



***Bureau of Land Management
Director's Protest Resolution Report***

**Northwest Colorado Greater
Sage-Grouse Proposed
Resource Management Plan
Amendment and Final
Environmental Impact
Statement (PRMPA/FEIS)**

March 15, 2019

This page intentionally left blank.

Contents

Acronyms.....	ii
Protesting Party Index.....	1
Endangered Species Act Consultation.....	1
FLPMA—ACECs/RNAs.....	2
FLPMA—Consistency with State and Local Plans.....	3
FLPMA—Fluid Minerals.....	5
FLPMA—General.....	7
FLPMA—Mitigation.....	11
FLPMA—Multiple Use.....	12
FLPMA—Special Status Species.....	14
FLPMA—Unnecessary or Undue Degradation (UUD).....	17
NEPA—Best Available Science.....	18
NEPA—Cooperating Agencies.....	23
NEPA—Cumulative Effects.....	24
NEPA—Impacts Analysis—General.....	27
NEPA—Impacts Analysis—Greater Sage-Grouse.....	28
NEPA—Impacts Analysis—Oil and Gas.....	30
NEPA—Mitigation.....	34
NEPA—Public Participation.....	36
NEPA—Purpose and Need.....	37
NEPA—Range of Alternatives.....	38
NEPA—Response to Public Comments.....	39
NEPA—Supplemental EIS.....	41
NEPA—Tiering/Incorporation by Reference.....	43
Other Laws.....	44
Protest Process.....	47

Acronyms

ACEC	area of critical environmental concern
AMS	analysis of the management situation
BLM	Department of the Interior, Bureau of Land Management
CEQ	The Council on Environmental Quality
CFR	Code of Federal Regulations
COT	Conservation Objectives Team
CPW	Colorado Parks and Wildlife
DOI	Department of the Interior
EIS	environmental impact statement
ESA	Endangered Species Act
FLPMA	Federal Land Policy and Management Act
Forest Service	United States Forest Service
GHMA	general habitat management area
IM	Instruction Memorandum
MD	management decision
MMPRDA	Materials and Minerals Policy, Research and Development Act of 1980
NEPA	National Environmental Policy Act
OFR	open file report
PHMA	priority habitat management area
RMP	Resource Management Plan
RNA	research natural areas
SFA	sagebrush focal areas
SO	Secretarial Order
SSS	special status species
USC	United States Code
USFWS	United States Fish and Wildlife Service
USGS	United States Geological Survey
UUD	unnecessary or undue degradation
WAFWA	Western Association of Fish and Wildlife Agencies

Protesting Party Index

Protester	Organization	Determination
Amber Swasey, Rose Pugliese, John Justman, Scott McInnis	Mesa County, Colorado	Dismissed – No Relevant Issues
Angela Busceme	N/A	Dismissed – No Standing
Carrie Mann	Friends of the Earth	Dismissed – Comments Only
Chris Talbot-Heindl	N/A	Dismissed – Comments Only
Christie Greene	N/A	Dismissed – Comments Only
Delia Malone	Sierra Club, Colorado Chapter	Denied – Issues and Comments
Eric Freeman	Rocky Mountain Wild	Denied – Issues and Comments
Georgia Kofoed	Augustus Energy Partners	Denied – Issues and Comments
Kent Holsinger	Board of Commissioners of Garfield County	Denied – Issues and Comments
Greta Anderson, ¹ Nancy Hilding, Michael Saul, Mark Salvo, Karimah Schoenhut, Rebecca Fischer, Steve Holmer,	Western Watersheds Project, ¹ Prairie Hills Audubon Society, Center for Biological Diversity, Defenders of Wildlife, Sierra Club Environmental Law Program, WildEarth Guardians, American Bird Observatory,	Denied – Issues and Comments
Michael Wetzell	N/A	Dismissed – No Standing
Nada Culver, ² Brian Rutledge, Luke Schafer, Megan Mueller Suzanne O’Neill, Jayson O’Neill, Mary Greene, Robert McEnaney	The Wilderness Society, ² National Audubon Society, Conservation Colorado, Rocky Mountain Wild, Colorado Wildlife Federation, Western Values Project National Wildlife Federation, Natural Resources Defense Council	Denied – Issues and Comments
Paul Lajeunesse	N/A	Dismissed – Comments Only
Ray Beck	Moffat County Board of Commissioners	Denied – Issues and Comments
Tim Hogan	N/A	Denied – Issues and Comments
Tonya Stevenson	N/A	Dismissed – No Standing
Tripp Parks	Western Energy Alliance	Denied – Issues and Comments

¹ This letter was cosigned by multiple parties. In this report, it is referenced as Greta Anderson, Western Watersheds Project. This letter was doubly submitted by Greta Anderson (WWP) and Michael Saul (CBD).

² This letter was cosigned by multiple parties. In this report, it is referenced as Nada Culver, The Wilderness Society

Endangered Species Act Consultation

The Wilderness Society

Nada Culver

Issue Excerpt Text: The changes made in the Proposed Amendments will also affect plants and wildlife species, including those that are listed as threatened or endangered under the ESA. Since these are new risks of harm, related to the new purpose and need, circumstances and policies that underly these Proposed Amendments, BLM cannot rely on findings from the 2015 ESA consultations.

Summary: The BLM cannot rely on findings from the 2015 Endangered Species Act (ESA) consultations because there are new risks of harm related to the new purpose and need, circumstances, and policies that underlie the Proposed Plan Amendment.

Response: According to Section 7 of the Endangered Species Act, the BLM must consult with the USFWS for actions that may affect endangered species.

In 2015, the BLM Colorado consulted with the USFWS, which concurred that the proposed action was not likely to affect any listed species. In 2018, the BLM Colorado determined that the proposed action was substantially similar to the 2015 decision (no allocation changes) and did not request additional consultation with the USFWS. The BLM fulfilled its obligations under Section 7 of the Endangered Species Act.

Because the BLM has fulfilled its obligations under Section 7 of the Endangered Species Act, the BLM denies this protest.

FLPMA—ACECs/RNAs

Western Watersheds Project

Greta Anderson

Issue Excerpt Text: As WWP et al. (2018) stated in comments and protests of the 2015 ARMPAs and their Complaint challenging the adequacy of those ARMPAs, BLM has failed to carry out its FLPMA-mandated obligation to prioritize the designation and protection of areas of critical environmental concern (ACECs) by failing to designate sage-grouse habitat as an ACEC. WWP et al. 2018. Nevertheless, BLM never even considered designating sage-grouse ACECs in the process of producing the PRMP, let alone prioritizing such designation. This violated NEPA and FLPMA.

Summary: The BLM has violated FLPMA by failing to prioritize the designation and protection of areas of critical environmental concern (ACECs) by not designating Greater Sage-Grouse habitat as an ACEC. The BLM violated NEPA by not considering ACECs in the process of producing the Proposed RMP Amendment/Final EIS.

Response: The BLM must carry forward all potential ACECs as recommended for designation in at least one alternative in the Draft RMP Amendment/Draft EIS (BLM Manual Section 1613.22.B). There is no requirement to carry forward potential ACECs into the Proposed RMP Amendment/Final EIS.

The BLM has full discretion in selecting ACECs for the various alternatives. A comparison of estimated effects and trade-offs associated with the alternative leads to development and selection of the Proposed RMP Amendment/Final EIS. BLM Manual 1613.33.E provides direction for when the BLM may choose not to designate potential ACECs.

The BLM properly considered and analyzed the designation of ACECs in 2015; no new information suggests it is necessary to reconsider those decisions. The BLM has determined the issue of ACECs to fall outside the scope of this effort to better align federal management with state management plans.

The BLM considered ACECs in the 2015 plan, and there is no new information to suggest that it is necessary to reconsider those decisions. Moreover, the BLM has determined the issue of ACECs falls outside the scope of this effort; because of these factors, the BLM denies this protest.

FLPMA—Consistency with State and Local Plans

Moffat County Board of Commissioners

Ray Beck

Issue Excerpt Text: Moffat County hosts 70 percent of Colorado’s sage-grouse habitat, nearly 1.2 million acres or 40 percent of the County. Despite this overwhelming stake in conservation of sage-grouse, BLM repeatedly ignored Moffat County’s suggestions and deferred to the State of Colorado’s suggestion -for example, BLM explicitly states that it will defer to the State when quantifying habitat offsets. See e.g., FEIS at 2-9. Moreover, the BLM incorrectly assumes that the State of Colorado speaks for Moffat County. This is patently incorrect and ignores the fact that local governments participate on equal footing with state governments. Compare 43 C.F.R. § 1610.3-1(a) with § 1610.3-1(c).

Summary: The BLM must provide local governments with an “opportunity for review, advice, and suggestion on issues and topics which may affect or influence other agency or other government programs” (CFR 1610.3-1(c)). This duty is not satisfied by providing an opportunity to state governments, id., nor is it satisfied by providing meaningful input to the public (CFR 1610.2). The BLM’s rules mirror the same independent treatment of local governments in FLPMA. See 43 US Code (USC) 1712(c)(9), and (f).

Response: 43 CFR 1610.3-1(c) states that, “State Directors and Field Managers shall provide other Federal agencies, State and local governments, and Indian tribes opportunity for review, advice, and suggestion on issues and topics which may affect or influence other agency or other government programs.”

The BLM held cooperating agency meetings on April 6 and August 30, 2018, and an additional question and answer period in Craig, Colorado, on December 19, 2018. Moffat County signed a memorandum of understanding (MOU) to fully participate in the EIS process as a cooperating agency. As a cooperating agency, the County provided valuable input on both the 2015 and 2018 plans. The MOU further defines the cooperating agency status, including providing Moffat County the opportunity to, as follows:

- Provide a consistency review with County plans, policies, and ordinances, identifying where inconsistencies exist and why consistency is not possible and any plausible ways to correct inconsistencies (43 Code of Federal Regulations (CFR) 1610.3-2 (a)(b)(c))
- Recognize the County’s responsibility and need for maintaining valued customs, varied cultures, and community stability (42 USC 4331(b))
- Provide the County with an opportunity to review, advise, and provide suggestions on issues and topics that may affect or influence County programs; in other words, the County may participate as a member of the planning team
- Include the County as a full partner in preparing alternatives and reviewing alternatives analysis and in all other planning activities, as provided for by its status as a cooperative agency
- Prepare a detailed economic analysis on planning actions that may adversely affect the County tax base or economy
- Provide the County with the opportunity to participate in developing schedules for planning activities, to the extent possible
- Incorporate in the Proposed RMP Amendment/Final EIS, to the maximum extent possible, the comments, recommendations, and data submitted by Moffat County during the complete planning process
- Agree that all documents provided to the BLM for this agreement will be protected to the fullest extent possible from review or release to individuals and entities, other than the parties and their designates, if the records are considered part of the deliberation process

The BLM provided Moffat County with the opportunity to provide review, advice, and suggestions and to provide special expertise, independent of other cooperating agencies and consistent with the cooperating agency MOU; therefore, the BLM denies the protest.

Western Energy Alliance

Tripp Parks

Issue Excerpt Text: Rather than adopting Colorado’s conservation mechanisms, the PRMPA adopts the 2015 plan amendment with only a few minor modifications. These changes do not provide the operational relief or flexibility needed for access and continued development of oil and natural gas resources, or otherwise alleviate the unduly onerous and unlawful restrictions carried forward from the 2015 plan amendment. The FEIS should adopt procedures applicable to oil and natural gas lessees that are consistent with the COGCC rules and the Colorado Package. Failing to do so will result in a violation of FLPMA.

Summary: The BLM is in violation of FLPMA because it failed to adopt procedures applicable to oil and natural gas leases that are consistent with the Colorado Oil and Gas Conservation Commission (COGCC) rules and the Colorado Package (for managing Greater Sage-Grouse).

Response: Section 202(c)(9) of FLPMA requires that “land use plans of the Secretary under this section shall be consistent with state and local plans to the maximum extent [s]he finds consistent with federal law and the purposes of this act”; however, BLM land use plans may be inconsistent with state, local, and tribal plans, where it is necessary to meet the purposes, policies, and programs associated with implementing FLPMA and other federal laws and regulations applicable to public lands (43 CFR 1610.3-2(a)).

40 CFR 1506.2(d) requires that EISs “discuss any inconsistency of a proposed action with any approved state or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.”

In accordance with these requirements, the BLM has considered state, local, and tribal plans that are germane to the development of the Colorado Proposed RMP Amendment/Final EIS. The BLM has worked closely with state, local, and tribal governments during its preparation. Chapter 5 describes coordination that has occurred throughout the development of the Colorado Proposed RMP Amendment/Final EIS. A list of these local, state, and tribal plans can be found in Section 1.6. As described under Table 2-2, the BLM’s land use planning decisions for oil and gas availability were modified to improve alignment with state management for the species – namely through its decisions about availability of leasing within one mile of leks and decisions about conditions under which waivers, exceptions, and modifications would be granted for NSO stipulations in PHMA. The agency will discuss why any remaining inconsistencies between the Colorado Proposed RMP Amendment/Final EIS and relevant local, state, and tribal plans cannot be resolved in the Record of Decision (ROD).

Because the BLM properly followed the provisions of FLPMA regarding public involvement and consistency with state and local plans, rules, and regulations, the BLM denies this protest.

Moffat County Board of Commissioners

Ray Beck

Issue Excerpt Text: Unlawful delegation of decision-making authority to CPW interferes with Moffat County’s land management authority.

Western Energy Alliance**Tripp Parks**

Issue Excerpt Text: The Federal Land Policy and Management Act (FLPMA) includes a directive that land use plans “shall be consistent with” state and local land use programs “to the maximum extent” consistent with federal law. There are significant inconsistencies between the PRMPA and the Colorado Greater Sage-Grouse Conservation Plan and Colorado Executive Order No. D 2014-004, Conserving Greater Sage-Grouse Habitat (Colorado Package) that result in a violation of the FLPMA directive.

Moffat County Board of Commissioners**Ray Beck**

Issue Excerpt Text: The 2018 Plan is inconsistent with local government land use plans and the NWC Plan in violation of NEPA and FLPMA. Attach. I at 8-9, 11- 12, 13-14, 16-18,23-25,92. BLM met with Moffat County only to inform the Commissioners that decisions, compromises, and agreements had been made with Colorado Parks and Wildlife (“CPW”) and what the Proposed Plan would include rather than providing Moffat County any meaningful opportunity to participate or to resolve any issues with the 2018 Plan despite the county’s statutory rights to participate equally under FLPMA...

Summary: The Proposed RMP Amendment/Final EIS improperly delegates authority to CPW and is inconsistent with the Colorado Greater Sage-Grouse Conservation Plan and Colorado Executive Order No. D 2014-004, and local government land use plans, which is a violation of FLPMA.

Response: Section 202(c)(9) of FLPMA requires that “land use plans of the Secretary under this section shall be consistent with state and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act”; however, BLM land use plans may be inconsistent with state, local, and tribal plans where it is necessary to meet the purposes, policies, and programs associated with implementing FLPMA and other federal laws and regulations applicable to public lands (43 CFR 1610.3-2(a)).

In accordance with this requirement, the BLM has considered state, local, and Tribal plans that are germane to the development of the Colorado Proposed RMP Amendment/Final EIS. The BLM has worked closely with state, local, and tribal governments during its preparation. Chapter 5 describes coordination that has occurred throughout the development of the Proposed RMP Amendment/Final EIS. A list of the local, state, and tribal plans that the BLM considered can be found in Section 1.6. In the ROD, the BLM will discuss why any remaining inconsistencies cannot be resolved. The Proposed Plan does not delegate authority to CPW; BLM retains decision-making authority in cooperation and coordination and coordination with the state, in recognition of its expertise in management of the species.

Because the BLM properly followed the provisions of FLPMA regarding public involvement and consistency with state and local plans, rules, and regulations, the BLM denies this protest.

