

**BEFORE THE UNITED STATES DEPARTMENT OF THE INTERIOR
AND BUREAU OF LAND MANAGEMENT DATA QUALITY OFFICIALS**

GARFIELD COUNTY, COLORADO)
GRAND COUNTY, COLORADO)
JACKSON COUNTY, COLORADO)
MESA COUNTY, COLORADO)
MOFFAT COUNTY, COLORADO)
RIO BLANCO COUNTY, COLORADO)
CARTER COUNTY, MONTANA)
FALLON COUNTY, MONTANA)
FERGUS COUNTY, MONTANA)
MCCONE COUNTY, MONTANA)
MUSSELSHELL COUNTY, MONTANA)
PHILLIPS COUNTY, MONTANA)
PRAIRIE COUNTY, MONTANA)
RICHLAND COUNTY, MONTANA)
TOOLE COUNTY, MONTANA)
YELLOWSTONE COUNTY, MONTANA)
ELKO COUNTY, NEVADA)
EUREKA COUNTY, NEVADA)
UINTAH COUNTY, UTAH)
WESTERN ENERGY ALLIANCE)
AMERICAN EXPLORATION & MINING)
ASSOCIATION)
COLORADO MINING ASSOCIATION)
COLORADO WOOL GROWERS ASSOCIATION)
INDEPENDENT PETROLEUM ASSOCIATION)
OF AMERICA)
INTERNATIONAL ASSOCIATION OF)
DRILLING CONTRACTORS)
MONTANA ASSOCIATION OF OIL, GAS &)
COAL COUNTIES)
MONTANA PETROLEUM ASSOCIATION)
NEVADA MINING ASSOCIATION)
PETROLEUM ASSOCIATION OF WYOMING)
PUBLIC LANDS COUNCIL)
UTAH MULTIPLE USE COALITION)

**Request for Reconsideration:
Data Quality Act Challenge
to U.S. Department of the Interior
Dissemination of Information
Presented in the Bureau of
Land Management National
Technical Team Report**

August 20, 2015

Petitioners

v.

BUREAU OF LAND MANAGEMENT

**REQUEST FOR RECONSIDERATION OF PETITIONERS' CHALLENGE PURSUANT
TO THE DATA QUALITY ACT**

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I. Introduction

On March 18, 2015, the counties and organizations listed above (the “Petitioners”) submitted their Challenge for Correction of Information (“Challenge”) against the Bureau of Land Management (“BLM”) *Report on National Greater Sage-Grouse Conservation Measures* (the “NTT Report”)¹

The Petitioners requested that BLM retract the NTT Report and all reliance thereon in existing and subsequent Land Use Plan Amendments, as well as decisions on permits and authorizations or issue an amended NTT Report that uses sound analytical methods and the best data available while ensuring transparency and objectivity. However, the Response was superficial and did not even begin to address the totality of issues raised in the Challenge. To summarily dismiss Petitioners’ thoughtful, thorough and extensively researched Challenge with a

¹ BLM, Sage-Grouse National Technical Team, A Report on National Greater Sage-Grouse Conservation Measures, <http://www.blm.gov/pgdata/etc/medialib/blm/co/programs/wildlife.Par.73607.File.dat/GrSG%20Tech%20Team%20Report.pdf> (Dec. 21, 2011).

hollow statement that it will be addressed in a subsequent agency action is unconscionable and unlawful under the Information Quality Act (44 U.S.C. § 3516) (“Data Quality Act,” or “DQA”), the presidential and secretarial orders on scientific integrity and transparency and the Administrative Procedures Act (5 U.S.C. § 701 et seq.) (“APA”).

On July 24, 2015, Anne E. Kinsinger, USGS Associate Director for Ecosystems; Amy Lueders, BLM Active Assistant Director for Resources and Planning; and Gary Frazer, FWS Assistant Director for Ecological Services, provided a combined response (“Response”) to this Challenge and two other challenges submitted by the Petitioners, purportedly addressing the Petitioners’ concerns about peer review, but completely failing to address the substance of the Challenge and the multitude of other serious issues raised in the nearly 200-page Challenge and exhibits.

