WESTERN ENERGY ALLIANCE

*Submitted via* www.regulations.gov

June 13, 2024

**Patricia Deibert**
National Sage-Grouse Conservation Coordinator
Bureau of Land Management, Utah State Office
ATTN: HQ GRSG RMPA
440 West 200 South, Suite 500
Salt Lake City, UT 84101

Agency Docket Number: BLM_HQ_FRN_MO4500174493

Re: Western Energy Alliance's Comments on the Greater Sage-Grouse Draft Resource Management Plan Amendment and Environmental Impact Statement

**Dear Ms. Deibert:**

Western Energy Alliance (Alliance) is concerned that the Bureau of Land Management's (BLM) Draft Resource Management Plan Amendment and Environmental Impact Statement (DRMPA/EIS) regarding management of the greater sage-grouse (GrSG) fails to effectively balance multiple uses as required under BLM's multiple use and sustained yield mandate. In proposing to amend 77 existing RMPs across 121 million acres of BLM-administered public land, 69 million acres of which are GrSG habitat in a single plan, BLM is improperly conducting centralized planning in violation of its own regulations and congressional direction in the Federal Land Policy and Management Act (FLPMA) regarding state and local planning. As a consequence, BLM runs roughshod over the important and effective work that states and localities have done over many decades to protect GrSG and its habitat. The Alliance appreciates the opportunity to comment and requests that BLM go back to state-specific planning, as most successfully done with the 2019 plan updates. The Colorado Oil and Gas Association (COGA) and West Slope COGA join the Alliance in support these comments.

The Alliance is concerned that each of the alternatives considered in the DRMPA/EIS, other than consideration of the 2015 plan and the 2019 plan, include components that cede BLM's authority over its statutory multiple-use management mandate, remove necessary flexibility at the state, local and project levels, and provide management for only one use—preservation of GrSG and its habitat—in contravention of FLPMA, the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA). BLM must provide an actual multiple-use alternative that provides a flexible

approach to GrSG management, including flexibility related to oil and natural gas development, and other public uses such as livestock grazing, mining, recreation, and renewable energy development.

Significantly, as discussed in further detail below, there are portions of Alternatives 3, 4, 5 and 6 that are unworkable and should be removed or significantly revised. As consistently expressed by multiple Alliance comment and protest letters throughout BLM's GrSG land use planning efforts, BLM must ensure that it manages GrSG and its habitat within its multiple-use and sustained yield mandate, consistent with statute, and in collaboration with states and the recommendations of their wildlife management agencies. BLM cannot impose overly arbitrary, unsupported, unduly unreasonable and burdensome management prescriptions and restrictive measures across the GrSG range that prohibit other uses, such as oil and natural gas development, and the rights-of-way and infrastructure necessary to power our nation.

## Interests of the Alliance

The Alliance is the leader and champion for independent oil and natural gas companies in the West. Working with a vibrant membership base for over 50 years, the Alliance stands as a credible leader, advocate, and champion of industry. Our expert staff, active committees, and committed board members form a collaborative and welcoming community of professionals dedicated to abundant, affordable energy and a high quality of life for all. Most independent producers are small businesses, with an average of fourteen employees.

Members of the Alliance explore for and develop oil and natural gas resources on BLM-managed public lands and adjacent state and private lands across the West, including in GrSG habitat. Alliance members are leaders in their communities, developing and implementing best management practices for the benefit of the GrSG and other species that rely on the sagebrush sea. Since before BLM initiated its first GrSG plan amendments, Alliance members were incorporating avoidance and minimization efforts into their planning processes, and have been continually pioneering and perfecting restoration methods to reduce impacts and improve GrSG habitat. Recent studies show the benefit of industry's reclamation and rehabilitation efforts on plant and insect diversity, improving GrSG habitat beyond historical sagebrush stands.[1] Additionally, technological innovation and improvements to operational efficiency continue to reduce industry's footprint on the landscape while also reducing drilling and completion

[1] Piceance Basin Restoration for Wildlife: Technical Publication Colorado Parks and Wildlife Technical Report No. 57, D.B. Johnston, 2020; "Insect abundance and diversity respond favorably to vegetation communities on interim reclamation sites in a semi-arid natural gas field," M.F. Curran et al., *Land*, *11*(4), 2022, p.527.; "Reclaimed sites in the Jonah Field show promising insect populations," Caitlin Tan, Wyoming Public Media, January 6, 2023; "Study finds Wyo gas fields abuzz with invertebrates," Mike Koshmrl, WyoFile, January 10, 2023.

times, resulting in less impacts to GrSG. Advanced horizontal drilling and hydraulic fracturing has resulted in a 70% reduction in the footprint of oil and natural gas on the land and reduced habitat fragmentation.[2]

Yet many of the provisions contained in the GrSG DRMPA/EIS will have a significant impact on Alliance members' business planning and operations by increasing operational costs, delaying project timeframes, and limiting or precluding operations in certain areas, including limiting their ability to develop their valid existing lease rights.