FLPMA—Fluid Minerals**Moffat County Board of Commissioners****Ray Beck**

Issue Excerpt Text: Combined, the 4 mile buffer and the NSO prescriptions blot out about 1.1 million acres in Moffat County. See Attach. 8, 03/ 19112 CPW Sage-Grouse Habitat Map. According to the 2018 FEIS, approximately 34 percent of the federal mineral estate in PHMA is currently unleased, including approximately 29 percent with high potential for oil and gas. FEIS at 4-5.3 There is no possible way to access these unleased parcels by directional drilling or horizontal drilling. Thus, there is no

difference between NSO and no leasing for the purposes of the eastern half of Moffat County. The closure of any of the major land uses affecting more than 100,000 acres requires a report to Congress. 43 U.S.C. § 1712(e). The closure of land to mineral development affecting more than 5,000 acres requires a withdrawal and a report to Congress. *Id.* at § 1714(c). A land use decision to close public lands to oil and gas leasing, therefore, is a de facto withdrawal without complying with FLPMA withdrawal procedures. *Id.* at § 1714(c); see e.g., Clayton W Williams, Jr., Exxon CO1p., 103 IBLA 192, 205A (1988) (informal [sic] agreement resulting in a lease moratorium “‘fit squarely’ within the definition of withdrawal as found in FLPMA,” which could only be implemented under the procedures in 43 U.S.C. § 1714.). The NSO prescription, is precisely the same type of moratorium as found in Clayton W Williams and requires a withdrawal and a report to Congress. *Id.* at § 1714(c) & (e).

Summary: The Proposed RMP Amendment/Final EIS improperly withdraws public lands from oil and gas development. The BLM must follow the withdrawal procedures.

Response: 43 USC 1712(e) requires and lays out the procedures for notifying Congress of “any management decision or action pursuant to a management decision that excludes (that is, totally eliminates) one or more of the principal or major uses for two or more years with respect to a tract of land of one hundred thousand acres or more.”

A closure of areas to oil and gas leasing during the planning process does not constitute a withdrawal under section 204 of FLPMA. Moreover, “no surface occupancy” does not constitute closure of the resource. Further, the waivers, exceptions, and modifications in this plan allow for site-specific flexibility in order to provide access for development. The proposed decision requires coordinating with the State of Colorado when considering the application of a waiver, exception, or modification and invites the County to engage with the BLM in related land use planning decisions. Counties will also be able to submit relevant information to BLM and the state for site specific determinations on whether to grant a WEM.

Because the Proposed RMP Amendment/Final EIS does not actually withdraw public lands from oil and gas leasing or development, the BLM denies this protest.

Western Energy Alliance Tripp Parks

Issue Excerpt Text: The FEIS may result in valid existing rights being violated through the imposition of overly restrictive stipulations. While BLM states that valid existing rights will be honored, the PRMPA could restrict these leases because it imposes a 3% disturbance cap, a density cap of 1 disruptive facility per 640 acres, and lek buffers.

Summary: The Proposed RMP Amendment/Final EIS creates the potential for violating valid existing rights, such as oil and gas leases.

Response: The Proposed RMP Amendment/Final EIS does not conflict with any valid existing rights, including those of oil and gas lessees.

As the Proposed RMP Amendment/Final EIS explains, any amendment to the plans would be subject to valid existing rights (see p. 1-6). For example, on page 1-8, it clarifies the use of lek buffers from the 2015 Approved RMP Amendment/Record of Decision with the following replacement text: “In undertaking BLM management actions, and consistent with valid and existing rights and applicable law in authorizing third-party actions, the BLM will evaluate the lek buffer distances during project-specific NEPA analyses, in accordance with Appendix H (Guidelines for Implementation and Adaptive Management). Appendix B of the [2015 Approved RMP Amendment/Record of Decision] will not be

carried forward.” Chapter 2 (p. 2-9) also states that “When authorizing third-party actions in designated Greater Sage-Grouse habitat, the BLM will seek to achieve the planning-level Greater Sage-Grouse management goals and objectives through implementation of mitigation and management actions, consistent with valid existing rights and applicable law.” In other words, if the application of a particular measure in the plan would interfere with valid existing rights, BLM would either not impose that measure or impose it only in a manner consistent with that right.

It should be noted that the BLM may restrict development of an existing oil and gas lease through conditions of approval (COAs) consistent with existing lease rights. When making a decision on discrete surface-disturbing activities, such as applications for permits to drill, following site-specific environmental review, the BLM has the authority to impose reasonable measures, such as COAs, to minimize impacts on other resource values. This includes restricting the siting or timing of lease activities (43 CFR 3100 and 3160; Interior Board of Land Appeals (IBLA) 2006-213 and -226 and 2008-197 and 200).

For the reasons stated above, the BLM denies this protest.

FLPMA—General

The Wilderness Society

Nada Culver

Issue Excerpt Text: BLM cannot delegate its ultimate authority to make decisions regardless of whether the information is provided by a contractor, project applicant or cooperating agency. See, e.g., 40 C.F.R. § 1506.5 (Agency responsibility) (“The agency shall independently evaluate the information submitted and shall be responsible for its accuracy.”); IM 2006-011 (“The State Director/Field Manager holds final decision authority regarding data used, alternatives studied in detail, analyses conducted, and document content and quality.”); BLM NEPA Handbook H-1790-1, Section 12.2 (BLM can adopt a joint EIS as co-lead agencies “as long as it is clear that only the BLM decision-maker is making a decision regarding resources under BLM authority.”).

Western Watersheds Project

Greta Anderson

Issue Excerpt Text: Finally the plan abdicates too much federal authority to the states. There are multiple problems with the proposed plan’s approach that gives increased and undue authority to the state. First, there is no legal or regulatory basis for giving state governments’ interests more consideration than other interested parties. While it’s true that FLPMA, by its own terms, does not diminish states’ authority to manage wildlife, neither does FLPMA instruct BLM to defer to the states. States’ views are but one of many perspectives that the agency should consider, just as extractive uses should not be given preferential treatment under the “multiple use” mandate. Second, the states have already shown that they are poor managers of sage-grouse, as demonstrated by the discussion of current regulatory mechanisms in FWS’s 2010 “warranted but precluded” decision. Finally, BLM has an affirmative obligation to manage federal lands for wildlife conservation, even if states have different views. According to Nie et al.’s (2017) review of federal wildlife management authority, federal agencies are often too deferential to states, and the management scheme described in the FEIS would exacerbate this shortcoming. We protest on this basis.

Western Energy Alliance

Tripp Parks

Issue Excerpt Text: Requiring consultation with Colorado Parks & Wildlife expands decision-making authority on whether to grant an exception to parties beyond BLM.

Western Energy Alliance**Tripp Parks**

Issue Excerpt Text: The PRMPA improperly cedes BLM’s authority relating to modification and waiver of lease stipulations such as no surface occupancy (NSO) within one mile of a lek.

Moffat County Board of Commissioners**Ray Beck**

Issue Excerpt Text: There is no language in FLPMA that authorizes delegation to a state agency. See *Frankl v. HTH Co l.p.*, 650 F.3d 1334, 1352 (9th Cir. 2011) (It is not permissible for an agency to delegate authority to a non-subordinate agency, absent congressional authorization). Nor did congress give CPW authority elsewhere to manage federal lands. See *infra* Vill(B). Although the State of Colorado enjoys authority over wildlife only a federal land agency may manage the federal land. Colorado or any state agency has no authority to manage federal land. Thus the provisions that grant final authority to CPW decide whether to grant a waiver or exception violates the fundamental division between state and federal authority. As is evident by Colorado Statutes, CPW works to manage wildlife in Colorado and thus their mission is fundamentally different than the BLM’s multiple use mandate for federal lands. BLM’s relinquishment of its authority to CPW is blatant.

Moffat County Board of Commissioners**Ray Beck**

Issue Excerpt Text: Moffat County vigorously objected to the BLM’s delegation of authority to the Colorado Parks and Wildlife to approve or deny WEMs. Attach. 4, at 6-7. Moffat County also raised this issue during meetings with BLM on April 4, 2018.

Moffat County Board of Commissioners**Ray Beck**

Issue Excerpt Text: The BLM unlawfully delegates to CPW final decision making authority to approve waivers, exceptions and modifications without any authority in FLPMA to delegate that ability to a state agency...

Western Watersheds Project**Greta Anderson**

See also: Other Laws

Issue Excerpt Text: This delegation violates BLM’s Congressionally-imposed statutory obligation under the Property Clause and Federal Land Policy and Management Act to manage public lands on behalf of the United States.

Moffat County Board of Commissioners**Ray Beck**

Issue Excerpt Text: when the BLM states in the 2018 Plan that it will “defer” to the State’s framework, the BLM assumes that it may defer to the State’s framework when it is clear that the State has no authority over federal lands and the standard that the State would impose conflicts with federal law (i.e. FLPMA). The adoption of the State’s framework and standard therein is arbitrary, capricious, or otherwise not in accordance with established law. See Attach. 4 at 8-9.

Western Watersheds Project**Greta Anderson**

Issue Excerpt Text: The proposed Northwest Colorado plan would unlawfully delegate to counties the authority to determine, at the fluid mineral leasing stage, that protective stipulations previously determined necessary for sage-grouse habitat should not apply.

Summary: BLM has improperly delegated or abdicated too much authority to the states.

Response: The BLM is obligated to coordinate its planning process with state and local governments, to provide for meaningful involvement in the development of resource management plans, and, if possible, to develop RMPs in collaboration with cooperating agencies (43 CFR 1610.3-1(a)(3), (4), and (5)). Further, a BLM land use planning decision must be consistent with officially approved and adopted local land use plans, as long as such local plans are consistent with the purposes, policies, and programs of federal laws and regulations (43 CFR 1610.3-2(a)).

The BLM has not delegated or abdicated authority to the states. As specified in the Proposed RMP Amendment/Final EIS's purpose and need, FLPMA specifically does not enlarge nor diminish the authority of the states in managing fish and wildlife. As the sovereign entities with the lead role in managing game species, including Greater Sage-Grouse, states play a critical role in conserving the species and its habitat. Protestors misread the proposed amendment as an unlawful abdication, but the BLM is simply fulfilling its obligation to collaborate and coordinate with state and local plans.

The BLM continues to build on the 2015 Approved RMP Amendment/Record of Decision, as envisioned in Secretarial Order (SO) 3353. It does this by collaborating with states and stakeholders to improve compatibility between federal management plans and state plans and programs at the state level, while ensuring consistency with the BLM's multiple use mission and obligation to protect Greater Sage-Grouse habitat. The proposed amendments are consistent with the BLM's discretionary authority to balance multiple uses in a manner that remains consistent with federal law. Moreover, the protestors inaccurately state that the plan delegates the BLM's authority to *determine* whether protective measures would apply to oil and gas leasing and development, when in fact the plan only provides for consultation with and input from state and local governments. BLM does not delegate any of its decision making authority.

For the reasons stated above, the BLM denies this protest.

Western Watersheds Project

Greta Anderson

See also: NEPA—Public Participation; NEPA—Supplemental EIS

Issue Excerpt Text: Contrary to BLM's representation, the changes introduced between the Northwest Colorado DEIS and FEIS are highly significant. Major changes since the DEIS include BLM's (unsubstantiated and unlawful) disclaimer of its authority to require compensatory mitigation for unavoidable environmental harm, as well as the previously-undisclosed delegation of lease stipulation exemption and modification determinations to counties. Under NEPA, the agency cannot delay providing information on such significant changes to the FEIS stage.

Summary: The BLM has made significant changes between the draft and final document without public notice or review.

Response: NEPA requires agencies to prepare supplemental EISs if the agency makes substantial changes to the proposed action that are relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns that bear on the proposed action or its impacts (40 CFR 1502.9(c)). "Substantial changes" in the proposed action relevant to environmental concerns are those that would result in significant effects outside of those analyzed in the draft or final EIS (BLM Handbook H-1790-1, p. 29). A supplemental EIS may also be required when a new alternative is added that is outside of the alternatives already analyzed and not a variation of an alternative or a combination of alternatives already analyzed (BLM Handbook H-1790-1, p. 29).

After accounting for state mitigation policies, voluntary mitigation by project proponents, federal and state investment into habitat enhancement and restoration, and environmental contributions to Greater Sage-Grouse habitat changes, such as fire, there are no significant differences in the environmental impacts resulting from mitigation approach between the 2015 and 2018 plans.

As described above, the BLM has not in fact made substantial changes between the draft and final document without public notice or review; accordingly, it denies this protest.

The Wilderness Society

Nada Culver

Issue Excerpt Text: Quite to the contrary, the “process” described by BLM in its response to public comments clearly does not satisfy-nor can it serve as a lawful surrogate for- the AMS required by 43 CFR 1610.4-4 and the BLM’s Land Use Planning Handbook, H-1601-1.

The Wilderness Society

Nada Culver

Issue Excerpt Text: Finally, the public has no means by which to measure the success of the 2015 Sage-grouse Plans without a new AMS.

The Wilderness Society

Nada Culver

Issue Excerpt Text: the BLM violated key provisions of its planning regulations, including the requirement to prepare an analysis of the management situation, or AMS. This analysis, required by 43 CFR 1610.4-4, is an essential first step in the land use planning process.

The Wilderness Society

Nada Culver

Issue Excerpt Text: The BLM’s assertion in its response to comments that “the current management situation is similar in condition to that assessed in 2015” is manifestly false. Since 2015, the 2015 Sage-grouse Plans were in place such that density and disturbance stipulations, compensatory mitigation, net conservation gain, required design features (RFDs), special focal areas (SFAs) etc. were in effect. It is impossible for the public to understand the effects of those management efforts because the management situation has not been evaluated since their implementation.

Summary: The BLM’s reliance on the 2015 Analysis of the Management Situation does not adequately dispense with its obligations under 43 CFR 1610.4-4 and its Land Use Planning Handbook, H-1601-1.

Response: In accordance with 43 CFR 1610.4-4, “The Field Manager, in collaboration with any cooperating agencies, will analyze the inventory data and other information available to determine the ability of the resource area to respond to identified issues and opportunities. The analysis of the management situation shall provide, consistent with multiple use principles, the basis for formulating reasonable alternatives, including the types of resources for development or protection.”

At the beginning of Chapter 3 of the Proposed RMP Amendment/Final EIS, is an explanation that the BLM analyzed the management situation in full compliance with its regulations and policies. The BLM evaluated inventory and other data and information, partnering with the US Geological Survey (USGS) and coordinating extensively with states, to help formulate reasonable alternatives. The BLM described this process in its Report to the Secretary in response to SO 3353 (August 4, 2017). Among other things, the BLM describes how it coordinated “with each State to gather information related to the [Secretary’s] Order, including State-specific issues and potential options for actions with respect to the 2015 GRSB Plans and IMs to identify opportunities to promote consistency with State plans” (Report to

the Secretary at 3.) Implementing that direction, the Proposed RMP Amendment/Final EIS incorporates, as appropriate, information in a USGS report that identified and annotated Greater Sage-Grouse science published since January 2015 (Carter et al. 2018), a report that synthesized and outlined the potential management implications of this new science (Hanser et al. 2018) and other best available science.

The Wilderness Society’s assessment of the BLM’s assertion in response to comments is patently inaccurate and ignores relevant sections of the Proposed RMP Amendment/Final EIS. The BLM’s Analysis of the Management Situation is more than adequate and manifestly compliant with 43 CFR 1610.4-4 and with the BLM’s own Land Use Planning Handbook, H-1601-1.