Petitioners hereby submit this Request for Reconsideration of Petitioners’ Challenge Pursuant to the Data Quality Act (“Request for Reconsideration”) against BLM pursuant to the DQA and the “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information disseminated by Federal Agencies” issued by the Office of Management and Budget (67 Fed. Reg. 8452 (Feb. 22, 2002) (“OMB Guidelines”)), as well as the “Information Quality Guidelines” of the U.S. Department of the Interior (67 Fed. Reg. 50687 (Aug. 5, 2002) (“DOI Guidelines”)) and BLM Guidelines (“BLM Guidelines”)² collectively known as (the “Guidelines”) as well as Presidential memoranda and secretarial orders on scientific integrity and transparency as discussed below.

² BLM, Information Quality Guidelines, http://www.blm.gov/style/medialib/blm/national/national_page.Par.7549.File.dat/guidelines.pdf.

I. Petitioners' Challenge

This Request for Reconsideration addresses BLM's inadequate response and failure to retract or amend the NTT Report. Petitioners renew their concerns that the NTT Report: (1) violates the quality, objectivity, utility, and integrity standards of the DQA and its Guidelines; (2) proposes restrictions that are contrary to the DQA; (3) misrepresents several key issues; (4) is subject to application of the DQA; and (5) does not comply with a myriad of other federal requirements and standards.

II. Disagreements with the BLM Response

Here, the Response improperly and unlawfully side-steps the requirements of the DQA as well as Obama Administration policies, guidelines, directives and orders cited by Petitioners by failing to address the Challenge and suggests instead that it will be included in the Decision File for the BLM Records of Decision on upcoming Land Use Plan Amendments. This is unacceptable, inappropriate and contrary to the DQA and implementing guidelines. Under what authority does the BLM purport to delay responding to Petitioners' multitude of concerns in the Challenge in a subsequent agency action?

Petitioners have numerous issues with the NTT Report that have serious implications for the West. Among many other serious flaws, the NTT Report: fails to recognize that states, local governments and private entities have undertaken significant and successful efforts to conserve GRSG; ignores substantive threats to GRSG (such as raven predation) in favor of pre-conceived notions of human impacts; and fails to recognize that populations of any given species naturally fluctuate with weather patterns.

In its Response, BLM wholly fails to address the examples of bias, conflicts and other peer review issues detailed in explicit detail in some 10 pages of Petitioners' Challenge and

accompanying exhibits.³ Among other significant issues, a small number of specialist-advocates have had a disproportionate influence on formulating federal policy. This insular group is selectively using its own research while ignoring contrary information and the full body of GRSG scientific literature.

Selective use of science creates a narrative that assumes GRSG populations are in decline despite contrary evidence. For example, a recent report from the Western Association of Fish and Wildlife Agencies based on actual data from the 11 western GRSG states documented that the GRSG population grew by nearly two-thirds since 2013 and is now at a very robust 424,645.⁴

For all the reasons herein, Petitioners request reconsideration of their Challenge, including but not limited to:

1. The Response Fails to Address Lack of Transparency

The Response fails to address the issue of BLM's lack of transparency. The NTT Report fails to meet quality and utility standards of the DQA and the Guidelines. OMB Guidelines require a high degree of transparency for influential information such as the NTT Report. BLM failed to provide basic information to the public about the NTT Report, despite the heavy reliance on it in agency decision-making. Only after extensive effort by the Petitioners, involving FOIA requests and litigation, did BLM provide relevant information that should have been disclosed and open for the public review and comment.

2. The Response Fails to Address Reproducibility

The Response fails to address the lack of reproducibility. OMB Guidelines provide a higher standard than even peer review regarding influential information, namely a “substantial

³ See, e.g. pp 18-23 of Petitioners' Challenge.

⁴ Available at: <http://www.eenews.net/stories/1060022897>.

reproducibility standard.”⁵ The NTT Report fails to meet the substantially reproducible standard required under the DQA and the Guidelines

3. The Response Fails to Address Robustness Checks

The Response fails to address the issue of required robustness checks. The NTT Report failed to undergo adequate robustness checks to meet the DQA standards of quality, objectivity, utility and integrity. For example, there are substantial technical errors in the NTT Report including misleading use of authority. Robustness checks are required for ensuring compliance with the DQA because the public will not be afforded any other mechanism for determining the objectivity, utility, and reproducibility of this non-disclosed information. In fact, “agencies shall apply especially rigorous robustness checks to analytic results and document what checks were undertaken.”⁶ DOI and BLM Guidelines mirror this requirement.⁷ The NTT Report underwent no such rigorous checks.