The Alliance has been participating in the GrSG planning process since BLM initiated the land use plan amendment process over a decade ago. The Alliance provided comments and formal protests on December 2, 2013, January 29, 2014, February 5, 2014, March 24, 2014, and June 29, 2015 for the 2015 RMPAs, and incorporates by reference those letters in full. Based on BLM's overly restrictive measures, in violation of FLPMA, the Mineral Leasing Act (MLA), NEPA, and APA, the Alliance filed suit in the U.S. District Court for the District of North Dakota against BLM to protect industry's rights. *See Western Energy Alliance v. Jewell*, Case No. 1:16-cv-00112.

The Alliance again provided comments on BLM's planning process leading to the 2019 RMPAs. In a series of letters submitted on each state Draft RMPA on August 2, 2018, the Alliance reiterated requests for BLM to align its plans with state-led conservation and management plans. In the case of the Wyoming Draft RMPAs, the Alliance supported many of the proposals that more closely aligned with that state's own plan. The Alliance here incorporates those letters by reference in full. Unfortunately, the 2019 plans were never implemented based on an U.S. District of Idaho court order enjoining the 2019 plans.

In response to BLM's efforts following the court's decision on the 2019 plans, the Alliance again provided comments on BLM's 2020 GrSG Draft Supplemental EIS on May 15, 2020, as incorporated by reference herein, further explaining best practices in the oil field that benefit GrSG and its habitat.[3]

On February 8, 2022, the Alliance provided comments on BLM's GrSG planning process, this time on BLM's notice of intent to once again amend the RMPs for GrSG. As reiterated in the Alliance's 2022 letter, incorporated in full herein by reference, the Alliance remains concerned with BLM's continued consideration of and modification to:

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[2] "Oil and gas impacts on Wyoming's sage-grouse: summarizing the past and predicting the foreseeable future," Dave H. Applegate and Nick L. Owens, *Human-Wildlife Interactions Vol. 8 No 2*, 2014, p. 284-290.

[3] See the discussion in Attachment D of the Alliance's May 15, 2020 comments titled "Summary of Improvements in Oil and Gas Technology and Best Practices that have Reduced Overall Impacts to Greater Sage-Grouse in the Pinedale Planning Area of Wyoming."

- Priority and general habitat management area (PHMA/GHMA) designations
- Areas of Critical Environmental Concern (ACEC)
- Lek buffers and disturbance and density caps
- Compensatory mitigation and net conservation gain requirements
- Adaptive management
- Leasing prioritization
- Waivers, exceptions, and modifications
- Underlying science justifying the plans.

Additionally, as explained in further detail below, the Alliance once again urges BLM to recognize and defer to state management plans. Before BLM initiated its first GrSG planning process, many of the western states were already managing for the protection and preservation of GrSG and its habitat, including developing and implementing plans that have consistently benefited GrSG while allowing multiple uses, and which have avoided the multiple legal challenges that BLM's plans have faced.

## History of the Alliance Defending Industry's Interests in GrSG Litigation

The Alliance has been actively involved in BLM's GrSG initiatives since at least 2008 and has always endeavored to collaboratively engage with BLM on this important issue and serve as a resource in providing BLM with substantive, technical data and information to help inform BLM's formulation of workable management prescriptions and decision making. The Alliance has actively defended numerous BLM decisions related to GrSG that have been and still are subject to legal challenges and on-going litigation and appeals.

For example, in 2014, the Alliance filed a legal challenge under the Freedom of Information Act, seeking information regarding whether BLM was relying on the best available science in its planning process.[4]

On April 7, 2016, the Alliance intervened in a legal challenge brought by Western Watersheds Project (WWP) and other organizations in February of 2016. WWP's suit challenged certain provisions of the 2015 plans (Idaho GrSG Lawsuit).[5] As a Defendant-Intervenor, the Alliance sought to defend portions of the plan challenged by WWP and other groups.

[4] *Western Energy Alliance v. U.S. Fish & Wildlife Serv.*, 13-cv-02811, U.S. Dist. Court, Dist. of Colorado.
[5] *Western Watersheds Project et al. v. Schneider*, 1:16-cv-00083, U.S. Dist. Court, Dist. of Idaho.

On May 12, 2016, the Alliance filed a separate lawsuit against the Department of the Interior, BLM, and the U.S. Forest Service, raising a challenge to portions of the decisions to approve the RMPAs related to the 2015 plans as contrary to law.[6]

Although the Alliance initially brought suit in federal district court for the District of North Dakota, the North Dakota court, over the Alliance's objection, severed its challenge and transferred portions to several other courts, including federal district courts in the Districts of Utah, Idaho, and D.C.[7] The portions of the Alliance North Dakota challenge that were transferred to Idaho were consolidated with the Idaho GrSG Lawsuit brought by WWP.

Shortly after these transfers, in January of 2017, the administration changed hands, and on June 7, 2017, the new Secretary of the Interior issued Secretarial Order No. 3353, which directed the BLM to review the 2015 plans to ensure they adequately complemented state efforts to conserve the species. The courts in Idaho, Utah, and D.C. stayed these cases on the request of the parties to allow BLM to review the plans and issue new decisions. The Alliance remains a party to all three cases, and intends to pursue its claims in these matters once final decisions are entered on the 2024 planning process.

