grouse Numbers in West Continue to Decline After Federal Protection Rejection, COLORADO PUBLIC RADIO (Sept. 13, 2019), <https://www.cpr.org/2019/09/13/sage-grouse-numbers-in-west-continue-to-decline-after-federal-protection-rejection/>. The National Interagency Fire Center has reported that, as of August 14, 2019, 4,521,967 acres of Greater Sage-Grouse habitat has been burned by fires over the past three years. https://www.nifc.gov/fireandsagegrouse/docs/SG_SMA_Jurisdictional.pdf.

In response to our comment regarding additional alternatives, the Forest Service, ignoring our earlier statement that doing so was counter to NEPA, noted that "[t]he full range of alternatives analyzed in the 2015 FEIS are incorporated by reference." See comment matrix. This can hardly be considered a suitable response (it is not so much a response as a statement reiterating the Forest Service's misguided approach to its alternatives analysis). Indeed, in all stages of this process, from scoping through to the final EIS, the Forest Service has hidden behind this incorporation response rather than acknowledge or evaluate viable, more protective, alternatives proposed by the undersigned organizations. The proposed alternatives represent actionable strategies that would be well within the stated purpose of this effort to improve management for 22

the greater sage-grouse and the Forest Service must respond to these substantial proposals and comments. By failing to thoroughly evaluate these additional, more protective alternatives, the Forest Service is not complying with NEPA.

Recommended changes to improve the Proposed Plan Amendments: To comply with NEPA, the Forest Service should thoroughly analyze alternatives that are more protective for sage-grouse than the Proposed Amendments.

V. The Forest Service Has Failed to Prioritize Leasing and Development Outside Sage-grouse Habitat.

In our scoping comments and again in our comments on the Draft Plan Amendments, we emphasized the importance of prioritizing oil and gas leasing and development outside sage-grouse habitat. This was a standalone commitment in the 2015 Sage-grouse Plans, separate and in addition to whatever incentives are implied by the existence of no surface occupancy stipulations that are applied to leases. The 2015 Sage-grouse Plans identify leasing prioritization as a "key component"; the plans specify that it applies in addition to designations of lands as open or closed to leasing and separately from the required lease stipulations. See, e.g., Rocky Mountain Record of Decision, p. 1-9. The 2015 Sage-grouse Plans also expressly state that the prioritization requirement applies "[i]n addition to allocations that limit surface disturbance" in sage-grouse habitat. *Id.* at 1-25. The explicit purpose in the 2015 Sage-grouse Plans for prioritizing leasing outside of habitat was to "limit future surface disturbance and encourage new development in areas that would not conflict with" sage-grouse habitat. *Ibid.* Prioritization, however, cannot serve its purpose to "limit future surface disturbance" in sage-grouse habitat if it does not actually limit leasing. Importantly, as noted in our previous comments, the Forest Service can exercise its authority to ensure meaningful prioritization is carried out. See, e.g., 30 U.S.C. [sect] 226(h), 43 C.F.R. [sect][sect] 3101.7-2(b) [ndash] (c).

Prioritizing leasing and development outside of both GHMA and PHMA is strongly supported by the best available science, as noted in letters submitted by sage-grouse scientists. See, Exhibits 1 and 2. As the 2018 letter, stated when warning about the potential consequences of changing the key commitments in the 2015 Sage-grouse Plans, "amendments that eliminate or weaken the need to prioritize the placement of anthropogenic impacts outside of designated habitats limit the effectiveness of landscape-scale conservation measures." Exhibit 1, p. 3. For this reason, the 2015 Sage-grouse Plans commit to prioritizing leasing and development outside of sage-grouse habitat. As provided for in the Approved Resource Management Plan Amendments (ARMPA) for the Great Basin Region,

. . . the ARMPAs prioritize oil and gas leasing and development outside of identified PHMAs and GHMAs. This is to further limit future surface disturbance and encourage new development in areas that would not conflict with GRSG. This objective is intended to guide development to lower conflict areas and as such protect important habitat and reduce the time and cost associated with oil and gas leasing development by avoiding sensitive areas, reducing the complexity of environmental review and analysis of potential impacts on sensitive species, and decreasing the need for compensatory mitigation. 23

Record of Decision for the Great Basin Region, p. 1-23.