FLPMA—Mitigation

Moffat County Board of Commissioners

Ray Beck

Issue Excerpt Text: Moreover, with new policies and directives, the BLM lacks any secondary authority to implement a “net benefit”, “net gain”, or other standard that improves sage-grouse habitat as a condition for a permit or lease. See BLM Instruction Memorandum 2018-093 (July 24, 2018); see also U.S. Fish and Wildlife Service Mitigation Policy, 83 Fed. Reg. 364 72 (July 30, 20 18) (“In light of the change in national policy reflected in Executive Order 13783 and Secretary’s Order 3349, the comments received by the Service, and concerns regarding the legal and policy implications of compensatory mitigation, particularly compensatory mitigation with a net conservation gain policy, the Service has concluded that it is no longer appropriate to retain references to or mandate a net conservation gain standard in the Service’s overall mitigation planning goal within each document. Because the net conservation gain standard is so prevalent throughout the Mitigation Policy, the Service is implementing this conclusion by withdrawing the Mitigation Policy.”). The BLM may not implement an “improvement” standard when the DOI has explicitly disclaimed such a policy.

Moffat County Board of Commissioners

Ray Beck

Issue Excerpt Text: Moffat County clearly and plainly explained in its DEIS comments that BLM may not require nor authorize a mitigation standard that would yield a Net Conservation Gain or, under different language, “conservation uplift” or “improvement” under BLM manuals; See Attach. 4, at 8-9.

Moffat County Board of Commissioners

Ray Beck

Issue Excerpt Text: The BLM unlawfully adopts a “conservation uplift” or similar mitigation standard by deferring to the State’s mitigation plan which conflicts with the plain language of FLPMA and, therefore, exceeds BLM’s authority.

Moffat County Board of Commissioners

Ray Beck

Issue Excerpt Text: The FEIS states that “[f]ollowing extensive review of FLPMA, including existing regulations, orders, policies, and guidance, the BLM has concluded that FLPMA does not explicitly mandate or authorize the BLM to require public land users to implement compensatory mitigation to offset environmental effects beyond the proponents level of impact.” FEIS at App. I-9. However, in the Executive Summary, BLM states that in “accordance with BLM Manual 6840, the BLM will undertake planning decisions, actions and authorizations “to minimize or eliminate threats affecting the status of [Greater Sage-Grouse] or to improve the condition of[Greater Sage-Grouse] habitat” across the planning area.” FEIS at ES- 9 (emphasis added).

Summary: The BLM erroneously states that it has no authority to require compensatory mitigation; however, this contradicts the language of the Proposed RMP Amendment/Final EIS, as well as BLM policy found in BLM Manual 6840.

Response: IM 2019-18 states that “Except where the law specifically requires or as described in this IM, the BLM must not require compensatory mitigation from public land users. While the BLM will consider voluntary proposals for compensatory mitigation, and state-mandated compensatory mitigation, the BLM will not accept any monetary payment to mitigate the impacts of a proposed action. In all instances, the BLM must refrain from authorizing any activity that causes unnecessary or undue degradation (UUD), pursuant to FLPMA Section 302(b).”

During the land use planning process, the BLM referred to BLM Manual 6840 (6840.2(B)), which describes how the BLM should address sensitive species and their habitats. The objective was to “initiat[e] proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of these species under the ESA.”

To align this planning with the BLM’s compensatory mitigation policy (IM 2019-18), the Proposed RMP Amendment/Final EIS clarifies that the BLM would consider compensatory mitigation only as a component of compliance with a state mitigation plan, program, or authority, or when offered voluntarily by a project proponent. As described in IM 2019-18, the BLM would evaluate any compensatory mitigation measures required by the State for all action alternatives in its NEPA analysis. Moreover, it would incorporate those measures as enforceable conditions of its authorization, as appropriate. If the project proponent were to volunteer compensatory mitigation as part of the proposed action, the BLM would evaluate compensatory mitigation for all action alternatives. If the state were to recommend compensatory mitigation and the proponent does not include it in the proposed action, the BLM would evaluate compensatory mitigation in at least one of the action alternatives.

Consistent with compensatory mitigation policy (IM 2019-18), except where the law specifically requires compensatory mitigation, or as described above, the BLM will not require compensatory mitigation from public land users. The assertion that the BLM is adopting a “conservation uplift” standard, and related protests about BLM’s legal authority require such a standard, are mistaken, and reflect a misreading of the Proposed Plan’s components. Nowhere in the plans is there a requirement for “conservation uplift,” net conservation gain, or a similar mitigation standard.

The Proposed RMP Amendment/Final EIS’s overall strategy for conserving Greater Sage-Grouse habitat, including its avoidance and minimization measures and its approach to compensatory mitigation, is consistent with the requirements and policy objectives of BLM Manual 6840.

For the reasons stated above, the BLM denies this protest.

FLPMA—Multiple Use

Moffat County Board of Commissioners

Ray Beck

Issue Excerpt Text: Section 302 of FLPMA, speaks to the discrete issue of what standard may or may not be applied to federal land management. *Chevron USA, Inc. v. Natural Res. Def Council*, 467 U.S. 837, 842 (1984) (“In interpreting an agency’s enabling or organic statute, we “employ[] traditional tools of statutory construction” to determine “whether Congress has directly spoken to the precise question at issue.”). Aside from Wilderness Study Areas, FLPMA provides that public lands shall be managed to avoid “undue and unnecessary degradation.” The courts have found FLPMA to inherently allow some

degradation. See *Theodore Roosevelt Conservation Partnership v. Salazar*, 661 F.3d 66,76-78 (D.C. Cir. 2011) (FLPMA’s unnecessary or undue degradation standard must be read in light of BLM’s responsibility under FLPMA to ensure public lands are managed under multiple use and sustained yield.); *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1222-1223 (9th Cir. 2011) (Section 1732(b) does not mandate BLM to adopt restrictions that would completely exclude off-road vehicle use in a specific area.). Thus, the BLM may not approve, authorize, or otherwise require mitigation that would “improve” habitat without also violating FLPMA. See Attach. 4

Summary: The BLM’s Proposed RMP Amendment/Final EIS fails to comply with FLPMA’s multiple-use and sustained yield requirements.

Response: Section 302(a) of FLPMA directs the Secretary of the Interior to “manage the public lands under principles of multiple use and sustained yield, in accordance with land use plans developed . . . under section 202 of the Act,” except as otherwise provided by law.

The term multiple use refers to the following (43 USC 1702):

- Managing public lands and their various resource values so that they are used in the combination that will best meet the present and future needs of the American people
- Making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions
- Using some land for less than all of the resources
- Balancing a combination of diverse resource uses and taking into account the long-term needs of future generations for renewable and nonrenewable resources, including recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values
- Using harmonious and coordinated management of the various resources without permanently impairing the productivity of the land and the quality of the environment
- Giving consideration to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output

All alternatives described in Section 2.3 of the Proposed RMP Amendment/Final EIS provide an appropriate balance of uses on the public lands. All alternatives allow some level of all uses in the planning area, in a manner that is consistent with applicable statutes, regulations, and BLM policy.

For the reasons stated above, the BLM denies this protest.

The Wilderness Society

Nada Culver

Issue Excerpt Text: FLPMA specifically prohibits efforts to enshrine a single use, such as energy development, as the “dominant” or pervasive use of public lands. See 43 U.S.C. § 1701(a)(7) (specifying that “management [of public lands] be on the basis of multiple use and sustained yield”); *id.* § 1712(e)(2) (requiring congressional oversight for actions that “exclude” principal uses for two or more years).

Summary: BLM’s Proposed RMP Amendment/Final EIS fails to comply with FLPMA’s multiple use and sustained yield requirements.

Response: Section 302(a) of FLPMA directs the Secretary of the Interior to “manage the public lands under principles of multiple use and sustained yield, in accordance with land use plans developed . . . under section 202 of the Act,” except as otherwise provided by law. Section 103(c) of FLPMA defines

multiple use as managing public lands and their various resource values so that they are used in the combination that would best meet the present and future needs of the American people. These vital resources include fish and wildlife species.

A primary objective of the BLM special status species policy is to initiate proactive conservation measures that reduce or eliminate threats to BLM sensitive species to minimize the likelihood of and need for listing the species under the ESA (BLM Manual Section 6840.02.B). Section 302(b) of FLPMA also requires that “in managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.”

BLM Manual 6840 describes how the BLM should address BLM sensitive species and their habitats during the land use planning process (6840.2(B)) with an overall objective of initiating “proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of these species under the ESA” (68040.02(B)).

All alternatives described in Section 2.3 of the Proposed RMP Amendment/Final EIS provide an appropriate balance of uses on the public lands. Each alternative allows some of level of all uses in the planning area, in a manner that is consistent with applicable statutes, regulations, and BLM policy.

For the reasons stated above, the BLM denies this protest.

FLPMA—Special Status Species

Western Watersheds Project

Greta Anderson

See also: FLPMA—UUD; NEPA—Impact Analysis—General

Issue Excerpt Text: These loopholes essentially render lek buffers optional and discretionary. This undermining of lek buffers renders them meaningless and is arbitrary and capricious and an abuse of discretion, and signals a failure to take the legally required ‘hard look’ at impacts of low structures on breeding and nesting sage-grouse. It also fails to provide the protections needed under the agency’s Sensitive Species Policy. The failure to provide adequate protections results in unnecessary and undue degradation of sage-grouse habitats.

Western Watersheds Project

Greta Anderson

Issue Excerpt Text: Furthermore, the expanded exception language under the proposed alternative, FEIS at 2-5 undermines the certainty of implementation and make it impossible for the reader to know exactly how lek buffers will be applied, the extent of their application, and the protection they will afford the beleaguered bird.

Summary: The BLM’s failure to provide adequate protections for Greater Sage-Grouse leks results in an unnecessary or undue degradation of its habitat and, in turn, is contrary to the BLM’s special status species policy.

Response: Section 302(b) of FLPMA requires that “in managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands”; however, Section 102(a)(7) of FLPMA declares that it is the policy of the United States that public lands be managed on the basis of “multiple use” and “sustained yield.” Section 103(c) of FLPMA defines multiple use as the management of public lands and their various resource values so that they are used in the combination that best meets the present and future needs of the American people. These vital resources include fish and wildlife species.

BLM Manual 6840 describes how the BLM should address BLM sensitive species and their habitats during the land use planning process (6840.2(B)) with an overall objective of initiating “proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of these species under the ESA”(6840.02(B)).

43 CFR 24.3 states “In general the States possess broad trustee and police powers over fish and wildlife within their borders, including fish and wildlife found on Federal lands within a State.”

The allocation exception process specifies a number of criteria that prevent harm to Greater Sage-Grouse and their habitat, while allowing for immediate responses to public health and safety concerns and complying with state, federal, and county laws. Further, many of the conservation objectives and management restrictions were carried forward from the Approved 2015 RMP Amendments. Lek buffers and the criteria for WEMs are but a small part of the comprehensive sage-grouse planning framework. 17 components are outlined under section ES 3.3, which are not affected by these changes and which will remain in place.

The BLM recognizes that Greater Sage-Grouse is a state-managed species, and, in accordance with 43 CFR 24.3(a), that a state’s authority regarding fish and resident wildlife guides how the BLM cooperates, in the absence of specific, overriding federal law. Further, the BLM recognizes that state governments have established fish and wildlife agencies with the responsibility and mandate to implement statutes for effective, appropriate, and efficient conservation and management of fish and resident wildlife species.

For the reasons stated above, the BLM denies this protest.

Western Watersheds Project

Greta Anderson

Issue Excerpt Text: The BLM inaccurately claims that it could not address population-based management as an issue for consideration during scoping for this RMPA/EIS, because, “the BLM does not manage species populations; the authority falls under the CPW’s jurisdiction.” NWCO PRMP/FEIS at 1-11. But the special status species policy clearly requires the BLM to manage for species populations by preventing declines in the populations that would lead to a listing. The BLM’s abdication and excuse here makes no sense in light of the agency’s policy, and we protest on this basis.

Summary: The BLM has improperly abdicated its authority to manage species populations by preventing declines in their populations against policy found in the special status species policy.

Response: BLM Manual 6840 (02(B)) describes how the BLM should address its sensitive species and their habitats during the land use planning process. It states that there should be an overall objective of “initiating proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of these species under the ESA.”

The manual further states that “The BLM should provide technical assistance to, and coordinate with, appropriate state agencies and other agencies, organizations, or private landowners developing and implementing conservation plans,” and that “The BLM should seek partnerships and cooperative relationships with other agencies, organizations, governments, and interested parties for the purposes of conservation of sensitive species and compliance with the ESA.” These include “State and local governments, such as governor’s offices, County commissioners, and City councils; County extension units, watershed councils, and resource conservation districts; and interested landowners.”

The Department of the Interior’s fish and wildlife policy, codified at 43 CFR 24, describes coordination and cooperation between federal and state governments for managing fish and wildlife. It recognizes that

states generally “possess broad trustee and police powers over fish and wildlife within their borders, including fish and wildlife found on Federal lands within a State” (43 CFR 24.3).

The BLM recognizes that Greater Sage-Grouse is a state-managed species, and that 43 CFR 24.3(a) says that state authority regarding fish and resident wildlife guides how the BLM cooperates with the state in the absence of specific, overriding federal law. Further, the BLM recognizes that state governments have established fish and wildlife agencies with the responsibility and mandate to implement state statutes for effective, appropriate, and efficient conservation and management of fish and resident wildlife species. The BLM’s Proposed RMP Amendment/Final EIS is not inconsistent with its special status species policy. The BLM has identified management actions affecting sagebrush habitats and analyzed the impacts on Greater Sage-Grouse populations consistent with its legal authorities.

The allocation exception process specifies a number of criteria that prevent harm to Greater Sage-Grouse and their habitat, while allowing for immediate responses to public health and safety concerns and complying with state, federal, and county laws. Further, many of the conservation objectives and management restrictions were carried forward from the Approved 2015 RMP Amendments. Lek buffers and the criteria for WEMs are but a small part of the comprehensive sage-grouse planning framework. 17 components are outlined under section ES 3.3, which are not affected by these changes and which will remain in place.

For the reasons stated above, the BLM denies this protest.

***Sierra Club, Colorado Chapter
Delia Malone***

Issue Excerpt Text: Now, despite Congress’s clear direction to make the conservation of endangered and threatened species the “highest priority,” the BLM, in the Colorado Draft EIS, is focused on “aligning” its conservation plans with those of the states. A purpose which, as developed under the current proposal, does not advance sage-grouse conservation but rather will result in ESA listing. In direct opposition to the mandates of the ESA, Secretarial Order 3353, stated that one of the policy goals for managing the Greater Sage-Grouse is to “give appropriate weight to the value of energy and other development on public lands” in compliance with President Trump’s Executive Order of March 28, 2017, “Promoting Energy Independence and Economic Growth” (EO 13783).

Summary: BLM’s EIS process is in direct opposition to Congress’s clear direction to make the conservation of endangered and threatened species the “highest priority” [Please note: the Greater Sage-Grouse is not a federally listed species subject to the Endangered Species Act.]

Response: BLM Manual 6840 describes how the BLM should address BLM sensitive species and their habitats during the land use planning process (6840.2(B)) with an overall objective of initiating “proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of these species under the ESA”(6840.02(B)).

The manual further states that “The BLM should provide technical assistance to, and coordinate with, appropriate state agencies and other agencies, organizations, or private landowners developing and implementing conservation plans,” and that “The BLM should seek partnerships and cooperative relationships with other agencies, organizations, governments, and interested parties for the purposes of conservation of sensitive species and compliance with the ESA.” These include “State and local governments, such as governor’s offices, County commissioners, and City councils; County extension units, watershed councils, and resource conservation districts; and interested landowners.”

43 CFR 24.3 recognizes that States generally “possess broad trustee and police powers over fish and wildlife within their borders, including fish and wildlife found on Federal lands within a State.” Under the Property Clause of the Constitution, Congress is given the power to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”

The BLM maintains the goals, objectives, many of the allowable use decisions and management actions of the 2015 Approved RMP Amendment/Record of Decision and the Proposed RMP Amendment/Final EIS to support conservation of sage-grouse and its habitats. The BLM recognizes that Greater Sage-Grouse is a state-managed species; thus, in accordance with 43 CFR 24.3(a), state authority regarding fish and resident wildlife guides how the BLM cooperates with the state in the absence of specific, overriding federal law. Further, the BLM recognizes that state governments have established fish and wildlife agencies have the responsibility and mandate to implement state statutes for effective, appropriate, and efficient conservation and management of fish and resident wildlife species.