Since the stay in 2017, the Alliance has continued to invest resources to defend its interests in portions of BLM's decisions challenging the Idaho Litigation. As a result of the planning process begun pursuant to Secretarial Order No. 3353, WWP Plaintiffs filed an amended complaint in the Idaho matter, and sought a preliminary injunction to prohibit BLM from implementing the 2019 plans. The Alliance joined numerous other defendant-intervenors in opposing this injunction, but the Idaho court granted Plaintiffs' relief in October of 2019 and ordered BLM to reimplement the 2015 plans. The Alliance agreed to stay its still-pending claims defending portions and challenging other portions of the 2015 plans pending BLM's continued re-analysis of its decision. The Alliance intends to pursue its claims in the Idaho matter, and reserves the right to amend its complaint to add any additional claims related to the present planning process.

The Alliance has also intervened in numerous challenges brought by WWP and others seeking to cancel BLM decisions to offer oil and natural gas parcels for competitive sale based on those plaintiffs' allegations that BLM has not adequately protected GrSG in reaching those decisions. As a Defendant-Intervenor, the Alliance has defended BLM's analysis of the impacts of GrSG in connection with these

[6] *Western Energy Alliance, et al. v. U.S. Dept. of the Interior*, 1:16-cv-00112-DLH-CSM, U. S. Dist. Court, Dist. of N. Dakota.
[7] *See, e.g. Western Energy Alliance v. U.S. Dept. of the Interior*, 1:16-cv-02482-EGS, U.S. Dist. Court, Dist. of Columbia; *Herbert, et al. v. Jewell*, 2:16-cv-01267, U.S. Dist. Court, Dist. of Utah.

leasing decisions.[8] This includes pursuing appeals of district court decisions finding that BLM's analyses were insufficient.[9] The Alliance's continued legal involvement in litigation regarding the GrSG planning process is further evidence to its commitment that BLM follow the law.

## BLM's Governing Legal Framework for Land Use Planning

As a foundational matter, it is important to understand BLM's governing legal framework with regard to land use planning and its direction from Congress to manage its lands for multiple use and sustained yield for present and future generations. Under this direction, BLM cannot, through the GrSG DRMPA/EIS, manage the entirety of the sagebrush sea, covering over 69 million acres and 10 states solely or almost exclusively for the preservation and protection of the GrSG and its habitat. This approach is contrary to Congress' intent in enacting FLPMA.

### Federal Land Policy and Management Act

#### *Land Use Plan Requirements*

FLPMA is the organic statute for BLM management of public lands. Under FLPMA, BLM is required to manage public lands under the principles of multiple use and sustained yield, in accordance with applicable land use plans, to meet the needs of present and future generations. 43 U.S.C. 1701(a)(7), (8) & (12); 43 U.S.C. § 1732 (a) & (b); 43 C.F.R. § 1610.5-3. FLPMA does not require beneficial impacts to resources, rather it mandates that the Secretary "prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b).

Significantly, FLPMA identifies mineral exploration and production as one of the "principle or major uses" of public lands. 43 U.S.C. § 1702(l). Furthermore, FLPMA emphasizes the importance of public resources to the United States domestic energy supply and contains an express declaration of Congressional policy that BLM manage public lands "in a manner which recognizes the Nation's need for domestic sources of minerals, [and other commodities] from the public lands. 43 U.S.C. § 1701(a)(12). FLPMA's definitions of multiple use and the major uses of public lands highlight the on-going utilization of natural resources on public lands for the benefit of the American people. 43 U.S.C. § 1702(c).

[8] *See, e.g. Western Watersheds Project v. Zinke*, 1:18-cv-187, U.S. Dist. Ct., Dist. of Idaho; *Montana Wildlife Fed. v. Bernhardt*, 18-cv-69, U.S. Dist. Ct., Dist. Montana; *Dakota Resource Council v. U.S. Dept. of Interior*, 22-cv-1853, U.S. Dist. Ct. Dist. of Columbia.
[9] *See, e.g. Western Watersheds Project v. Zinke*, No. 20-35297, U.S. Court of Appeals for the Ninth Circuit, *Montana Wildlife Federation v. Zinke*, No. 20-35609 (consol.) U.S. Court of Appeals for the Ninth Circuit.

*Discretion in Land Use Plans*

Congress provided the Secretary of the Department of the Interior (Secretary) with significant discretion and authority to "manage the public lands under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a). Judicial precedent recognizes the Secretary's broad grant of discretion under FLPMA to achieve the statutory goal of managing federal lands under the principles of multiple use and sustained yield. *See Norton v. S. Utah Wilderness Alliance,* 542 U.S. 55, 66 (2004) (BLM has "a great deal of discretion" in deciding how to achieve FLPMA obligations); *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 518 (D.C. Cir. 2010) ("The Bureau has substantial discretion to decide how to achieve the multiple use and sustained yield objectives."); *Or. Natural Desert Ass'n v. BLM*, 531 F.3d 1114, 1135 (9th Cir. 2008) (BLM's "wide authority" to manage public lands "allows it ample discretion").