4. The Response Fails to Address Conflicts of Interest

The Response fails to address the issue of conflicts of interest. A number of the relevant regulations and guidance stress the importance of independence⁸ and the need to avoid conflicts of interest.⁹ In this case, a small number of GRSG specialist-advocates have had a

⁵ OMB Guidelines, 67 Fed. Reg. 8452, 8457 (Feb. 22, 2002).

⁶ OMB Guidelines V3.b.ii.B.ii (emphasis added).

⁷ BLM Guidelines 2(c).

⁸ Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities 59 Fed. Reg. 34270 (Jul. 1, 1994); OMB Peer Review Bulletin; Memorandum for the Heads of Executive Departments and Agencies. 74 Fed. Reg. 10671 (Mar. 11, 2009), available at: <http://www.gpo.gov/fdsys/pkg/FR-2009-03-11/pdf/E9-5443.pdf> (<http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf>); Performance Work Statement for Scientific, Technical and Advisory Services (http://www.fws.gov/informationquality/peer_review/IDIQ_Performance_Work_Statement_17Nov2011.pdf); Information Quality Guidelines and Peer Review (http://www.fws.gov/informationquality/topics/InformationQualityGuidelinesrevised6_6_12.pdf).

⁹ Policy on Committee Composition and Balance and Conflicts of Interest for Committees Used in the Development of Reports (<http://nationalacademies.org/coi/>); Final Information Quality Bulletin for Peer Review 70 Fed. Reg. 2664 (Jan. 14, 2005); Memorandum for the Heads of Executive Departments and Agencies (<http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf>);

disproportionate influence on formulating federal policy including their overlapping participation in preparation of the NTT and COT Reports as well as the highly influential USGS GRSG Monograph and peer reviews thereon. The conflicts of interest that permeate the NTT Report violate numerous sources of authority, including the DQA, its implementing Guidelines, the DOI Manual, NAS policy and various secretarial orders and presidential memoranda discussed herein.

5. The Response Fails to Address Peer Review

The Response failed to address the significant issues with the peer review process. The NTT Report failed to undergo adequate peer review as required by the DQA, the Guidelines and the presidential and secretarial orders and memoranda. The Challenge detailed numerous areas in which the peer review was inadequate, including peer review standards, conflicts of interest of reviewers, failure of the peer review to undergo public comment, lack of peer review transparency, and the lack of objectivity.

6. The Response Fails to Address Best Available Science

The Response failed to address that the NTT Report was not based on the best available science. The NTT Report and the studies cited therein fail to meet the best available science standards. The information disseminated also failed to meet DQA standards for quality, objectivity, integrity and utility. Significant uncertainties were ignored and conjecture and opinion are presented as facts.

7. The Response Fails to Address Lack of Objectivity

The Response failed to address the bias and lack of objectivity. The NTT Report failed to meet DQA standards for quality and integrity. It is biased by the use of policy-driven assumptions, inferences, and uncertainties that are not supported by scientific data. The NTT

Report inadequately treats uncertainties through presumptive interpretations of data, inaccurate portrayal of threats and differential treatment of environmental factors. BLM clearly failed to address these fundamental shortcomings with the NTT Report and failed to adequately explain assumptions, limitations and bias in the information disseminated.

8. The Response Fails to Address Selective Citations

The Response failed to address the selective citations used in the NTT Report. The NTT Report selectively presents information while ignoring information contrary to its preferred conservation measures. Rather, it represents a partial presentation of scientific information to justify a narrow range of preferred conservation measures and policies.

9. The Response Fails to Address Unfounded Restrictions on Human Activities

The Response failed to address the NTT Report's unfounded restrictions on human activities. Despite the lack of scientific support, the NTT Report proscribes land management actions such as: four-mile No Surface Occupancy of active leks; limits on surface disturbance; manage sagebrush cover; and right-of-way exclusion and avoidance areas. In addition, the BLM proposes arbitrary conservation measures that are not supported by scientific research.

10. The Response Fails to Address Misrepresentations

The Response failed to address Misrepresentations. The Petitioners' Challenge detailed the NTT Report's misrepresentation of several key issues including: GRSG populations trends and persistence; natural population fluctuations; predation and predator control; hunting; West Nile Virus; existing regulatory mechanisms; livestock grazing; state, local, and private conservation efforts; and multiple-use mandates.