The lack of a meaningful commitment to prioritization has had obvious consequences. Since the change in administration, the Bureau of Land Management issued new guidance in December 2017 through Instruction Memorandum 20218-026, which states: "the BLM does not need to lease and develop outside GRSG habitat management areas before considering any leasing and development within GRSG", which revoked the prior guidance interpreting the 2015 Sage-grouse Plans. A report issued by the National Audubon Society, The Wilderness Society and the National Wildlife Federation analyzing the differences in leasing and drilling in sage-grouse habitat between the first years after the 2015 Sage-grouse Plans were signed and the time period after this administration began implementing them found:

? The number of acres leased per month in sage-grouse habitat was 3 times higher under the current administration.

? The number of acres leased per month in priority habitat was 10 times higher.

? The number of drilling permits approved per month in sage-grouse habitat was twice as high.

? The number of drilling permits approved per month in priority habitat was 7 times higher.

See, Oil and Gas Development on Federal Lands and Sage-Grouse Habitats October 2015 to March 2019, Western EcoSystems Technology, Inc.⁷ This translates to millions of acres leased and thousands of drilling permits issued. By exercising its authority to require prioritization of leasing and drilling outside habitat, the Forest Service will best comply with its mandates to support species and ecosystem viability, sustainability, and diversity for sage-grouse, which is especially important given that the grouse is designated a species of conservation concern.

⁷ Available at https://www.audubon.org/sites/default/files/greater_sage-grouse_habitat_reportfinal_20190725.pdf and attached as Exhibit 5.

Recommended changes to improve the Proposed Plan Amendments: We recommend the following approaches for prioritizing leasing and development outside sage-grouse habitat.

Leasing: Based on the limited amount of Forest Service lands with sage-grouse habitat and the fact that issuance of a lease is an irretrievable commitment of resources (See, e.g., *Pennaco Energy, Inc. v. U. S. DOI*, 377 F.3d

1147, 1160 (10th Cir. 2004)), we recommend that the Forest Service require a higher showing of protection before leasing can occur in habitat. In addition, since the no surface occupancy stipulations and other protective lease stipulations that are in use are less certain to apply, given the broadening of opportunity for waivers, exceptions and modifications, the best way to protect habitat is to avoid leasing altogether [ndash] relying on the first and most effective tier of the mitigation hierarchy.

We recommend that the Forest Service not consent to leasing in PHMA or GHMA when there is existing anthropogenic disturbance in a Biologically Significant Unit at or above three percent (3%) in Colorado, Idaho, Nevada or Utah, or five percent (5%) in Wyoming. Once the existing surface disturbance levels have been reduced, then leasing can resume. 24

Development: Decisions to approve applications for permits to drill in sage-grouse habitat will be based on the following evaluation of factors:

- Where applications for permits to drill are in high quality/intact habitat, are not in proximity to existing disturbance and/or require additional infrastructure to be developed, they will not be prioritized and opportunities will be evaluated to relocate permits.
- Where applications for permits to drill are not in areas with high or moderate potential, they will not be prioritized.
- Where applications for permits to drill are able to use existing well pads and infrastructure and otherwise avoid surface disturbance and noise impacts to leks, they are more suitable for processing and approval.
- Applications for permits to drill outside priority habitat should be considered for approval prior to parcels in PHMA.

VI. The Forest Service Has Not Met the Requirements Set Out in the Applicable Planning Regulations.

The Proposed Amendments violate the Forest Service's own planning regulations because they do not include plan components that will maintain a "viable population" of greater sage-grouse—a substantive, unambiguous requirement of the regulations.

A. The Planning Regulations Unambiguously Require that Plan Components Maintain a Viable Population of Relevant Species of Conservation Concern.

As an overarching principle, the Forest Service's 2012 planning regulations require that land management plans "maintain or restore" ecosystems' "ecological integrity" and "diversity," including "their structure, function, composition, and connectivity." 36 C.F.R. [sect] 219.9(a).

Additional requirements apply for "species of conservation concern" like the greater sage-grouse. For these species, the Forest Service "shall determine" whether the general plan components provide "the ecological conditions necessary to . . . maintain a viable population of each species of conservation concern within the plan area." Id. [sect] 219.9(b)(1). If they do not, the plan must include species-specific components that do.⁸ Id. A "viable population" is "[a] population of a species that continues to persist over the long term with sufficient distribution to be resilient and adaptable to stressors and likely future environments." Id. [sect] 219.19.

⁸ Even if the Forest Service "determines that it is beyond the authority of the Forest Service or not within the inherent capability of the plan area to maintain or restore the ecological conditions to maintain a viable population of a species of conservation concern in the plan area," the plan must include "components to maintain or restore ecological conditions within the plan area to contribute to maintaining a viable population of the species within its

range." 36 C.F.R. [sect] 219.9(b)(2) (emphasis added).