*Valid Existing Rights*

Pursuant to FLPMA, BLM is obligated to recognize valid existing lease rights. 43 U.S.C. § 1701 note (h) ("All actions by the Secretary concerned under this Act shall be subject to valid existing rights."); *see also* 43 C.F.R. § 1610.5-3(b); BLM Manual 1601.06G ("All decisions made in land use plans, and subsequent implementation decisions, will be subject to valid existing rights."). Valid existing rights are not pre-empted, or otherwise excused, by BLM's future determinations for resource protection. Pursuant to federal statute, BLM cannot terminate, modify, or alter valid existing property rights. *Id.*

Oil and natural gas leases are contracts between the federal government and private parties, which provide the private lessees the right to explore for, produce, and sell, a mineral. This binding contract governs the development of the leased minerals. *Mobil Oil Exploration & Producing S.E., Inc. v. United States*, 530 U.S. 604, 607–08 (2000). Subsequent action by BLM is controlled by the terms of the contract, and lessees are entitled to the "right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of the leased resource in a leasehold . . . ." 43 C.F.R. § 3101.1-2.

Valid existing rights override subsequent land use proposals such as ACECs, lands with wilderness characteristics and other land use or resource designations. Indeed, federal courts and the Interior Board of Land Appeals (IBLA) have consistently held that operators may develop their existing leases within later designated areas of special emphasis if BLM issued their leases prior to the enactment of FLPMA or the special designation. *See, e.g., Colorado Environmental Coalition v. Bureau of Land Management*, 932 F. Supp. 1247, 1251 (D. Colo. 1996); *Colorado Environmental Coalition*, 135 IBLA 356, 359-360 (1996); *SUWA*, 100 IBLA 63 (1987); *Utah Wilderness Coalition*, 91 IBLA 124, 125, 130 (1986).

Federal courts have interpreted valid existing rights to mean that federal agencies cannot impose stipulations or conditions of approval that make development on existing leases either uneconomic or unprofitable. *See Utah v. Andrus*, 486 F. Supp. 995, 1011 (D. Utah 1979). BLM cannot prohibit lessees from developing their leases. *Nat'l Wildlife Fed.*, 150 IBLA 385, 403 (1999). Only Congress has the right to completely prohibit development once a lease has been issued. *W. Colorado Congress*, 130 IBLA 244, 248 (1994).

## Energy Policy Act of 2005

Section 363 of the Energy Policy Act of 2005 (Energy Policy Act) requires BLM to ensure lease stipulations are "only as restrictive as necessary to protect the resource for which the stipulations are provided." 42 U.S.C. § 15922(b)(3)(C).

BLM guidance reiterates the Energy Policy Act's mandate. BLM Handbook 1624-1, titled "Planning for Fluid Mineral Resources," instructs BLM to identify problems with existing management decisions, analyze effects of multiples stipulations, and ensure that "the least restrictive stipulation that effectively accomplishes the resource objectives" be used. BLM Handbook 1624-1 at III-11. When developing an RMP, BLM should specifically "provide evidence that less restrictive measures were considered but found inadequate to provide effective protection for other land uses or resource values." *Id.* at III-14.

## Mineral Leasing Act of 1920

Pursuant to the MLA, and the applicable lease terms, BLM and lessees are both legally obligated to avoid waste of leased, public oil and natural gas resources. Under Section 16 of the MLA, 33 U.S.C. § 225, an oil and natural gas lessee is required to prevent waste of leased minerals in order to maximize the economic benefit to the lessor. *See generally* BLM Form 3100-11 § 4 ("Lessee . . . must prevent unnecessary damage to, loss of, or waste of leased resources."). Similarly, BLM's regulations regarding onshore oil and natural gas operations mandate that the lessee "maxim[ize] [the] ultimate economic recovery of oil and gas with minimum waste . . . ." 43 C.F.R. § 3162.1(a).

Federal oil and natural gas leases grant the lessee the exclusive right and obligation to explore for and develop the federal fluid minerals, including the use of federal surface to develop these minerals. Specifically, this BLM regulation states that a lessee shall have the right to use "the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold . . . ." 43 C.F.R. § 3101.1-2.

## BLM Failed to Provide Adequate Time for Public Review and Comment in Violation of FLPMA and the Administrative Procedure Act; Additional Public Comment Period Required

FLPMA requires federal agencies to provide adequate notice and opportunity to comment on land use plan amendments and revisions. 43 U.S.C. § 1712(f); 43 C.F.R. § 1610.2(a). Similarly, the APA requires both notice and the opportunity to comment when an agency proposes a substantive rule. 5 U.S.C. § 553.

**Comment 1:** The GrSG DRMPA/EIS presents thousands of pages of complex, overlapping, and confusing proposed management prescriptions that are not presented in any coherent or user-friendly manner. While BLM provides an overview of existing management direction in Appendix 2 according to the 2015 and 2019 plans, the cross-reference to proposed changes by alternative number does not provide actual reference to the potential substantive plan modifications. Instead, Appendix 2 provides more than 750 additional pages of confusion.