For the reasons stated above, the BLM denies this protest.

FLPMA—Unnecessary or Undue Degradation (UUD)

Western Watersheds Project

Greta Anderson

See also: FLPMA—SSS; NEPA—Impact Analysis—General

Issue Excerpt Text: These loopholes essentially render lek buffers optional and discretionary. This undermining of lek buffers renders them meaningless and is arbitrary and capricious and an abuse of discretion, and signals a failure to take the legally required ‘hard look’ at impacts of low structures on breeding and nesting sage-grouse. It also fails to provide the protections needed under the agency’s Sensitive Species Policy. The failure to provide adequate protections results in unnecessary and undue degradation of sage-grouse habitats.

Western Watersheds Project

Greta Anderson

Issue Excerpt Text: The COT report went on to make conservation recommendations, an effective baseline of management actions that must be undertaken to conserve and protect the sage-grouse throughout its range, i.e. to prevent undue and unnecessary degradation to the species’ habitat. The current plans do not comport with the COT report recommendations - which were themselves weakened due to political influence - but are the very minimum that is necessary for the agency to do. Since these proposed actions are inconsistent with that standard, the plans fail to comply with FLPMA’s overarching mandate.

Summary: The Proposed Plan does not comport with the Conservation Objective Team report and fails to provide adequate protections for Greater Sage-Grouse leks. This results in an unnecessary or undue degradation of Greater Sage-Grouse and, in turn, is contrary to the BLM’s special status species policy.

Response: Section 302(a) of FLPMA directs the Secretary of the Interior to “manage the public lands under principles of multiple use and sustained yield, in accordance with land use plans developed . . . under section 202 of the Act,” except as otherwise provided by law. Section 103(c) of FLPMA defines “multiple use” as the management of the public lands and their various resource values so that they are used in the combination that will best meet the present and future needs of the American people. These vital resources include fish and wildlife species. Section 302(b) of FLPMA also requires that “in managing

the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.”

The COT report is a suite of suggested conservation objectives based on science. The BLM reviewed the science available, including the COT report to inform its management actions. Management actions that deviate from recommendations in the COT report do not invalidate the BLM’s decision-making authority.

BLM Manual 6840.2(B) describes how the BLM should address sensitive species and their habitats during the land use planning process. The overall objective of the BLM’s policy is to initiate “proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of these species under the ESA.” (BLM Manual Section 6840.02.B)

The Proposed RMP Amendment/Final EIS provides for the balanced management of the public lands in the planning area. In developing that document, the BLM fully complied with its planning regulations (43 CFR 1610), the requirements of NEPA, and other statutes, regulations, and executive orders related to environmental quality. The Proposed RMP Amendment/Final EIS identifies appropriate allowable uses, management actions, and other mitigation measures that prevent the unnecessary or undue degradation of public lands. It does not authorize any use of the public lands, much less any that would result in unnecessary or undue degradation.

The BLM’s proposed management direction would improve alignment with state agencies and enhance coordination between jurisdictions (43 CFR 24.3(a)). Proposed management changes would result in foreseeable effects on the species, described in Section 4.5 of the Proposed RMP Amendment/Final EIS; however, such effects could be justified in balancing competing interests, reflecting the BLM’s multiple-use mission. Congress recognized that through the BLM’s multiple-use mandate, there would be conflicting uses and impacts on the public land.

In addition, adopting the Proposed RMP Amendment/Final EIS would not violate FLPMA’s requirement to prevent UUD. This is because adoption of the proposed plan would not authorize any public land uses that would result in UUD.

For the reasons stated above, the BLM denies this protest.

NEPA—Best Available Science

Sierra Club, Colorado Chapter Delia Malone

Issue Excerpt Text: BLM’s amended plan ignores best available science and prioritizes the interests of the oil and gas industry over preserving sage-grouse habitat. Sage-grouse research published since 2015 corroborates the negative relationships between oil and gas development and sage-grouse survivability (Hanser et al. 2018).

Michael Saul

Issue Excerpt Text: BLM’s proposed elimination of the Colorado one-mile no new leasing buffer for active leks lacks any rational basis and is contrary to the best available science. Manier et al. (2014:2), the paper relied upon by BLM to generate buffer distances, themselves explain in detail why the 0.6-mile buffer distance is inappropriate.

Western Watersheds Project**Greta Anderson**

Issue Excerpt Text: BLM’s proposed elimination of the Colorado one-mile no new leasing buffer for active leks lacks any rational basis and is contrary to the best available science. Manier et al. (2014:2), the paper relied upon by BLM to generate buffer distances, themselves explain in detail why the 0.6-mile buffer distance is inappropriate.

The Wilderness Society**Nada Culver**

Issue Excerpt Text: FEISs actually points to the need to sustain the direction in the 2015 Sage-grouse Plans, including maintaining a landscape-scale approach, retaining priority and general habitat management areas and preserving protections from oil and gas development. However, many of these elements of the plans are being weakened or removed altogether in contravention of this accepted science. In addition, more recent science has only reinforced this interpretation of the weight of existing, applicable science (including BLM’s USGS Synthesis). For instance, a report by Burkhalter et al. 2018 found that landscapes associated with a higher abundance of males on leks were those located in highly connected, sagebrush-dominated areas with limited energy development. A report by Lipp, T.W. and Gregory, A.J. 2018 found that, as energy demands continue to increase, and with multiple species of grouse listed or nominated for listing under the ESA, negative impacts attributed to energy development are likely to continue. And a study by Row, et al., finds that, although population strongholds will likely have much higher suitability values, maintaining areas outside of these regions should help maintain connectivity between these existing protection areas. This new science emphasizes the importance of retaining protections from energy development, maintaining connectivity and ensuring that management is conducted at a landscape-scale.

Western Watersheds Project**Greta Anderson**

Issue Excerpt Text: The “literature minimum” for low structures of 400m (0.12) mile, derived from Manier et al. (2014:14), similarly suffers from a complete absence of factual basis.

Western Watersheds Project**Greta Anderson**

Issue Excerpt Text: therefore the low end of the interpreted range presented in Manier et al. (2014) is without basis.

Moffat County Board of Commissioners**Ray Beck**

Issue Excerpt Text: The BLM did not address the controversies regarding 3% disturbance caps. The 3 percent anthropogenic disturbance threshold in priority habitats does not address specific threats, nor does it take into account the varieties in the type of disturbance, local conditions, or mitigation that may be used.

Moffat County Board of Commissioners**Ray Beck**

Issue Excerpt Text: According to Dr. Rob Roy Ramey’s review of the NTT Report, Holloran instead “reported on leks affected by different numbers of impacts in each of four quadrants in the cardinal directions, and predictions based upon correlations at a scale of 3 km. Data, significance tests, and scatterplots of those correlative analyses were not reported by Holloran (2005), making the scientific rationale for his one-well-per-section not reproducible.” Attach. 6 at Appendix 8. Perhaps more importantly, in 2010, Holloran found no population loss but only temporary movement of birds to other

leks. Id. Thus, Holloran’s report is not only methodologically flawed but it documents no long-term adverse effect to sage-grouse.

Moffat County Board of Commissioners

Ray Beck

Issue Excerpt Text: Since 2013, Moffat County has consistently commented that the BLM’s reliance on certain reports, studies, and other science is misplaced and ignores significant, and growing, controversy surrounding those studies and the issues therein. See Attach. 5, at 1-2. Moffat County exhaustively detailed these failures in its 2015 Protest. Attach. 6, at 11-15. Moffat County reviewed the 2018 Plan closely and determined that BLM’s reliance on the NTI Report, COT Report, USGS Buffer Report and others remained unchanged and that the BLM had not reconsidered these issues despite NEPA rules that require consideration of responsible opposing viewpoints and the decision of the Nevada District Court in *Western Exploration LLC. v. Jewell* setting aside the FEIS due to the major changes adopted after the close of the public comment period. Attach. 4, at 5-6.

Western Watersheds Project

Greta Anderson

Issue Excerpt Text: It is important to note that Wallestad and Schladweiler (1974) made no pretense of testing distances at which energy development has impacts on sage-grouse. Instead, they reported only on the distance from the lek where most locations occurred, and their study is silent on how far energy development would need to be sited to prevent major impacts on birds located in this area. BLM’s elimination of the 1-mile no leasing buffer around active leks for energy development is therefore arbitrary and capricious and an abuse of discretion, and signals a failure to take the legally required ‘hard look’ at impacts of low structures on breeding and nesting sage-grouse.

The Wilderness Society

Nada Culver

Issue Excerpt Text: eliminating the prioritization requirement, or scaling it back, would not be in accord with the best available science. As mentioned above, the COT report recognized the need to provide for prioritization. The sage-grouse scientists in their letter to Secretary Zinke found that the prioritization guidance was an important way of dealing with indirect and cumulative effects. Exhibit I at 3. The BLM’s National Technical Team (NTT) Report supports the need for prioritization.

The Wilderness Society

Nada Culver

Issue Excerpt Text: Further, BLM cannot merely assert that there are no impacts from these changes when they have undermined the consistency, reliability and measurability that supported not only the FWS’s “not warranted” finding but also the BLM’s conclusions regarding conservation of the greater sage-grouse. The conclusions of both FWS and BLM 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 consistent with the 2018 Proposed RMP Amendments, as has been repeatedly brought to BLM’s attention by leading sage-grouse scientists.

The Wilderness Society

Nada Culver

Issue Excerpt Text: New science has underscored the importance of GHMA for connectivity between PHMA, which makes landscape-scale management vital for successful conservation of sage-grouse habitat. The approach taken in the 2018 Proposed Amendments, which weakens protections undermines this approach.

Moffat County Board of Commissioners**Ray Beck**

Issue Excerpt Text: The 2018 Plan failed to adequately disclose and analyze the effects of conservation measures that were adopted in the 2015 Plans also without proper analysis and disclosure despite significant controversy regarding the science upon which those conservation measures were based including disturbance caps, lek buffers, density requirements, habitat restoration/cover objectives, and mitigation standards;

Western Watersheds Project**Greta Anderson**

Issue Excerpt Text: The PRMP proposes to use lek buffers in PHMA and GHMA that have no basis in science and are less than what the sage-grouse requires. Although lek buffers in the 2015 ARMPAs were already less than what the best available science indicates are necessary, Colorado BLM now proposes to (a) eliminate no-new-leasing provisions for approximately 224,000 acres of habitat within one mile of occupied leks, and (b) to reduce the certainty of habitat protections for PHMA and GHMA alike through multiple changes that increase the likelihood that No Surface Occupancy stipulations will be waived or modified.

Moffat County Board of Commissioners**Ray Beck**

Issue Excerpt Text: The USGS report cites the study's own authors for more than half of the propositions offered by the report. Perhaps equally troubling is the fact that two of the Manier authors were also authors of BLM's NTT Report. Moffat County provided data from the Pinedale Planning Area refutes the necessity of large buffers surrounding sage-grouse leks. The USGS Buffer report was introduced in the 11th hour during the 2015 planning process and the BLM has yet to fully analyze and disclose the precise parameters of that study and the controversy surrounding its methodology.

Sierra Club, Colorado Chapter**Delia Malone**

Issue Excerpt Text: This plan amendment is in clear conflict with scientific findings from the USGS (Hanser et al. 2018 and Manier et al., 2014).

Summary: The BLM has failed to rely on the best available science in the following ways:

- Overlooking the impacts of oil and gas development on Greater Sage-Grouse survivability
- Proposing eliminating the Colorado 1-mile no new leasing buffer
- Not maintaining a landscape-scale approach for Greater Sage-Grouse conservation
- Using the “literature minimum” when determining lek buffer distances
- Not addressing the scientific controversy regarding 3 percent disturbance caps
- Continuing to rely on the NTT report, COT report, and USGS buffer report in the Proposed RMP Amendment/Final EIS
- Not accounting for the impacts of energy development on Greater Sage-Grouse when determining lek buffer distances
- Eliminating prioritization of oil and gas leasing outside Greater Sage-Grouse habitat
- Asserting that there are no impacts associated with the Proposed RMP Amendment/Final EIS is inconsistent with the COT report
- Overlooking the role of general habitat management areas (GHMA) for habitat connectivity
- Not disclosing and analyzing the effects of conservation measures adopted in the 2015 Approved RMP Amendment/Record of Decision or the scientific debates and controversy regarding these measures

- Determining lek buffer distances in GHMA and important habitat management areas (IHMA) that are at odds with best available science
- Relying on the USGS report when determining lek buffer distance
- Not addressing the Proposed RMP Amendment/Final EIS's conflicts with the scientific findings from the USGS

Response: The Council on Environmental Quality's (CEQ) regulations (40 CFR 1500.1(b)) implementing NEPA require that agencies use "high quality information." NEPA regulations (40 CFR 1502.24) require the BLM to "insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements."

BLM Handbook H-1790-1 (p. 55) also directs the BLM to "use the best available science to support NEPA analyses, and give greater consideration to peer-reviewed science and methodology over that which is not peer-reviewed." Under the BLM's guidelines for implementing the Information Quality Act, the BLM applies the principle of using the "best available" data in making its decisions (BLM Information Quality Act Guidelines, February 9, 2012).

In developing the 2018 Proposed Plan, the BLM specifically partnered with the USGS to review the best available information and incorporate the management implications of that information into this Proposed RMP Amendment/Final EIS. The report from the USGS is available at <https://pubs.er.usgs.gov/publication/ofr20180117> and is referenced throughout the EIS.

The BLM places great import on the best available information, including new scientific studies and government reports that indicate a potential change in its assumptions or conditions related to land use planning. The BLM has to balance reviewing new information with determining what information is relevant to a decision in light of the BLM's purpose and need. Many protestors highlighted information and studies for the BLM to consider, and the BLM has reviewed each source submitted. Further, the BLM asked the USGS to participate in the review and to verify if information was included in the USGS synthesis report that was developed for the Proposed RMP Amendment/Final EIS. Many suggested articles were already included for analysis in the USGS report and may have been missed by protestors in the initial review of the synthesis report and Draft RMP Amendment/Draft EIS.

BLM staff, including scientists and NEPA specialists, reviewed both known and new studies, and each BLM state office reviewed specific studies that informed their planning decisions and environmental conditions. The BLM has included, where appropriate, updates to analyses in the Proposed RMP Amendment/Final EIS. Overall, studies submitted by protestors did not offer information that changed the analysis of the Proposed RMP Amendment/Final EIS; they also did not offer any new conditions or other information that the BLM had not considered already.

The BLM has reviewed all new information and suggested studies from comments received rangewide and in specific states. Further, the BLM takes new information seriously and identified 11 articles from the studies suggested in comments. These studies are sorted below, as follows:

- Those cited in the USGS report
- Those in the bibliography of the USGS report
- Those that the BLM considered when developing the Proposed RMP Amendment/Final EIS and reviewing comments

It is not necessary to incorporate a commenter's suggested scientific reports and data into the Proposed RMP Amendment/Final EIS. As stated above, the BLM has already reviewed the referenced articles to

determine if the information is substantially different from the information considered and cited in the Proposed RMP Amendment/Final EIS. The article does not provide additional information that would result in effects outside the range of those already discussed in the Proposed RMP Amendment/Final EIS. The BLM relied on high quality information from a large number of sources to examine changes made between the 2015 Approved RMP Amendment/Record of Decision and the Proposed RMP Amendment/Final EIS.

The Proposed RMP Amendment/Final EIS was prepared reflecting the information contained in Hanser et al. 2018; thus, the EIS is in conformance with Hanser.

The BLM has reviewed Burkhalter et al. (2018), T. W. Lipp and A. J. Gregory (2018), and Row et al. (2018) to determine if the information is substantially different from the information considered and cited in the Proposed RMP Amendment/Final EIS. The BLM found that it does not provide additional information that would result in effects outside those in the Proposed RMP Amendment/Final EIS. These studies may be new publications, modeling approaches, or genetic analyses; however, they all support the conclusions and findings detailed in the science synthesis found in the USGS Open File Report (OFR) mentioned previously. Further, Row et al. is a direct continuation of work cited in the OFR.