III. The DQA Applies to the NTT Report

The Petitioners' Challenge shows that the NTT Report is subject to the DQA and Guidelines, as it is an "Information Dissemination Product."¹⁰ The NTT Report qualifies as highly influential information¹¹ and if uncorrected, the NTT Report will cause substantial harm to Petitioners and the West. The superficiality of the Response indicates BLM did not take its obligations under the DQA or the many other authorities cited in the Challenge seriously. Referring to a future action not directly related to the action at hand does not even begin to constitute an adequate response and fulfillment of obligations under the DQA.

IV. The Response Ignores Compliance with other Federal Standards and Requirements

In addition to the failure of the NTT Report to comply with the DQA and Guidelines, it also fails to comply with Presidential direction on scientific integrity and transparency, DOI scientific integrity standards, and possibly the Paperwork Reduction Act. The Response wholly fails to recognize and address these concerns.

V. Petitioners' Challenge was not Duplicative, Unnecessary or Unduly Burdensome

BLM may not abdicate its duties under the DQA or the other standards and requirements discussed at length in Petitioners' Challenge because it intends to publish Records of Decisions on Land Use Plan Amendments at a future date. BLM has simply failed address substantive and serious concerns with transparency, peer review and integrity in any meaningful way. Accordingly, the BLM Response is unlawful pursuant to the DQA as well as arbitrary and capricious.

¹⁰ OMB Guidelines, 67 Fed. Reg. 8452, 85460 (Feb. 22, 2002).

¹¹ OMB Guidelines, 67 Fed. Reg. 8452, 8455 (Feb. 22, 2002).

VI. The Response was Arbitrary and Capricious

The U.S. Supreme Court has held that an agency decision is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Also, an agency action is arbitrary and capricious if the agency fails to “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 158 (1962)).

Here, the BLM Response fails to articulate a rational explanation for the scant conclusions contained therein. BLM has wholly failed to meet its obligations under the DQA in its Response.

VII. The Petitioners and their Contact Information

Petitioners are affected persons or organizations¹² as they may use, be benefited by, or be harmed by the disseminated information. Petitioners have a direct interest in the quality and integrity of agency science and decision making, to ensure effective conservation. The Petitioners engage in ranching, grazing, mining, and energy development on multiple-use federal, state and private lands throughout the West, or are counties that rely on these activities for their economic and social viability. The Petitioners are particularly attuned to how the NTT Report affects management of public lands in the West. The management restrictions, regulatory measures, and closures recommended in the NTT Report will negatively impact the economy,

¹² BLM Guidelines 4(b).

the future viability of countless communities, local governments, small businesses, family farms and ranches, mining enterprises, electricity and oil and natural gas development in the West.

The Petitioners' primary representatives can be reached at the following addresses:

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Petitioners

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Attorney for Petitioners

VIII. Procedure

Upon receiving a request for reconsideration, the Assistant Director, Information Resources Management ("AD-IRM"), or their designee, must chair a panel which will make a decision on the appeal within 60 calendar days of receipt of the appeal.¹³ A further appeal can be made, if necessary, to the BLM Director. Final decisions are to be made within 60 calendar days.¹⁴

IX. Conclusion

The NTT Report is a highly influential document, as BLM and USFS are using it to make substantial land use decisions across nearly 60 million acres of public lands throughout 11 western states. As such, it must adhere to the standards of quality, integrity, objectivity and utility in the Data Quality Act as well as administration standards of scientific integrity and transparency.

The Petitioners respectfully request that BLM retract the NTT Report and all reliance thereon in existing and subsequent Land Use Plans Amendments, as well as decisions on permits and authorizations. Alternatively, BLM could, as required by the DQA and the Guidelines, issue

¹³ BLM Guidelines 4(i).

¹⁴ *Id.*

an amended NTT Report that uses sound analytical methods and the best data available while ensuring transparency and objectivity. Any amended Report should incorporate all reliable information, not just the data supporting false hypotheses. It should also identify the limitations of data used rather than stating assumptions as fact. Finally, any amended Report should use and include the best available data as discussed herein.

Respectfully submitted this 20th day of August, 2015.

Holsinger Law, LLC

A handwritten signature in black ink, appearing to read 'K. Holsinger', with a stylized flourish at the end.

Kent Holsinger
Attorney for Petitioners