To compound matters exponentially, Chapter 2 of the GrSG DRMPA/EIS presents a myriad of overlapping, interlocking, or mutually exclusive management prescriptions that in turn are based on a variety of indicators, benchmarks, and criteria that are defined, if at all, in various Appendices (e.g., the Habitat Assessment Framework (HAF) in Appendix 8) and/or some of the more than 300 new studies that BLM apparently has relied upon to formulate such a byzantine management plan. BLM has not afforded the public and interested stakeholders sufficient time to perform an adequate review and provide substantive, meaningful comments on the GrSG DRMPA/EIS.

The American Petroleum Institute (API) has conducted an extensive scientific review of the HAF and the quality of science BLM is using in the GrSG DRMPA/EIS. API's work also highlights how much of the science BLM is relying on is insufficiently peer-reviewed beyond a very insular group of scientists within the U.S. Geological Survey (USGS) and U.S. Fish and Wildlife Service (FWS). The insularity of this group has caused the government to ignore studies that run counter to the narrative it is trying to create in the DRMPA/EIS. The Alliance incorporates by reference API's comments, particularly as they relate to the deficiencies of the science BLM is relying upon and the technical details of novel concepts introduced in the DRMPA/EIS.

**Comment 2:** The GrSG DRMPA/EIS presents new science and technical studies that have not been made available for peer review, or public review and comment. The GrSG DRMPA/EIS relies on a myriad of new scientific studies, and only cites to an abstract from the USGS. *See* GrSG DRMPA/EIS Section 1.2.3 (citing Teige, et al., Annotated Bibliography of Scientific Research on Greater Sage-Grouse Published

from October 2019 to July 2022 (November 2023); Carter, et al. Annotated Bibliography of Scientific Research on Greater Sage-Grouse Published from 2015 to 2019 (2020)).

Significantly, the Teige, et al. 2023 abstract covers over 147 new studies that BLM incorporated to promulgate the GrSG DRMPA/EIS. Similarly, the Carter, et al. 2020 USGS Report covers over 169 publications and studies regarding the GrSG and its habitat. Yet, the GrSG DRMPA/EIS makes no effort to explain which specific studies BLM relied upon from these 316 studies documented by the USGS to formulate new management prescriptions or otherwise inform its substantive decision-making. As a result, while BLM states that it is utilizing new science, it does so in a black box, to the detriment of the public. Indeed, BLM's failure to explain how, where, and why it used this new science violates the APA and FLPMA's requirement for providing adequate review and comment.

Stakeholders such as the Alliance need additional time to review and analyze these studies. The government needs more time to perform adequate scientific peer review to inform comments, recommendations, and additional technical information for presentation to BLM before the GrSG DRMPA/EIS is finalized.

Indeed, by limiting public review and comment, BLM is violating the APA and NEPA by not affording sufficient time for stakeholders. This failure is similar to the legal errors found by the U.S. district courts for the districts of Montana and Idaho in the context of BLM's truncated public review and comment periods for BLM competitive oil and natural gas lease sales that offered certain parcels for sale containing GrSG habitat. *See Montana Wildlife Federation v. Haaland*, Case No. 4:18-cv-00069; *Western Watersheds Project v. Haaland*, Case No. 1:18-cv-00187.

**Comment 3:** BLM ignores recent scientific research that shows how the impact of modern oil and natural gas development on GrSG is largely mitigated by new technologies, regulation, and reclamation. When BLM does cite to some of these papers in the DRMP/EIS, BLM cites them in a way that supports a narrative that oil and natural gas have significant and largely unmitigable, population-level impacts on GRSG, while ignoring findings in the cited papers that contradict that view.[10] BLM's biased discussion of the scientific literature is further compromised by reliance on papers that find impacts based on

[10] Applegate and Owens 2014; Johnston 2020; "Wyoming sage-grouse working groups—Lessons learned," Christiansen et al., *Human-Wildlife Interactions*, Winter 2017; "A simulation framework for assessing physical and wildlife impacts of oil and gas development scenarios in Southwestern Wyoming," S.L. Garman, *Environmental Modeling and Assessment*, June 2017; "Probability of lek collapse is lower inside sage-grouse core areas—Effectiveness of conservation policy for a landscape species," E.S. Spence et al. *PLoS ONE,* November 9, 2017; "Patterns of nest survival, movement and habitat use of sagebrush-obligate birds in an energy development landscape," C.P. Kirol, Dissertation, University of Waterloo, 2021; and "Resource selection by greater sage-grouse varies by season and infrastructure type in a Colorado oil and gas field," B.L. Walker, *Ecosphere,* May 23, 2022.

outdated oil and natural gas technologies, practices, and regulations. These studies conflate drilling impacts with the production phase, which has much less impact. They also conflate impacts from additional types of energy development including solar, wind, coal and transmission lines.[11]

BLM fails to account for changes in drilling technology over the last 15 years and the reduction in *cumulative* effects from this technological change due to reduced disturbance and fragmentation. Further, though BLM includes the Applegate and Owens 2014 paper in the references, it does not include or cite the findings or reference the authors or anyone else who has tried to put oil and natural gas into context in Chapter 4: Environmental Consequences. There is no mention whatsoever of reduced cumulative effects due to horizontal drilling and multiple wells on a pad. Oil and natural gas development may decrease lek attendance, but that does not necessarily mean the population has declined. There is no mention of the 5% threshold and one feature per square mile that has been designed to protect sage-grouse in the Wyoming Executive Order (EO) or in the papers that have been published suggesting the EO is working. BLM has made no effort to define the extent and intensity of oil and natural gas impacts in a meaningful way, other than maps which show dots for wells. Those maps are dramatically not to scale. By use of the wrong scale, the maps suggest much higher impacts than those actually incurred.