The BLM relied on high quality information and the best available data in preparing the Proposed RMP Amendment/Final EIS; accordingly, the BLM denies this protest.

Summary: The BLM has failed to rely on best available science by not maintaining a landscape-scale approach for Greater Sage-Grouse conservation.

Response: The CEQ’s regulations implementing NEPA (40 CFR 1500.1(b) require that agencies use “high quality information.” NEPA regulations require the BLM to “insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements” (40 CFR 1502.24).

The BLM’s NEPA Handbook H-1790-1 (p. 55) also directs it to “use the best available science to support NEPA analyses, and give greater consideration to peer-reviewed science and methodology over that which is not peer-reviewed.” Under the BLM’s Information Quality Act Guidelines (February 9, 2012) for implementing the Information Quality Act, it applies the principle of using the “best available” data in making its decisions.

NEPA—Cooperating Agencies

Moffat County Board of Commissioners

Ray Beck

Issue Excerpt Text: During the cooperating agency process, Moffat County was given a mere 30 days to review the proposed changes, purpose and need, and the various issues that would be addressed as the result of scoping. See Attach. 4, at 3. During this time, Moffat County met with BLM several times to voice concerns, only to learn that BLM would not be making any adjustments to the at the request of Moffat County because BLM had already agreed with CPW what changes would, and would not, be made in the 2018 Plan. BLM, rather, used the meetings to unilaterally inform Moffat County about what the new plan would include as the result of coordination and cooperation with CPW.

Summary: The BLM did not properly involve Moffat County in developing the Proposed RMP Amendment/Final EIS.

Response: There is no requirement for how BLM must involve a particular cooperating agency in the development of a land use planning and NEPA document. The specific role of each cooperating agency is based on jurisdiction by law or special expertise, which is determined on an agency-by-agency basis. The BLM works with cooperating agencies to develop and adopt a memorandum of understanding that includes their respective roles, assignment of issues, schedules, and staff commitments (43 CFR 46.225(d)).

All cooperating agencies have been given opportunities to participate during various steps of the planning process. This includes regular briefings, requests for input on draft alternatives and the administrative Draft RMP Amendment/Draft EIS, and identification of issues and data during scoping and during the public comment period. The Proposed RMP Amendment/Final EIS further describes the participation of cooperating agencies in Chapter 5, Section 5.2. The purpose of and need for this planning clearly defines the BLM’s intent to better align its management actions with those of the State of Colorado. This purpose and need did not prevent or prohibit the BLM from considering the input of other cooperating agencies nor the public. The BLM also provided several additional opportunities for Moffatt County to participate in the planning process and provide input to the BLM.

The BLM properly involved all cooperating agencies in the development of the Proposed RMP Amendment/Final EIS.

NEPA—Cumulative Effects

Western Watersheds Project

Greta Anderson

Issue Excerpt Text: Moreover, the PRMP does not and cannot analyze the proposed actions in context of the proposed changes to United States Forest Service (USFS) management. The USFS is also revising the land use plan amendments for sage-grouse habitat and the implications of the proposed management in both agencies have a cumulative impact that has not yet been assessed. The failure to take a rangewide look at reasonably foreseeable changes is a violation of NEPA, and also violates the agency’s policy on connected actions.

Western Watersheds Project

Greta Anderson

Issue Excerpt Text: As WWP and others have repeatedly asserted in court filings and comments, BLM cannot take the hard look NEPA requires without considering the impacts of its actions on a rangewide basis. WWP et al. 2018 at 14-15. Operationally, this requires BLM to prepare a Programmatic EIS looking at how the many exceptions to enforceable protections written into the PRMPs could combine to affect the health of sage-grouse rangewide. Even if BLM does not prepare a PEIS, however, it still must consider the health of sage-grouse populations on a rangewide basis to achieve the required hard look.

Western Watersheds Project

Greta Anderson

Issue Excerpt Text: As WWP previously explained on numerous occasions, e.g., WWP et al. (2018), an adequate cumulative impacts analysis must consider how the continued shrinking of sage-grouse range is affecting the bird’s persistence. It must also consider how the many exceptions written into the plans to allow for threats to sage-grouse to persist will affect sage-grouse populations-vague statements like “[s]ome small, localized populations may be at continued risk due to reasonably foreseeable infrastructure and energy development projects over the next 20 years, when combined with unplanned events such as wildfires, drought, and associated decline in Greater Sage-Grouse habitat quality,”

NWCO PRMP/FEIS at 4-16, coupled with the assumption that any losses would be offset by undisclosed and uncertain “conservation efforts,” do not meaningfully inform the public about cumulative effects.

The Wilderness Society

Nada Culver

Issue Excerpt Text: BLM has also failed to account for and analyze the destruction of vital sage grouse habitat due to wildfires. In 2018, 2,034,318 acres of sage grouse habitat on federal land was damaged by fire. Of these 1,057,309 acres were on BLM land.⁴ The loss of this habitat will have a significant impact on sage grouse survival, yet BLM simply states that these losses to fire are accounted for in the 2015 FEIS. See e.g., Utah FEIS at 4-44. 2018 was one of the worst wildfire seasons on record and it is clear that wildfires will become an increasing problem in the West. BLM must sufficiently analyze the threat of rapidly increasing fire to sage grouse.

The Wilderness Society

Nada Culver

See also NEPA—Mitigation

Issue Excerpt Text: BLM must analyze the impacts that will result from the elimination of required vital conservation measures incorporated in the 2015 Sage-grouse Plans including: (1) net conservation gain and (2) compensatory mitigation. The 2015 NEPA analyses were conducted on the premise that these measures would be in place. The 2018 Plan Amendments have eliminated or created significant uncertainty regarding these requirements, and as a result the BLM must conduct a revised cumulative impacts analysis that accounts for the impacts that will result from the elimination of these measures across the range.

The Wilderness Society

Nada Culver

Issue Excerpt Text: The BLM has also failed to analyze the reasonably foreseeable cumulative impacts from oil and gas lease sales, which have significantly increased under the current administration. Issuing an oil and gas lease is an irretrievable commitment of resources. See e.g., *New Mexico ex rel. Richardson v. BLM*, 565 F.3d at 718; *Pennaco Energy, Inc. v. United States DOI*, 377 F.3d 1147, 1160 (10th Cir. 2004). Since 2017, BLM has put approximately 1.5 million acres of sage-grouse habitat up for lease, with more than 720,000 acres sold and in excess of 2 million potentially to be leased in February and March 2019. Notably, BLM can project the amount of wells associated with opening areas to leasing and with individual leases, but has failed to do so in connection with these FEISs. BLM must incorporate these details into a compliant cumulative impacts analysis for these plan amendments.

Western Watersheds Project

Greta Anderson

Issue Excerpt Text: Without this rangewide hard look, BLM has not considered how its decisions to permit sage-grouse habitats to become degraded, or even destroyed, will contribute to species-level declines.

Western Watersheds Project

Greta Anderson

Issue Excerpt Text: WWP has raised these, and other, issues requiring a hard look throughout this process and BLM has nevertheless failed to review the impacts of its actions on a rangewide basis. See WWP et al. 2018.

Western Watersheds Project**Greta Anderson**

Issue Excerpt Text: BLM cannot take the hard look NEPA requires without considering the impacts of its actions on a rangewide basis. WWP et al. 2018. Operationally, this requires BLM to prepare a Programmatic EIS looking at how the many exceptions to enforceable protections written into the PRMPs could combine to affect the health of sage-grouse rangewide. Even if BLM does not prepare a PEIS, however, it still must consider the health of sage-grouse populations on a rangewide basis to achieve the required hard look.

The Wilderness Society**Nada Culver**

Issue Excerpt Text: BLM fails to analyze the impacts of large-scale oil and gas projects that are occurring within all states.

The Wilderness Society**Nada Culver**

Issue Excerpt Text: Although BLM claims the cumulative effects from these projects were considered in previous NEPA documents, changes to other BLM policies will affect their impacts.

Western Watersheds Project**Greta Anderson**

Issue Excerpt Text: Without examining impacts on a rangewide basis, an adequate cumulative impact analysis is not possible. Nevertheless, the agency elected to examine cumulative effects only at the WAFWA management zone level. Moreover, the newly-added so-called “cumulative effects analysis” is woefully inadequate. NWCO PRMP/FEIS at 4-12 to 4-27. As WWP et al. (2018) explained, the analysis must meaningfully inform the public about how further weakening the already-inadequate protections in the 2015 ARMPAs will have combined impacts that could harm or otherwise affect sage-grouse. WWP et al. 2018. Rather than considering and disclosing likely impacts in a meaningful and informative way, the analysis makes vague statements and refers to previous discussions in the 2015 RMP EISs (which did not take a rangewide hard look).

Summary: In its cumulative impacts analysis, the BLM failed to take a rangewide look at cumulative impacts and to account for actions affecting Greater Sage-Grouse habitat on USFS lands, as required under NEPA. Other affects that the BLM inadequately examined are the following:

- The uncertainties about discretionary protections under the Proposed RMP Amendment/Final EIS
- The trends of Greater Sage-Grouse habitat shrinkage
- The destruction of Greater Sage-Grouse habitat from wildfire
- Changes in compensatory mitigation policy, and changes in mitigation requirements, between the 2015 Approved RMP Amendment/Record of Decision and the Proposed RMP Amendment/Final EIS
- Foreseeable oil and gas sales projected from increased oil and gas leasing since 2017
- Changes in BLM policy since 2015

Response: The BLM must discuss the cumulative effects of the proposed action and the alternatives when preparing an EIS (BLM Handbook H-1790-1, Section 6.8.3). The CEQ regulations define cumulative effects as “. . . the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions” (40 CFR 1508.7).

The BLM has complied fully with the requirements of 40 CFR 1508.7. It prepared the cumulative impact analysis based on the broad nature and scope of the proposed management options under consideration at the land use planning level. In the cumulative impact analysis, the BLM considered the effects of planning, when added to other past, present, and reasonably foreseeable (not highly speculative) federal and nonfederal actions. The cumulative impacts section (Section 4.8) identifies all actions that were considered in the cumulative impacts analysis, on range- and zone-wide bases and including the in-progress US Forest Service plans. It provides a basis for the cumulative impacts analysis for each affected resource.

The BLM took into account the relationship between the proposed action and these reasonably foreseeable actions. This served as the determining factor as to the level of analysis performed and presented. The information presented in the Proposed RMP Amendment/Final EIS enables the decision-maker to make a reasoned choice among alternatives.

The BLM adequately analyzed cumulative effects in the Proposed RMP Amendment/Final EIS; accordingly, the BLM denies this protest.

[NEPA—Impacts Analysis—General](#)

Western Watersheds Project

Greta Anderson

See also: *FLPMA—Special Status Species; FLPMA—Unnecessary or Undue Degradation*

Issue Excerpt Text: These loopholes essentially render lek buffers optional and discretionary. This undermining of lek buffers renders them meaningless and is arbitrary and capricious and an abuse of discretion, and signals a failure to take the legally required ‘hard look’ at impacts of low structures on breeding and nesting sage-grouse.

Summary: The BLM failed to adequately explain the uncertainties associated with discretionary protections in the plan.

Response: NEPA (40 CFR 1502.15) directs that data and analyses in an EIS must be commensurate with the importance of the impact. In 40 CFR 1500.1(b) it directs that NEPA document preparers must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail. The BLM is required to take a hard look at potential environmental impacts of adopting the Proposed RMP Amendment/Final EIS.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

NEPA directs that when an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an EIS, and there is incomplete or unavailable information, the agency must always make clear that such information is lacking. The agency also must provide context of its relevance, available information, and alternative approaches to obtaining information to obtain a decision in the face of uncertainty (40 CFR 1502.22).

Land use planning-level decisions are broad in scope. For this reason, analysis is typically broad and qualitative, rather than quantitative or focused on site-specific actions. The baseline data provide the necessary basis to make informed, land use plan-level decisions. The decisions under consideration by

the BLM are programmatic and would not result in on-the-ground planning decision or actions; for example, the BLM is not approving an application for permit to drill. Because of this, the scope of the analysis was conducted at a regional, programmatic level.

In this case, the “expanded exception language” in the proposed plan is to clarify the use and flexibility of lek buffers as a tool for analyzing impacts on leks, including consideration of topography, based on the type of impacts. The Proposed RMP Amendment/Final EIS balances the risk of uncertainty against the benefits of management flexibility, when considering changes to the 2015 Approved RMP Amendment/Record of Decision. Nonetheless, planning criteria identified for this amendment include consideration of how planning decisions may affect future listing determinations for Greater Sage-Grouse under the ESA, which includes changes to applying lek buffers.

For the reasons stated above, the BLM provided an adequate explanation of uncertainties associated with discretionary protections in this plan; accordingly, the BLM denies this protest.

[NEPA—Impacts Analysis—Greater Sage-Grouse](#)

Sierra Club, Colorado Chapter Delia Malone

Issue Excerpt Text: BLM’s amendments are arbitrary and capricious because they do not effectuate that purpose and do not adequately consider how reducing the protections of the 2015 plans will increase the peril to the species and affect its status with regard to the standards of the ESA.

Summary: The Proposed RMP Amendment/Final EIS fails to analyze the effects of the regulatory changes on the persistence of Greater Sage-Grouse and the likelihood of listing it under the ESA.

Response: NEPA (40 CFR 1502.15) directs that data and analyses in an EIS must be commensurate with the importance of the impact. In 40 CFR 1500.1(b) it directs that NEPA document preparers must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail. The BLM is required to take a hard look at potential environmental impacts of adopting the Proposed RMP Amendment/Final EIS.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions, by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

A land use planning-level decision is broad in scope. For this reason, the analysis of land use plan alternatives is typically broad and qualitative, rather than quantitative or focused on site-specific actions. The baseline data provide the necessary basis to make informed, land use plan-level decisions.

The decisions under consideration by the BLM are programmatic in nature and would not result in on-the-ground planning decision or actions; for example, the BLM is not approving an application for permit to drill to start drilling. Because of this, the scope of the analysis was conducted at a regional, programmatic level. The analysis focuses on the direct, indirect, and cumulative impacts that could result from on-the-ground changes. This analysis identifies impacts that may result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

In the Proposed RMP Amendment/Final EIS, the impacts on Greater Sage Grouse is in Section 4.5 (*Impacts on Greater Sage-Grouse*) and Section 4.8 (*Range-wide Cumulative Effects Analysis—Greater Sage-*

Grouse). Section 4.5 is an evaluation of the Proposed RMP Amendment/Final EIS’s contribution to surface disturbance, which contributes to habitat loss, habitat avoidance, and habitat fragmentation. Section 4.8 is an evaluation of foreseeable effects on surface disturbance range-wide. In this analysis, the BLM concludes that impacts in the on the species in the Proposed RMP Amendment/Final EIS are largely similar to those of the No Action Alternative. Translating these consequences to a finding about listing under the ESA is the responsibility of the US Fish and Wildlife Service and is outside the scope of the Proposed RMP Amendment/Final EIS.

The BLM complied with NEPA’s requirement to analyze the environmental consequences of and impacts on Greater Sage-Grouse; accordingly, the BLM denies this protest.

Western Watersheds Project

Greta Anderson

Issue Excerpt Text: The PRMP/FEIS commits the BLM to working with the Natural Resource Conservation Service (NRCS) to “develop ‘outcome-based grazing’ to provide greater flexibility for livestock permittees and land managers to meet habitat objectives as conditions on-the-ground change.” NWCO PRMP/FEIS at 1-2. This is problematic because, while the program itself is still in its infancy, the implementation of “outcome-based grazing,” has not yet been tested and, as such, it is entirely unclear whether such grazing management will adequately provide the protection Greater sage-grouse need from the myriad adverse impacts of livestock grazing. Because “outcome-based grazing” as a concept didn’t emerge until well after the 2015 ARMPAs, no assessment or analysis of how this program would work in sage-grouse habitat has ever been conducted. This fails NEPA’s requirement to take a hard look, and we protest on this basis.