In other words, on top of a general requirement to maintain ecosystem integrity and diversity, for every species of conservation concern within a given planning area, the plan must include components[mdash]either general or species-specific[mdash]that create the ecological conditions necessary to maintain a population that persists over time and can adapt to stressors and change. 25

Critically, these requirements are substantive, not procedural. They do not, for example, merely require the Forest Service to add species-specific plan components without regard for their efficacy. Rather, the regulations require plan components that will actually maintain long-term viability of species of conservation concern. See, e.g., *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 932 (9th Cir. 2010) (finding plan components violated the pre-2012 planning rules[rsquo] requirement to "maintain viable populations of existing . . . species") (quoting 36 C.F.R. [sect] 219.19 (2000)). The regulations[rsquo] preamble confirms this reading of the plain language:

[the Final Rule] would require that plans use a complementary ecosystem and species-specific approach to provide for the diversity of plant and animal communities and maintain the persistence of native species in the plan area. Ecosystem plan components would be required for ecosystem integrity and diversity, along with additional, species-specific plan components where necessary to . . . maintain viable populations of species of conservation concern.

National Forest System Land Management Planning, 77 Fed. Reg. 21162, 21167 (April 9, 2012).

Nor are these substantive requirements subject to agency interpretation and judicial deference. As the Supreme Court stated in its recent decision regarding Auer deference, "the possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it[mdash]genuinely ambiguous" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019). Here, the regulation is clear on its face, bolstered by an equally clear explanation in the rulemaking process.

Thus, the planning regulations are unambiguous and not open to agency interpretation: as a substantive matter, the Forest Service must write plans that maintain viable populations of greater sage-grouse.

B. The Plan Does Not Include Components that Maintain a Viable Population of Sage-Grouse.

With the planning regulations[rsquo] requirements laid out, the critical question is whether the Final Plan includes components that create ecological conditions necessary to maintain a viable sage-grouse population. The science shows it does not.

Two standards constrain the Forest Service[rsquo]s scientific decision-making. First, procedurally, the planning regulations require the Forest Service to use the "best available scientific information" throughout the planning process. 36 C.F.R. [sect] 219.3. Second, substantively, "[a]n agency violates the APA when it has . . . offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass[rsquo]n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Read together, these standards require the Forest Service to inform itself with the best available science and then justify its decisions in a manner consistent with that science.

Connecting these standards back to the planning regulations, the Forest Service cannot implement (or neglect to implement) plan components if, according to the best available science, 26

the resulting ecological conditions would be insufficient to maintain a viable sage-grouse population.

The 2019 Forest Service Proposed Amendments do not meet the requirement to maintain a viable sage-grouse

population. We have pointed to a number of studies throughout these comments that highlight the importance of preserving sage-grouse habitat at a landscape scale, and that point to the negative impacts of energy development on these habitats and in turn on the bird. Yet, instead of relying on this science to improve protections, thereby ensuring ecosystem integrity and the maintenance of viable populations of sage-grouse, the Forest Service insists on a Proposed Amendment that significantly weakens the protective measures put in place under the 2015 plan. Collectively, these actions will help push the bird towards an endangered species listing:

- The removal of the Sagebrush Focal Areas will jeopardize pristine, irreplaceable habitat that is critical to sage-grouse survival.
- The expansion of waivers, exceptions and modifications to NSO stipulations in oil and gas leases will negatively impact sage-grouse lifecycle activities, such as breeding, further jeopardizing sage-grouse populations.
- The removal of GHMA in Utah will limit the Forest Service's ability to protect sage-grouse habitat from impacts related to energy development, rights-of-way and travel management. GHMA plays an important role in maintaining connectivity between PHMA and studies have shown that disturbances disrupting this connectivity could negatively impact sage-grouse viability.
- The change from a "net conservation gain" standard to a "no net loss" standard will result in an unacceptable loss of habitat further imperiling the sage-grouse.
- The failure to prioritize leasing and development outside habitat will lead to unnecessary degradation and loss of habitat.

As noted, even under the more protective 2015 plan, sage-grouse populations continue to decline at perilous rates. Given these trends it is unclear how the Forest Service can reconcile approving a plan that weakens 2015 protections with its regulatory obligations to ensure viability of the sage-grouse. If anything, the Forest Service should be strengthening 2015 protections.

CONCLUSION

The Objecting Parties hope that you will view the issues and recommended changes in this Objection as opportunities to make further improvements in the final plan amendments that will benefit the survival of the greater sage-grouse and look forward to participating in the next steps in this planning process.

Sincerely,

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