**Comment 4:** The GrSG DRMPA/EIS does not meet BLM's science and data requirements under its own Land Use Planning Handbook and Information and Data Quality Guidelines, or under the requirements of the National Environmental Policy Act (NEPA). BLM Land Use Planning Handbook H-1601-1, Appendix D, p. 13; 40 C.F.R. § 1500.1(b); 40 C.F.R. § 1502.8. In developing a land use plan amendment, BLM cannot evaluate consequences to the environment, determine least restrictive lease stipulations, or assess how best to promote domestic energy development without adequate data and analysis. Here, however, the BLM failed to show whether it utilized any science or data at all to draft the proposed protective measures. Nor has BLM shown how the new restrictions will impact economic development.

**Comment 5:** BLM initiated this current stage of the GrSG planning process with a notice of intent and request for comments on a revised GrSG land use plan in November 2021, which the Alliance submitted comments on in February 2022. Since then, the Alliance has been patiently waiting over two years for the GrSG DRMPA/EIS. While BLM had these full two years to develop over 2,500 pages of planning-related documents, BLM is now affording the Alliance and other stakeholders only 90 days to review and comment on the proposed plan amendments. Ninety days is hardly sufficient to provide fulsome and

[11] "Greater Sage-Grouse Response to the Physical Footprint of Energy Development," C.P. Kirol et al., *Journal of Wildlife Management,* 2020.

substantive comments on each of the management prescriptions proposed to regulate oil and natural gas development within GrSG habitat.

**Requested Action 1:** BLM must withdraw the GrSG DRMPA/EIS and revise it to include citations to explain where, how, and why BLM used each of these new scientific studies on GrSG to develop the proposed management prescriptions in the GrSG DRMPA/EIS. After that update, BLM then needs to provide the public sufficient time to review, analyze and comment on the GrSG DRMPA/EIS and underlying studies.

**Requested Action 2:** Consistent with its March 28, 2024 letter, the Alliance respectfully requested an additional 180 days of public review and comment on the GrSG DRMPA/EIS and related materials and scientific technical information. BLM has had more than two years to develop the GrSG DRMPA/EIS yet affords the public only 90 days to review and attempt to provide substantive comments.

## The GrSG DRMPA/EIS Unlawfully Imposes New Policies Without Explanation or Justification, and Implements New BLM Regulations Not in Effect at the Time of Issuance for Public Comment

The land use plan revision or amendment process under FLPMA is not a substitute for the APA's formal rulemaking process. The APA requires BLM to comply with formal rulemaking procedures when an agency proposes a substantive rule. *See* 5 U.S.C. § 533.

Moreover, it is well settled that when an agency changes positions, the APA requires it to (a) "display awareness that it is changing position;" (b) show that the new policy is permissible under governing statutes; (c) explain why the agency believes the new policy is better than the old one; and (d) "show that there are good reasons for the new policy," which requires a more detailed explanation where the "new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." *Fed. Communications Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009).

**Comment 6:** The GrSG DRMPA/EIS reflects that BLM imposed regulatory requirements not in effect at the time the GrSG DRMPA/EIS was issued for public review and comment. At best, these new regulatory requirements are presented as new policies in the Draft RMPAs at the time of issuance.

**Requested Action 3:** At a minimum, BLM needs to withdraw the GrSG DRMPA/EIS, update the document to specifically identify these new regulatory requirements, including appropriate legal citations, so that the public can be afforded a meaningful opportunity to review, analyze and comment upon the imposition and implementation of these new regulations.

**Comment 7:** BLM has not provided any explanation or otherwise shown why new regulations not yet in effect or even published in the Federal Register before the issuance of the GrSG DRMPA/EIS are appropriate or necessary for GrSG management.

Here, BLM has not met the legal requirements for the imposition of these new policies and regulations. For example, the GrSG DRMPA/EIS reflects entirely new management concepts and prescriptions related to landscape intactness and ecosystem resilience. It imposes new definitions of unnecessary and undue degradation in contradiction of FLMPA's standards. It incorporates new requirements for conservation and restoration and takes a new look at prioritization of ACECs. Some of these new management concepts and management prescription are contained in and imposed by BLM's new public land and conservation regulations that were published after the GrSG DRMPA/EIS was issued for public comment. "Conservation and Landscape Health," 89 Fed. Reg. 40,308 (May 9, 2024).

**Comment 8:** Other management concepts in the GrSG DRMPA/EIS are entirely new BLM policies not even proposed as draft rules, which represent a fundamental and dramatic policy shift in how BLM manages resources and habitats under its multiple use mandate under FLPMA. BLM fails entirely to meet the APA's legal requirements detailed by the U.S. Supreme Court which require BLM to explain these fundamental policy shifts and the imposition of new regulatory requirements to public stakeholders and regulated entities. BLM's GrSG DRMPA/EIS does not provide any explanation or justification for these new policies and requirements. *Fed. Communication Comm'n*, 556 U.S. at 515–16.