Summary: The Proposed RMP Amendment/Final EIS fails to analyze the effects of outcome-based grazing on Greater Sage-Grouse.

Response: NEPA (40 CFR 1502.15) directs that data and analyses in an EIS must be commensurate with the importance of the impact. In 40 CFR 1500.1(b) it directs that NEPA document preparers must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail. The BLM is required to take a hard look at potential environmental impacts of adopting the Proposed RMP Amendment/Final EIS.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

The contention that the Proposed RMP Amendment/Final EIS commits the BLM to “outcome-based grazing” is false. The discussion of “outcome-based grazing” that the protester points to is background language contained in the introduction of the document (Section 1.1); it recognizes the BLM’s broader position to support adaptive management activities for livestock grazing. The decisions in the Record of Decision that the BLM commits are limited to those discussed in Chapter 2 and detailed in Table 2-2 of the Proposed RMP Amendment/Final EIS.

The BLM complied with NEPA’s requirement to analyze the environmental consequences or impacts on Greater Sage-Grouse in the Proposed RMP Amendment/Final EIS; accordingly, the BLM denies this protest.

NEPA—Impacts Analysis—Oil and Gas

The Wilderness Society

Nada Culver

Issue Excerpt Text: Accordingly, the Final EISs should, but do not, provide and evaluate the following information: * The number of parcels and number of acres leased for oil and gas development in sagegrouse habitat since 2015; * Historical data showing the number of parcels and acres leased in sagegrouse habitat such that post-2015 data may be contextualized and trends may be observed. This information’s absence renders the Proposed RMP Amendments and Final EISs unlawful. NEPA requires that “high quality” environmental information be “available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b). When there is “incomplete or unavailable information,” BLM must “make clear that such information is lacking.” 40 C.F.R. § 1502.22. When the missing information is “relevant to reasonably foreseeable significant adverse impacts” and “essential to a reasoned choice among alternatives,” the agency must obtain the information and include it in the EIS, unless the costs of obtaining it are “exorbitant” or “the means to obtain it are not known.” 40 C.F.R. 1502.22(a). In the latter case, where costs or practical limitations make the data unavailable, BLM is required to do the next best thing and include in the EIS (1) a statement that the information is incomplete or unavailable, (2) a statement of the information’s relevance to foreseeable significant impacts, (3) a “summary of existing credible scientific evidence” relevant to evaluating impacts, and (4) the agency’s evaluation of impacts based on “theoretical approaches or research methods generally accepted in the scientific community.” 40 C.F.R. 1502.22(b).

Moffat County Board of Commissioners

Ray Beck

Issue Excerpt Text: The FEIS states that changing the No Leasing prescription in the 2015 Plan to an NSO prescription in the 2018 Plan “would make additional acres available to leasing, [but] the impact on Greater Sage-Grouse is likely to be minimal because surface disturbance, fragmentation, and indirect habitat loss would not be expected to increase due to restrictions on surface disturbance.” FEIS at 4-17 (emphasis added); 4-5. The FEIS admits that Moffat County has correctly identified the new NSO prescriptions as functionally identical to the No Leasing prescription of the previous plan. See Attach. 4, at 2-3. The FEIS, however, does not explain why an NSO prescription is preferred over a Controlled Surface Use stipulation.

Summary: The BLM has not provided or analyzed sufficient information regarding the following:

- The number of parcels and number of acres leased for oil and gas development in Greater Sage-Grouse habitat
- Why an NSO prescription is preferred over a CSU stipulation

Response: NEPA (40 CFR 1502.15) directs that data and analyses in an EIS must be commensurate with the importance of the impact. In 40 CFR 1500.1(b) it directs that NEPA document preparers must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail. The BLM is required to take a hard look at potential environmental impacts of adopting the Proposed RMP Amendment/Final EIS.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

In accordance with 40 CFR 1502.22, when an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency must always make clear that such information is lacking. If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency must include the information in the EIS.

A land use planning-level decision is broad in scope. For this reason, land use plan alternatives analysis is typically broad and qualitative, rather than quantitative or focused on site-specific actions. The baseline data provide the necessary basis to make informed land use plan-level decisions.

The decisions under consideration by the BLM are programmatic in nature and would not result in on-the-ground planning decision or actions; for example, the BLM is not approving an application for permit to drill to start drilling. Because of this, the BLM conducted the analysis at a regional, programmatic level. It focused on the direct, indirect, and cumulative impacts that could result from on-the-ground changes. In particular, the BLM relied on a reasonably foreseeable oil and gas development scenario to support its decision-making. Activities and impacts that have occurred since the 2015 Approved RMP Amendment/Record of Decision are within the range of what the BLM anticipated in 2015. This analysis identifies impacts that may result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

Further, NSO stipulations are not the functional equivalent of closing or withdrawing a resource from public access; rather, they are designed to avoid or minimize impacts on surface resources. Further, the waivers, exceptions, and modifications in this plan allow for site-specific flexibility in order to provide access for development. The subsurface resource is still available for public access, while providing the BLM and the public with a measure of protective management for surface resources of concern. The analysis focuses on the direct, indirect, and cumulative impacts that could result from on-the-ground changes. This analysis identifies impacts that may result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

The BLM complied with NEPA’s requirement to analyze the environmental consequences and impacts on oil and gas in the Proposed RMP Amendment/Final EIS; accordingly, the BLM denies this protest.

The Wilderness Society
Nada Culver

Issue Excerpt Text: This decision to remove SFAs marks a significant retreat from environmental protections that have been recognized as needed for sage-grouse conservation by the U.S. Fish and Wildlife Service, yet the BLM has failed to conduct any meaningful analysis of this impact. A conclusory statement suggesting the removal of this designation will not result in significant environmental impacts woefully overlooks the protections, beyond withdrawing lands from mineral entry, afforded by the SFAs, and fails to meet BLM’s “hard look” obligations under NEPA.

The Wilderness Society
Nada Culver

Issue Excerpt Text: BLM must “make clear that such information is lacking” and explain why it is either exorbitantly costly or impossible to obtain. 40 C.F.R. § 1502.22(b).

Summary: The BLM failed to provide and adequately examine the environmental impacts of removing SFAs (including indirect effects from mineral development), as well as information relating to these impacts.

Response: NEPA (40 CFR 1502.15) directs that data and analyses in an EIS must be commensurate with the importance of the impact. In 40 CFR 1500.1(b) it directs that NEPA document preparers must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail. The BLM is required to take a hard look at potential environmental impacts of adopting the Proposed RMP Amendment/Final EIS.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

Additionally, the BLM must discuss the cumulative effects of the proposed action and the alternatives when preparing an EIS (BLM Handbook H-1790-1, Section 6.8.3). CEQ regulations (40 CFR 1508.7) define cumulative effects as “. . . the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions.”

NEPA (40 CFR 1500.1(b)) requires that high quality environmental information be “available to public officials and citizens before decisions are made and before actions are taken.” When there is “incomplete or unavailable information,” the BLM must “make clear that such information is lacking” (40 CFR 1502.22). When the missing information is “relevant to reasonably foreseeable significant adverse impacts” and “essential to a reasoned choice among alternatives,” the agency must obtain the information and include it in the EIS, unless the costs of obtaining it are “exorbitant” or “the means to obtain it are not known” (40 C.F.R. 1502.22(a)). In the latter case, where costs or practical limitations make the data unavailable, the BLM is required to do the next best thing and include the following in the EIS

- A statement that the information is incomplete or unavailable
- A statement of the information’s relevance to foreseeable significant impacts
- A “summary of existing credible scientific evidence” relevant to evaluating impacts
- The agency’s evaluation of impacts, based on “theoretical approaches or research methods generally accepted in the scientific community” (40 CFR 1502.22(b))

The BLM has complied fully with the requirements of 40 CFR 1508.7. It prepared a cumulative impact analysis based on the broad nature and scope of the proposed management options under consideration at the land use planning level. In the cumulative impact analysis, the BLM considered the effects of the Proposed RMP Amendment/Final EIS, when added to other past, present, and reasonably foreseeable (not highly speculative) federal and nonfederal actions. In the cumulative impacts section (Section 4.8), the BLM identified all actions that were considered in the cumulative impacts analysis. It provides a basis for the cumulative impacts analysis for each affected resource.

The BLM considered the relationship between the proposed action and these reasonably foreseeable actions to determine the level of analysis. The information presented in the Proposed RMP Amendment/Final EIS enables the decision-maker to make a reasoned choice among alternatives.

The Proposed RMP Amendment/Final EIS incorporates by reference the 2015 Northwest Colorado Proposed Land Use Plan Amendment/Final EIS and the 2016 Draft EIS for Sagebrush Focal Area Withdrawal, which comprehensively analyzed the cumulative impacts of these planning decisions under consideration.

The BLM adequately analyzed the cumulative effects in the Proposed RMP Amendment/Final EIS; the BLM denies this protest.

Moffat County Board of Commissioners

Ray Beck

Issue Excerpt Text: CPW will not likely approve WEMs and thus the NSO-2 prescription completely removes the great majority of the eastern half of the county from development. The 2018 FEIS never discloses this reality and instead relies on analysis from the 2015 FEIS. The 2015 FEIS also failed to acknowledge the practical effect.

Summary: The BLM failed to provide and adequately examine information relating to Colorado Parks and Wildlife’s (CPW’s) decision on waivers, exceptions, and modifications and the subsequent effects of CPW’s decision.

Response: NEPA (40 CFR 1502.15) directs that data and analyses in an EIS must be commensurate with the importance of the impact. In 40 CFR 1500.1(b) it directs that NEPA document preparers must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail. The BLM is required to take a hard look at potential environmental impacts of adopting the Proposed RMP Amendment/Final EIS.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

The BLM retains decision authority to grant or deny a waiver, exception, or modification. The protestor is mistaken in assuming that authority resides with the CPW. It would be speculative and uninformative to prejudice what recommendation the CPW would offer to the BLM when considering WEMs in the future.

The BLM complied with NEPA’s requirement to analyze the environmental consequences of and impacts on oil and gas in the Proposed RMP Amendment/Final EIS; accordingly, the BLM denies this protest.

Moffat County Board of Commissioners

Ray Beck

Issue Excerpt Text: Moffat County has persistently raised the functional equivalence of NSO and No Leasing since 2013 and BLM’s failure to analyze the impacts of such a prescription to 1.1 million acres in Moffat County. See Attach. 5, at 13-15; Attach. 6, June 29, 2015 Protest at 5-92 ; Attach. 4, at 1-4. Moffat County attempted to work directly with BLM to resolve these issues by developing language which it submitted in track changes on December 21, 2018. Attach. 7, Moffat County NSO Proposal.

Moffat County Board of Commissioners

Ray Beck

Issue Excerpt Text: No Surface Occupancy (“NSO”) in Priority Habitat Management Areas (“PIIMA”) with Waivers Exceptions and Modifications (“WEMs”) upon approval by Colorado Parks and Wildlife (“NSO-1”) and NSO within 1 mile of active lek pending approval by Colorado Parks and wildlife (“NSO-2”) operate to effectively close the entire eastern half of Moffat County to oil and gas development. The 2018 FETS did not analyze nor disclose the impact of preventing oil and gas development in most of this area;

Summary: The BLM failed to provide and adequately examine information relating to the impacts of NSO and no leasing on land in Moffat County.

Response: NEPA (40 CFR 1502.15) directs that data and analyses in an EIS must be commensurate with the importance of the impact. In 40 CFR 1500.1(b) it directs that NEPA document preparers must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail. The BLM is required to take a hard look at potential environmental impacts of adopting the Proposed RMP Amendment/Final EIS.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

An NSO stipulation is not the functional equivalent of closing or withdrawing a resource from public access; rather, NSOs are designed to avoid or minimize impacts on surface resources. Further, the waivers, exceptions, and modifications in the Proposed RMP Amendment/Final EIS allow for site-specific flexibility, in order to provide access for development. The subsurface resource would still be available for public access, while providing the BLM and the public with a measure of protective management for surface resources of concern. The analysis focuses on the direct, indirect, and cumulative impacts that could result from on-the-ground changes. The Proposed RMP Amendment/Final EIS identifies impacts that may result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

The BLM complied with NEPA's requirement to analyze the environmental consequences and impacts on oil and gas in the Proposed RMP Amendment/Final EIS; accordingly, it denies this protest.

NEPA—Mitigation

The Wilderness Society

Nada Culver

Issue Excerpt Text: At some point along the way, BLM would then ostensibly find a manner to make these and other state measures enforceable. Of course, to the extent states require or permit payment of funds, it is unclear how BLM will reconcile this with the prohibition on mandating compensatory mitigation on BLM lands or accepting a monetary contribution for implementing compensatory mitigation set out in IM 2019-18. Overall, in fact, it is unclear how if BLM cannot enforce compensatory mitigation under its own authority, it can then enforce compensatory mitigation that states require - and BLM does not provide an explanation.

Summary: The BLM's compensatory mitigation tool, as outlined in the Proposed RMP Amendment/Final EIS, is so uncertain and undefined that it is not enforceable or effective under the standards set out by NEPA and the related case law.

Response: NEPA (40 CFR 1502.14(f) and 1502.16(h)) requires the BLM to include a discussion of measures that may mitigate adverse environmental impacts. Potential forms of mitigation are as follows (40 CFR 1508.20):

- Avoid the impact altogether by not taking a certain action or parts of an action
- Minimize impacts by limiting the degree or magnitude of the action and its implementation

- Rectify the impact by repairing, rehabilitating, or restoring the affected environment
- Reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action
- Compensating for the impact by replacing or providing substitute resources or environments

To align this planning with the BLM’s compensatory mitigation policy (IM 2019-18), the Proposed RMP Amendment/Final EIS clarifies that the BLM will consider compensatory mitigation only as a component of compliance with a state mitigation plan, program, or authority or when offered voluntarily by a project proponent. As described in IM 2019-18, the BLM in its NEPA analysis will evaluate any compensatory mitigation measures required by the State in all action alternatives. It will incorporate those measures as an enforceable condition of its authorization. When the proponent volunteers compensatory mitigation as part of a proposed action, the BLM will evaluate compensatory mitigation in all action alternatives. When the state recommends compensatory mitigation, and the proponent does not include it in a proposed action, the BLM will evaluate compensatory mitigation in at least one of the action alternatives.

For the reasons stated above, the BLM denies this protest.

***The Wilderness Society
Nada Culver***

Issue Excerpt Text: As detailed in M-37039, FLPMA and other applicable laws allow BLM to require compensatory mitigation. Taking the opposite approach based on a misreading of the law is both arbitrary and capricious and contrary to law, and moreover violates FLPMA’s requirement to avoid unnecessary or undue degradation (UUD). Abandoning compensatory mitigation as a tool to prevent habitat degradation would violate this requirement. As noted above, the UUD standard prohibits degradation beyond that which is avoidable through appropriate mitigation and reasonably available techniques.

Summary: The BLM’s approach to compensatory mitigation violates FLPMA’s requirement to prevent UUD.

Response: Section 302(b) of FLPMA requires that “in managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” Section 302(a) of FLPMA directs the Secretary to “manage the public lands under principles of multiple use and sustained yield, in accordance with land use plans developed . . . under section 202 of the Act” except as otherwise provided by law. M-37039 has been revoked by M-37046. Furthermore, the Proposed RMP Amendment/Final EIS provides for the balanced management of the public lands in the planning area. In developing it, the BLM fully complied with its planning regulations (43 CFR 1610), the requirements of NEPA, and other statutes, regulations, and executive orders related to environmental quality. The Proposed RMP Amendment/Final EIS identifies appropriate allowable uses, management actions, and other mitigation measures that prevent the unnecessary or undue degradation of public lands. It does not authorize any use of the public lands, much less any that would result in unnecessary or undue degradation.