**Comment 9:** In the GrSG DRMPA/EIS, BLM: (1) does not display or otherwise present an awareness of its changing position; (2) does not demonstrate that these new policies and new regulations are permissible under FLMPA; (3) does not explain why these new regulatory requirements are better than the prior ones; and (4) does not provide any reasons or detailed explanations on the factual and technical findings that contradict BLM's prior management prescriptions and framework under the prior plans (e.g., 2015 and 2019 plans).

**Comment 10**: The primary alternatives in the GrSG DRMPA/EIS (Alternatives 3, 4, 5 and 6) present various management prescriptions that rely entirely on implementation of the Habitat Assessment Framework (HAF) which is ostensibly presented in Appendix 8. The HAF in turn presents a myriad of rigid and complex habitat indicators and benchmarks, and these indicators and benchmarks in turn present and impose a series of complex criteria for each that are mandatory for BLM and for public land users who must analyze a proposed action under them and ensure compliance.

This regulatory framework is unduly and unreasonably burdensome, and will not result in consistent or rational management as required under FLPMA's implementing regulations. Instead, this overly complex

regulatory framework will ensure subjective decision-making that is arbitrary, capricious, and abuses discretion in violation of the APA, FLPMA, and the resource use statutes that BLM is obligated to comply with, such as the MLA.

**Comment 11:** The HAF's indicators, benchmarks and criteria are utilized as formal regulations governing BLM decision-making and whether to authorize uses and development of public land. As a result, the HAF is a formal regulation, promulgated outside of BLM's governing regulations, and outside of the formal rulemaking process required under the APA.

For example, before an authorized action may be allowed to proceed, BLM and the project proponent must ensure and document that all of the relevant benchmarks and related criteria have been achieved and successfully implemented. This is a regulation, attempted to be disguised at best as a mandatory analytic framework that must be complied with in order for any public use of lands to proceed. The Alliance is struck by the impracticality of implementing this overly complex and convoluted HAF. BLM already struggles to meet statutory mandates under the Energy Policy Act of 2005 and the MLA to issue permits and conduct regular quarterly oil and natural gas leasing. How are BLM staff to navigate this convoluted new structure in any kind of systematic or consistent manner?

**Requested Action 4:** BLM must withdraw the HAF and withdraw the GrSG DRMPA/EIS and issue a Notice of Rulemaking for the HAF within BLM's regulations implementing FLPMA, MLA, and all other statutes that provide for use and development of public lands and public land resources (e.g., the Livestock Grazing Act and Mining Act).

**Requested Action 5:** BLM is legally required to withdraw the GrSG DRMPA/EIS and revise it to comply with BLM's statutory requirements under the APA to explain and justify its new polices and regulatory requirements. BLM must then afford the public sufficient time for review and comment so the public may provide substantive and meaningful comments to better inform BLM's decision-making on the management framework and prescriptions proposed.

## The GrSG DRMPA/EIS Violates FLPMA's Land Use Planning Directives for Multiple-Use Management

FLPMA requires BLM manage the public lands "on the basis of multiple use and sustained yield" "in a manner which recognizes the Nation's need for domestic sources of minerals . . . from the public lands . . . ." 43 U.S.C. §§ 1701 (7) & (12). BLM's objective for resource management planning is to maximize resource values for the public through a "rational, consistently applied set of regulations and

procedures" while promoting multiple use management and providing for public participation. 43 C.F.R. § 1601.0-2.

**Comment 12:** The GrSG DRMPA/EIS is obtuse, illegible, arbitrary, capricious, and not in compliance with FLPMA and its implementing regulations. The GrSG DRMPA/EIS does not present a rational and consistent set of management prescriptions, procedures, or regulations for the multiple-use management of 77 federal land use plans covering over 121 million acres in 10 states.

Instead, the GrSG DRMPA/EIS presents a byzantine series of contradictory proposed management prescriptions instead of a rational, coherent, or consistent management framework. The GrSG DRMPA/EIS is not user-friendly for the public, or for BLM staff that will be tasked with implementing, administering, and managing the final plans.

While BLM attempts to present proposed changes between the 2015 plans, 2019 plans, and the 2024 draft, BLM fails to identify any specifics as to the proposed management prescriptions and restrictions under the 2024 draft. The charts in Appendix 2 merely note that there are changes contained in the relevant alternatives to the 2024 draft, but makes no effort to identify these changes, let alone provide citations to allow the public to cross-reference and identify these proposed changes.

Given the voluminous and confusing nature of the GrSG DRMPA/EIS and its multiple appendices, it is incumbent upon BLM to follow its statutory mandate under FLPMA and the APA to present coherent information to the public to allow for meaningful review and comment as well as enable BLM to deliberatively incorporate substantive comments and make appropriate changes.