The Proposed RMP Amendment/Final EIS includes mitigation by, for example, applying NSO stipulations, with certain exceptions, modifications, and waivers, and by avoiding areas surrounding leks for such land use authorizations as rights-of-way. The three-tier habitat approach is designed to avoid and minimize effects on Greater Sage-Grouse designated habitat by moving potential disturbances out of PHMA and IHMA and into nonhabitat, thus effectively mitigating the adverse effect. In fiscal year 2018, the BLM funded approximately \$29 million in Greater Sage-Grouse management actions resulting in

approximately 500,000 acres of treated Greater Sage-Grouse habitat and expects to invest another \$17 million of habitat management projects in fiscal year 2019. These types of actions and allowable uses are forms of mitigation under 40 CFR 1508.20.

For the reasons stated above, the BLM denies this protest.

NEPA—Public Participation

Western Watersheds Project

Greta Anderson

See also: *FLPMA—General*; *NEPA—Supplemental EIS*

Issue Excerpt Text: Contrary to BLM’s representation, the changes introduced between the Northwest Colorado DEIS and FEIS are highly significant. Major changes since the DEIS include BLM’s (unsubstantiated and unlawful) disclaimer of its authority to require compensatory mitigation for unavoidable environmental harm, as well as the previously-undisclosed delegation of lease stipulation exemption and modification determinations to counties. Under NEPA, the agency cannot delay providing information on such significant changes to the FEIS stage.

Summary: The BLM did not provide the public with an opportunity to comment on changes made to the Proposed RMP Amendment/Final EIS between the draft and final document.

Response: NEPA (40 CFR 1502.9(c)) requires agencies to prepare supplemental EISs if the agency makes substantial changes to the proposed action that are relevant to environmental concerns or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. “Substantial changes” in the proposed action relevant to environmental concerns are changes that would result in significant effects outside the range of those analyzed in the draft or final EIS (BLM Handbook H-1790-I, p. 29). A supplemental EIS may also be required when a new alternative is added that is outside the spectrum of alternatives already analyzed and not a variation of an alternative or a combination of alternatives already analyzed (BLM Handbook H-1790-I, p. 29).

The clarification to BLM’s mitigation policy does not represent a substantial change from the draft EIS; rather, the BLM is clarifying the role that state requirements play in guiding the its decision to evaluate compensatory mitigation as part of the proposed actions. in its NEPA analysis, the BLM will still evaluate compensatory mitigation in the same way that it will include other state requirements as part of a proposed action.

Because the clarification to BLM’s mitigation policy does not represent a substantial change from the draft EIS, it does not need to prepare a supplemental EIS; accordingly, the BLM denies this protest.

The Wilderness Society

Nada Culver

Issue Excerpt Text: The lack of coherence in the Proposed Amendments frustrates the public’s ability to understand what BLM intends to propose and to evaluate the likelihood of its effectiveness; further, because it is only just being presented in the FEISs, the public has yet to have an opportunity to provide meaningful comments. Courts have invalidated such “incomprehensible” agency plans and environmental analyses that contain conflicting and confusing information. See, e.g., *California ex rel. Lockyer v. U.S. Forest Service*, 465 F. Supp. 2d 917, 948-50 (N.D.Cal. 2006).

Summary: The BLM’s proposed amendments are not clear enough for the public to understand the intended action and its effectiveness. The BLM has also failed to provide the public with an opportunity

to comment on changes to the Proposed RMP Amendment/Final EIS between the draft and final document.

Response: 40 CFR 1500.2(b) states that “Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.”

The BLM outlined its intent regarding management actions and the likelihood of effectiveness of these actions in a clear and concise manner in Chapter 1 (Purpose of and Need for Action) of the Proposed RMP Amendment/Final EIS and throughout its analyses. Any incoherence or discrepancies were addressed in Appendix 1: Responses to Substantive Public Comments on the Draft EIS. Consequently, the BLM has met its obligations under 40 CFR 1500.2(b) to produce a concise, clear, and scientifically supported Proposed RMP Amendment/Final EIS.

The Proposed RMP Amendment/Final EIS complies with the requirements of 40 CFR 1500.2(b). Because the clarification to the BLM’s mitigation policy does not represent a substantial change from the draft EIS, the BLM does not need to prepare a supplemental EIS; accordingly, the BLM denies this protest.

NEPA—Purpose and Need

The Wilderness Society

Nada Culver

Issue Excerpt Text: Also in violation of NEPA, BLM has improperly defined the “purpose and need” to reflect the narrow wishes of certain states and not broader objectives set forth in the ESA and other federal laws. NEPA prohibits BLM from “mandating” that the interests of project proponents “define the scope of the proposed project.” NPCA, 606 F.3d at 1070. Instead, BLM must reference and incorporate broader, national objectives as enumerated in statutes and other congressional directives. *Id.* BLM failed to do so here, and instead developed the “purpose and need” to carry out the wishes of specific states.

The Wilderness Society

Nada Culver

Issue Excerpt Text: It has developed an unreasonably narrow “purpose and need” for the FEISs that forecloses consideration of any alternative that does not align with state plans and recent DOI and BLM policies that “prioritize energy independence. . . .”

The Wilderness Society

Nada Culver

Issue Excerpt Text: Further, it is self-evident that this “purpose and need” was defined not by BLM, as required by NEPA, but by certain states (i.e., project proponents).

Summary: The BLM defined the purpose and need too narrowly so as to carry out the wishes of specific states.

Response: In accordance with NEPA (40 CFR 1502.13), the BLM has discretion to establish the purpose of and need for a proposed action. The BLM must construct its purpose and need to conform to existing decisions, policies, regulation, and laws (BLM Handbook H-1790-1, Section 6.2).

The BLM established the purpose of and need for the Proposed RMP Amendment/Final EIS, which is described at Section 1.2, to meet its land use planning mandate under FLPMA. In FLPMA, Congress provided the BLM with discretion and authority to manage public lands for multiple use and sustained yield. It declared it the policy of the United States to coordinate planning with the land use planning and

management programs of other federal, state, and local governments, consistent with the laws governing the administration of the public lands.

In addition to FLPMA’s directive to provide for enhanced cooperation and greater consistency with state, tribal, and local governments, since 2015, there have been additional executive and secretarial orders that direct the Department of the Interior to prioritize energy independence and greater cooperation with the states specific to the management of Greater Sage-Grouse. In light of these more recent policies, summarized in Section I.1 of the Proposed RMP Amendment/Final EIS, its purpose and need is to modify the approach to Greater Sage-Grouse management in existing land use plans through the following:

- Enhancing cooperation and coordination with Colorado and tribes where applicable
- Aligning with Department of the Interior and BLM policy directives that have been issued since 2015
- Incorporating appropriate measures that conserve, enhance, and restore habitat in a manner that better aligns with Colorado’s conservation plan

The purpose and need provided the appropriate scope to allow the BLM to analyze a reasonable number of alternatives that represent approaches for managing the public lands in the planning area. The purpose and need made a range of reasonable alternatives available for consideration, such that any foreordained outcome was not the only one available; rather, the BLM considered a No Action Alternative as well as a Management Alignment Alternative.

Finally, states are not “project proponents” that have applied to the BLM to use public lands. Section 202(c)(9) of FLPMA requires that “land use plans of the Secretary under this section shall be consistent with state and local plans to the maximum extent he finds consistent with federal law and the purposes of this act.” The Department of the Interior’s Fish and Wildlife Policy, codified at 43 CFR 24, describes coordination and cooperation between federal and state governments relating to the management of fish and wildlife. In 43 CFR 24.3, it recognizes that states generally “possess broad trustee and police powers over fish and wildlife within their borders, including fish and wildlife found on Federal lands within a State.”

The BLM properly established the purpose of and need for the Proposed RMP Amendment/Final EIS; accordingly, the BLM denies this protest.

NEPA—Range of Alternatives

Western Watersheds Project

Greta Anderson

Issue Excerpt Text: (NTT 2011), would implement habitat protections based on the best available science, and maximize the potential to recover greater sage-grouse to healthy population levels such that ESA listing becomes unnecessary, a key part of the purpose and need for the original ARMPAs. Yet BLM failed to even consider such an alternative, even though it would be eminently reasonable and implementable. In failing to consider a range of reasonable alternatives, BLM’s PRMP EIS for NWCO violates NEPA’s ‘range of alternatives’ requirement.

The Wilderness Society

Nada Culver

Issue Excerpt Text: we submitted a standalone proposed alternative and identified specific alternatives that should be evaluated, such as completing the supplemental NEPA required to maintain

Sagebrush Focal Areas, considering an alternative that would both strengthen protections from oil and gas development while improving consistency with state plans or considering an alternative to maintain net conservation gain in all states. BLM did not evaluate any of these alternatives.

Summary: The BLM failed to propose and fully analyze other alternatives, including a conservation alternative aimed at maximizing the potential for Greater Sage-Grouse population recovery in order to avoid ESA listing or alternatives proposed by organizations like the Wilderness Society.

Response: When an agency is preparing an EIS, NEPA requires it to rigorously explore and objectively evaluate all reasonable alternatives. Further, it requires that the agency briefly discuss the reasons that alternatives were eliminated from detailed study (40 CFR 1502.14(a)).

The BLM developed a range of reasonable alternatives that meet the purpose of and need of for the Proposed RMP Amendment/Final EIS and that address resource issues identified during the scoping period. The Proposed RMP Amendment/Final EIS analyzed two alternatives, which are described in Section 2.3. The alternatives cover the full spectrum and vary in the following:

- Degrees of protection for each resource and use
- Approaches to management for each resource and use
- Mixes of allowable, conditional, and prohibited uses in various geographic areas
- Levels and methods for restoration

A conservation-based alternative would not enhance coordination with the state or improve alignment with state management of Greater Sage-Grouse; therefore, it would fail to meet the purpose of and need for the Proposed RMP Amendment/Final EIS. By failing this, the recommended alternative for a conservation-based plan is unreasonable.

The BLM considered a range of reasonable alternatives in the Proposed RMP Amendment/Final EIS, in full compliance with NEPA; accordingly, the BLM denies this protest.

NEPA—Response to Public Comments

Moffat County Board of Commissioners

Ray Beck

Issue Excerpt Text: BLM has repeatedly responded that the language in the 2018 Plan will allow oil and gas development through application of WEMs. See Attach. 4, at 2-3. This response is inadequate for at least two reasons: (1) Colorado Parks and Wildlife has indicated that it would not approve of any WEMs anywhere within 4 miles of a lek; and (2) BLM has provided no information that a Controlled Surface Use stipulation in PIIMA and within 4 miles of a lek would not provide the exact same benefit as an NSO.

Moffat County Board of Commissioners

Ray Beck

Issue Excerpt Text: The FEIS does not respond to Moffat County's comments regarding: No Surface Occupancy within 1 mile of sage-grouse leks or within PHMA; * Controlled surface use stipulations supported by Moffat County; * BLM's improper coordination with Colorado Parks and Wildlife; * BLM's failure to work with Moffat County on issues identified by Moffat County during the administrative phase; BLM's Failure to address scientific controversy surrounding literature and data used to support the 2015 Plan and elements in the 2018 Plan that remain unchanged despite increased controversy; Unlawful delegation to Colorado Parks and Wildlife of federal land management decisions; * Mitigation

standard does not comport with the plain language of FLPMA; BLM’s failure to address new literature with regards to predation, residual stubble height, and other important developments recognized by BLM and Forest Service in Utah and Wyoming.

Moffat County Board of Commissioners

Ray Beck

Issue Excerpt Text: The BLM failed to respond to Moffat County’s comments in its capacity as a cooperating agency and as a local government to the DEIS in Appendix I.

Summary: The BLM failed to meet its obligations in responding to public comments, because it did not respond to or incorporate any mitigation measures or alternatives that various organizations and agencies suggested in scoping.

Response: The BLM is required to assess, consider, and respond to all substantive comments received (40 CFR 1503.4). Substantive comments are those that reveal new information, missing information, or flawed analysis that would substantially change conclusions (BLM Handbook H-1601-I, pp. 23 and 24).

In compliance with NEPA, the BLM considered all public comments submitted on the draft RMP Amendment/Draft EIS. It complied with 40 CFR 1503.4 by performing a detailed comment analysis that assessed and considered all substantive comments received. Appendix G of the Proposed RMP Amendment/Final EIS presents the BLM’s responses to all substantive comments.

The BLM summarized the issues raised by each comment letter and provided a meaningful response. Its responses identified any modifications to the alternatives, improvements to the impacts analysis, and factual corrections made as a result of public comment. The BLM’s response also explains why certain public comments did not warrant further response.

The BLM’s comment response process does not treat public comments as a vote for a particular action; rather, the process ensures that the BLM considers every comment when preparing the Proposed RMP Amendment/Final EIS.

The BLM adequately responded to public comments on the Proposed RMP Amendment/Final EIS; accordingly, the BLM denies this protest.

Moffat County Board of Commissioners

Ray Beck

Issue Excerpt Text: NEPA requires the BLM to “respond to comments” on the draft EIS and “discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency’s response to the issues raised.” 40 C.F.R. § 1502.9; see also 40 C.P.R. § 1503.4. The FEIS must “state how alternatives considered in it and decisions based on it will or will not achieve the requirements of [NEPA] and other environmental laws and policies.” 40 C.F.R. § 1502.2(d). Comments that highlight discrepancies between the action and the statutory framework deserve explicit and direct response. *Am. Wild Horse Pres. Campaign v. Zinke*, 2017 WL 4349012, at *13 (D. Idaho Sept. 29, 2017), appeal dismissed sub nom. *Am. Wild Horse Pres. Campaign v. Jewell*, 2017 WL 7796295 (9th Cir. Dec. 13, 2017).

The Wilderness Society

Nada Culver

Issue Excerpt Text: 40 C.F.R. § 1503.4(a) (emphasis added). In the Proposed Amendments and FEISs, BLM utterly failed to comply with this obligation. Each Proposed Amendment includes an Appendix that purports to set out both a rangewide response comments and a state-specific response to comments by

first summarizing comments, then responding to those summaries and then setting out the “full text of parsed comments.” However, the summaries of comments are so broad that they do not accurately represent the comments submitted.

Moffat County Board of Commissioners

Ray Beck

Issue Excerpt Text: The BLM provides a mere 23 pages of responses to summarized comments.

Summary: The BLM failed to meet its obligations in responding to public comments, because its summary and response to those comments is so broad that they do not accurately represent the comments submitted.

Response: The BLM is required to assess, consider, and respond to all substantive comments received (40 CFR 1503.4). Substantive comments are those that reveal new information, missing information, or flawed analysis that would substantially change the conclusions (BLM Handbook H-1601-1, pp. 23 and 24). When the comments are especially long, the CEQ regulations allow for similar comments to be grouped or summarized and addressed in a single response (40 CFR 1503.4(a)).

In compliance with NEPA, the BLM considered all public comments submitted on the Draft RMP Amendment/Draft EIS. It complied with 40 CFR 1503.4 by performing a detailed comment analysis that assessed and considered all substantive comments received. Appendix I of the Proposed RMP Amendment/Final EIS presents the BLM’s responses to all substantive comments.

In compliance with 40 CFR 1503.4(a), the BLM grouped and summarized similar comments and addressed them in a single response. The BLM identified any modifications to the alternatives, improvements to the impacts analysis, and factual corrections made as a result of public comment. The BLM also explained why certain public comments did not warrant further agency response. The agency ensured that each of these comment summaries adequately captured the detailed issues raised by each commenter and that the responses were reasonable and proportional to the comments submitted.

Additionally, the BLM’s comment response process does not treat public comments as if they were a vote for a particular action. The process ensures that the BLM considers every comment when preparing the Proposed RMP Amendment/Final EIS.

The BLM adequately responded to comments submitted by Moffat County on the Proposed RMP Amendment/Final EIS; accordingly, the BLM denies this protest.

NEPA—Supplemental EIS

Western Watersheds Project

Greta Anderson

See also: *FLPMA—General; NEPA—Public Participation; SOL Review (mitigation, supplementation)*

Issue Excerpt Text: Contrary to BLM’s representation, the changes introduced between the Northwest Colorado DEIS and FEIS are highly significant. Major changes since the DEIS include BLM’s (unsubstantiated and unlawful) disclaimer of its authority to require compensatory mitigation for unavoidable environmental harm, as well as the previously-undisclosed delegation of lease stipulation exemption and modification determinations to counties. Under NEPA, the agency cannot delay providing information on such significant changes to the FEIS stage.

The Wilderness Society
Nada Culver

Issue Excerpt Text: In addition, the change in circumstances due to ongoing fires in sage-grouse habitat over the last three years, burning millions of acres, should be evaluated in supplemental analysis. See, Information Bulletin No. FAIB2017-009, Greater Sage-grouse Habitat Data for Wildland Fire Management Decision Making and Reporting of Acres Burned (updated October 23, 2018), attached as Exhibit 2.

The Wilderness Society
Nada Culver

Issue Excerpt Text: this type of change requires BLM to conduct analysis, because the plans have changed from incorporating specific commitments to ensuring there is a gain of habitat to no longer making such a commitment. Simply “stating without further analysis” that analysis is not required does not fulfill NEPA’s hard look requirement or absolve BLM of supplementing the NEPA analysis conducted for the 2015 Sage-grouse Plans, a discussed in further detail below.

Summary: Changes made regarding compensatory mitigation and lease stipulation exemption and modification determinations between the Draft RMP Amendment/Draft EIS and the Proposed RMP Amendment/Final EIS warrant preparation of a supplemental EIS.

Response: NEPA requires agencies to prepare supplements to either a draft or final EIS if they make substantial changes to the proposed action that are relevant to environmental concerns. It also requires a supplement if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts (40 CFR 1502.9(c)). Substantial changes in the proposed action relevant to environmental concerns are those that would result in significant effects outside the range of effects analyzed in the draft or final EIS (BLM Handbook H-1790-1, p. 29).

A supplemental EIS may also be required when a new alternative is added that is outside the spectrum of alternatives already analyzed. It may not be a variation of an alternative or a combination of alternatives already analyzed (BLM Handbook H-1790-1, p. 29).

The clarification to the BLM’s mitigation policy does not represent a substantial change from the draft EIS. Rather, the BLM is clarifying the role that state requirements play in guiding its decision to evaluate compensatory mitigation as part of the proposed actions. The BLM will still evaluate compensatory mitigation in the same way that it includes other state requirements as part of a proposed action.

Because the clarification to the BLM’s mitigation policy does not represent a substantial change from the Draft RMP Amendment/Draft EIS, the BLM does not need to prepare a supplemental EIS; accordingly, the BLM denies this protest.

The Wilderness Society
Nada Culver

Issue Excerpt Text: BLM’s new legal interpretation and guidance (set out in Instruction Memorandum 2019-018) represents the very sort of “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts” that demand further analysis.

The Wilderness Society
Nada Culver

Issue Excerpt Text: We have seen the effects of this change in policy through about 1.5 million acres of sage-grouse habitat offered for lease since 2017, with more than 700,00 sold, and more than 2 million

acres of habitat up for lease in February and March 2018. The effects of this change on sage-grouse habitat significant and certainly should be analyzed as part of these EISs.

Summary: The change in the legal interpretation and guidance for mitigation set out in IM 2019-018 is a significant new circumstance and information relevant to environmental concerns and bearing on the proposed action or its impacts. As such, preparation of a supplemental EIS is merited, and the BLM has erred by preparing a final EIS. Recent trends in oil and gas leasing demonstrate substantial changes in leasing, resulting from the change in mitigation policy.

Response: NEPA (40 CFR 1502.9(c)) requires agencies to prepare supplements to either a draft or final EIS if the agency makes substantial changes to the proposed action that are relevant to environmental concerns or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. Substantial changes in the proposed action relevant to environmental concerns are those that would result in significant effects outside the range of those analyzed in the draft or final EIS (BLM Handbook H-1790-1, p. 29).

A supplemental EIS may also be required when a new alternative is added that is outside the spectrum of alternatives already analyzed, and not a variation of an alternative or a combination of alternatives already analyzed (BLM Handbook H-1790-1, p. 29).

The clarification to the BLM’s mitigation policy does not represent a substantial change from the Draft RMP Amendment/Draft EIS; rather, the BLM is clarifying the role that state requirements play in guiding its decision to evaluate compensatory mitigation as part of the proposed actions. The BLM will still evaluate compensatory mitigation in the same way that it will include other state requirements as part of a proposed action.

For the reasons stated above, the BLM does not need to prepare a supplemental EIS; accordingly, the BLM denies this protest.

[NEPA—Tiering/Incorporation by Reference](#)

The Wilderness Society

Nada Culver

Issue Excerpt Text: The modification and/or elimination of major components of the 2015 Sage-grouse Plans result in a new set of conditions by the 2018 Proposed Amendments preclude BLM from relying on the environmental analysis in the 2015 environmental impact statements; new NEPA analysis is required.

The Wilderness Society

Nada Culver

Issue Excerpt Text: In essence these Proposed RMP Amendments have changed the central tenets of the 2015 Sage-grouse Plans. As a result, BLM cannot rely on the analysis and alternatives that were developed to support the landscape level, conservation-focused 2015 Sage-grouse Plans to support the case-by-case, development-focused 2018 RMP Amendments.

The Wilderness Society

Nada Culver

Issue Excerpt Text: neither tiering nor incorporating by reference can be justified when the purpose and need, the goals and objectives and the “Administrative priorities” are all opposed to those that set the direction of the 2015 Sage-grouse Plans.

The Wilderness Society**Nada Culver**

Issue Excerpt Text: The resulting decisions in these Proposed Amendments are in direct conflict with the commitments made in the 2015 Sage-grouse Plans and, as a result, cannot justify incorporate of the 2015 EISs' cumulative impact analysis or range of alternatives.

Summary: It is insufficient for the BLM to rely on the analysis and alternative in the 2015 Approved RMP Amendment/Record of Decision for the analysis of the Proposed RMP Amendment/Final EIS. This is because there are major differences in plan components between the amendments from 2015 and the Proposed RMP Amendment/Final EIS.

Response: CEQ regulations (40 CFR 1502.21) direct agencies to incorporate material by reference into an EIS, where doing so would cut down on its bulk without impeding agency and public review of the action. The agencies would have to cite such material and briefly describe its content. CEQ (40 CFR 1508.28 and 1502.20) also directs agencies to incorporate any existing NEPA analyses in order to focus subsequent analysis on new issues, provided that actions analyzed are “clearly consistent” between documents.

The BLM is using incorporation by reference, not tiering, to streamline its analysis, which is consistent with DOI priorities. Incorporating the 2015 Approved RMP Amendment/Record of Decision by reference is allowable under BLM regulations and is appropriate in this circumstance. This is because the purpose of the Proposed RMP Amendment/Final EIS builds on the goals and objectives of the 2015 Approved RMP Amendment/Record of Decision. Further, in the CEQ’s “40 Questions,” question 24c states that “Tiering is a procedure which allows an agency to avoid duplication of paperwork through the incorporation by reference of the general discussions and relevant specific discussions from an environmental impact statement of broader scope into one of lesser scope or vice versa.” The BLM has summarized and referenced applicable aspects of the 2015 Approved RMP Amendment/Record of Decision throughout the Proposed RMP Amendment/Final EIS, especially in Chapters 2 and 4.

In addition, by incorporating the 2015 Approved RMP Amendment/Record of Decision by reference, BLM avails itself of a larger range of management options previously analyzed in a broadly distributed EIS. While the purpose of the Proposed RMP Amendment/Final EIS is different, the alternatives considered in the 2015 Approved RMP Amendment/Record of Decision, which are incorporated by reference, have informed the range of alternatives analyzed in detail in the Proposed RMP Amendment/Final EIS; thus, the protestor’s argument that there are major differences in the plans misapprehends how the two plans relate to one another. Finally, the 2015 cumulative effects analysis has also been updated with quantitative analysis of the cumulative impacts from planning decisions for each management zone to the Proposed RMP Amendment/Final EIS. This was done to address range-wide issues and concerns.

For the reasons stated above, the BLM denies this protest.

Other Laws**Moffat County Board of Commissioners****Ray Beck**

Issue Excerpt Text: According to the FEIS, the BLM would “defer” to the State’s compensatory mitigation framework and is “committed” to imposing requirements that would derive from that framework. FEIS-4-8. The State of Colorado’s mitigation framework, however, requires “net conservation uplift” or “net conservation benefit or net conservation gain.” See Executive Order D20

18-036 at 2. The State of Colorado, however, does not have authority to impose any standard or requirement on federal lands, let alone a standard that conflicts with federal law. The Property Clause of the U.S. Constitution gives Congress the right “to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them” *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917); see also *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

Western Watersheds Project

Greta Anderson

See also: *FLPMA—General*

Issue Excerpt Text: This delegation violates BLM’s Congressionally-imposed statutory obligation under the Property Clause and Federal Land Policy and Management Act to manage public lands on behalf of the United States.

Summary: The BLM violates the Property Clause of the US Constitution by deferring to the State of Colorado’s compensatory mitigation framework for managing Greater Sage-Grouse habitat on federal lands.

Response: Article IV, Section 3, of the Constitution states that “The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.”

Congress delegated land use planning authority on public lands to the Secretary of the Interior in FLPMA (Section 202). Section 202(a)(9) requires the Secretary to “coordinate the land use inventory, planning, and management activities” of public lands with the “land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located.” It goes on to state that “Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him.”

43 CFR 24.3(a) describes how state authority regarding fish and resident wildlife guides how the BLM cooperates with the state in the absence of specific, overriding federal law.

The Proposed RMP Amendment/Final EIS states on p. 2-9 that “The BLM will defer to the appropriate State authority to quantify habitat offsets, durability, and other aspects used to determine the recommended compensatory mitigation action.” On p. 4-8, it states that “the BLM is committed to implementing beneficial habitat management actions to reduce the threats of fire and invasive species to Greater Sage-Grouse.”

The BLM recognizes that Greater Sage-Grouse is a state-managed species, and, in accordance with 43 CFR 24.3(a), that state authority regarding fish and resident wildlife guides how the BLM cooperates with the state, in the absence of specific, overriding federal law. Further, the BLM recognizes that state governments have established fish and wildlife agencies with the responsibility and mandate to implement statutes for effective, appropriate, and efficient conservation and management of fish and resident wildlife species. Accordingly, the BLM is pursuing agreements with the States of Colorado, Idaho, Nevada, Oregon, Utah and Wyoming to clarify how the BLM, project proponents, and state management agencies will collaborate to implement a state’s compensatory mitigation plan. The BLM will defer to a state method for habitat quantification, if such a tool exists, and will incorporate the state’s assessment into the appropriate NEPA documentation.

The Proposed RMP Amendment/Final EIS clarifies that the BLM will consider compensatory mitigation only as a component of compliance with a state mitigation plan, program, or authority or when offered voluntarily by a project proponent. The Proposed RMP Amendment/Final EIS further clarifies the application of the mitigation standard as a planning-level goal and objective for Greater Sage-Grouse habitat conservation.

The BLM commits to cooperating with the State of Colorado to analyze applicant-proffered or State-imposed compensatory mitigation to offset residual impacts. The BLM may then authorize such actions consistent with NEPA analysis and the governing resource management plan. Contrary to the protestor's contention, this does not violate the Property or Supremacy Clauses of the Constitution; rather, the BLM retains management authority over authorizations on federal land, and the terms and conditions over those authorizations. The protestor is simply incorrect that states lack any authority whatsoever on federal lands; the state retains its police powers unless they conflict with federal law. The protestor has not identified how BLM's coordination with the state on compensatory mitigation and deference to it on habitat quantification would do so.

As described above, the BLM has not violated the Property Clause of the US Constitution by deferring to the State of Colorado's compensatory mitigation framework for managing Greater Sage-Grouse habitat on federal lands; accordingly, the BLM denies this protest.

Western Energy Alliance Tripp Parks

Issue Excerpt Text: The conservation measures set forth in the PRMPA violate the Energy Policy Act of 2005 because they are not the least restrictive and go beyond what is necessary to protect the resource. The proposed operational restrictions are also inconsistent with BLM's regulations which authorize lessees to use as much of the surface as is reasonable to develop their minerals.² BLM should revise the buffers and timing limitations in the FEIS to reflect the standards of the Energy Policy Act of 2005 and BLM's own regulations.

Summary: The Proposed RMP Amendment/Final EIS violates the Energy Policy Act of 2005. This is because the stipulations are not the least restrictive and go beyond what is necessary to protect the resource. In addition, the restrictions are inconsistent with the BLM's regulations that authorize lessees to use as much of the surface as is reasonable to develop their minerals.

Response: Section 353 of the Energy Policy Act of 2005 requires the BLM to ensure that lease stipulations are applied consistently and "only as restrictive as necessary to protect the resource for which the stipulations are applied" (42 USC 15922(b)(3)(C)).

43 CFR 3101.1-2 states that "A lessee shall have the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold subject to: Stipulations attached to the lease; restrictions deriving from specific, nondiscretionary statutes; and such reasonable measures as may be required by the authorized officer to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed. To the extent consistent with lease rights granted, such reasonable measures may include, but are not limited to, modification to siting or design of facilities, timing of operations, and specification of interim and final reclamation measures. At a minimum, measures shall be deemed consistent with lease rights granted provided that they do not: require relocation of proposed operations by more than 200 meters; require that operations be sited off the leasehold; or prohibit new surface disturbing operations for a period in excess of 60 days in any lease year."

The Proposed RMP Amendment/Final EIS does not violate the Energy Policy Act; accordingly, the BLM denies this protest.

Protest Process

Western Watersheds Project

Greta Anderson

Issue Excerpt Text: We also note that because of the federal government shutdown beginning on December 22, 2018, the protest period should be extended. There were at least two days during this period when the planning website were unavailable and impacted the public's ability to get access to documents stored online. WWP requested this extension via email to all the state directors on January 3, 2019 and did not receive a response.

Summary: Due to the government shutdown that rendered the planning website unavailable, the protest period should be extended.

Response: CEQ NEPA regulations require the BLM to "encourage and facilitate public involvement in the NEPA process to the fullest extent possible (40 CFR 1500.2(d) and 1506.6).

Regarding protest procedures, 43 CFR 1610.5-2(a)(1) states the following: "Any person who participated in the planning process and has an interest which is or may be adversely affected by the approval or amendment of a resource management plan may protest such approval or amendment. A protest may raise only those issues which were submitted for the record during the planning process. The protest shall be in writing and shall be filed with the Director. The protest shall be filed within 30 days of the date the Environmental Protection Agency published the notice of receipt of the final environmental impact statement containing the plan or amendment in the Federal Register. For an amendment not requiring the preparation of an environmental impact statement, the protest shall be filed within 30 days of the publication of the notice of its effective date."

The protestor does not explain how the unavailability of the document online affected the protestor's ability to protest. In any event, the BLM extended the protest period for the Proposed RMP Amendment/Final EIS by 6 days, from January 9 to January 15, 2019. Consequently, the BLM complied with the requirements outlined in 43 CFR 1610.5-2.

In compliance with 40 CFR 1500.2(d), the BLM involved the public to the extent required and necessary in preparing the Proposed RMP Amendment/Final EIS. Chapter 5 outlines the efforts undertaken by the BLM throughout the process to ensure that it remained open and inclusive, to the extent possible.

The BLM complied with the protest procedure requirements outlined in 43 CFR 1610.5-2 and met its obligations to involve the public in the planning process to the extent possible; accordingly, the BLM denies this protest.

This page intentionally left blank.