**Requested Action 6:** BLM needs to revise the GrSG DRMPA/EIS and the charts presented in Appendix 2 to present a coherent, user-friendly matrix that will allow members of the public to better ascertain and understand the management prescriptions being proposed under each of the Alternatives, when these management prescriptions are applicable, and what additional indicators, benchmarks and criteria are also imposed and required for each management prescription (e.g., the requirements detailed in the HAF in Appendix 8).

## The GrSG DRMPA/EIS Violates FLPMA's Mandate to Work with the States to Ensure Consistency

FLPMA requires that BLM work with state and local governments in the land use planning process in order to ensure consistency as well as to reduce conflict when such land use plans could have a significant impact on adjacent non-federal lands. As explained in FLPMA, BLM is required to:

> coordinate the land use inventory, planning, and management activities of or for such 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 . . . ; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials . . . in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. . . . Land use plans . . . shall be consistent with State and local plans to the maximum extent [the Secretary] finds consistent with Federal law and the purposes of this Act.

43 U.S.C. § 1712(c)(9).

**Comment 13:** In the planning processes leading up to the 2015 and 2019 plans, BLM's draft RMPAs were broken out by state, providing clear and comprehensive understanding of what each alternative entailed, and ultimately, what management prescriptions were provided in the final plan. In this new version, the GrSG DRMPA/EIS provides a series of alternatives with charts and cross references, but no clear picture of what each of the 77 plans would ultimately entail, or how those plans align with, defer to, or entirely contradict what the relevant state plan is. It is hard to even navigate the GrSG DRMPA/EIS to determine what all the management prescriptions are by state, whereas with the 2015 and 2019 plans stakeholders in any one state could read a coherent plan for their state and comment on how they relate to the particular circumstances in that state.

Importantly, FLPMA requires BLM to confer with states and the local wildlife agencies where land use plans would have significant impacts on adjacent lands. Here, where BLM continues to impose disturbance and density caps, timing limitations, noise limitations, adaptive management requirements and compensatory mitigation requirements, among other restrictions, if BLM's guidance is not consistent with state management, it could drive oil and natural gas companies and other public land users to site projects on state or fee lands adjacent to federal lands just to avoid overly burdensome and restrictive measures. Indeed, in order to avoid the BLM restrictions, a company may site its disturbance on non-federal lands even where the better location from a habitat avoidance standpoint is the federal lands. BLM must ensure that its planning process is consistent with state measures in order to avoid such unintended consequences.

**Comment 14:** BLM must recognize and align with state plans and defer management to state plans such as the states of Wyoming and Utah. The State of Wyoming has the largest population of GrSG and has

been managing GrSG according to a series of executive orders creating the GrSG Core Area Protection Plan. This approach has stabilized GrSG populations, and recent surveys from the Wyoming Game and Fish Department (WGFD) indicate that the lek count is growing, with a 6 percent increase from 2021 to 2022 and a 15 percent increase from 2022 to 2023.[12]

With this demonstrated effectiveness of Wyoming's plan, as well as the ongoing stakeholder involvement through the state's Sage-grouse Implementation Team (SGIT), it makes no sense for BLM to implement conflicting management measures. BLM's management prescriptions for the Wyoming plans should reflect that state's core and non-core designations, and any compensatory mitigation requirement should be consistent with the state's mitigation requirements. Finally, any lek buffers and density and disturbance caps should reflect the state's requirements to provide consistency and allow operators to site their projects based on actual habitat avoidance instead of restriction avoidance.

Similarly, in Utah, the state established its own Conservation Plan for GrSG in 2013. It updated the plan in 2017 and continues to provide benefits to GrSG and its habitat across the Utah range. GrSG numbers continue to rise in Utah, and GrSG and habitat benefit from the state's concerted effort to improve habitat through restoration projects across the state.

Any changes to BLM management in Utah should be consistent with the State's Conservation Plan. Likewise, Nevada, Idaho, and the remaining states all have conservation and management plans that BLM must ensure it is incorporating and utilizing where appropriate to allow for consistency across the planning areas.

**Requested Action 7:** BLM needs to provide a set of state-specific plans for this planning process that clearly identifies the proposed management actions on federal lands and how those actions are similar to, or different from, state conservation measures.

**Requested Action 8:** BLM must work with the states in this planning process to create management plans that are consistent with the ongoing state efforts. While BLM's plans have faced a series of lawsuits and negative court orders since implementing the 2015 plan, the state plans have remained uncontested. Indeed, the states have been able to continue managing their plans with moderate refinements for the benefit of the GrSG instead of sweeping changes based on new administrations. BLM should follow the states to create durable plans for the benefit of the GrSG and its habitat.

[12] Mike Koshmrl, "After slump, strutting Wyoming sage grouse start to rebound," WyoFile, Sept. 11, 2013, https://wyofile.com/after-slump-strutting-wyoming-sage-grouse-start-to-rebound/.

## BLM Must Issue Individual Records of Decision for Each State

**Comment 15:** Given the significant differences between the 10 affected states regarding management prescriptions and concepts, BLM should not aggregate 77 resource management plan amendments under a single Record of Decision (ROD). Instead, BLM should issue a separate ROD for each of the states. In addition to promoting more efficient land use plans and management, this approach would also minimize forum shopping by potential plaintiff organizations seeking to file a legal challenge against all of the RMPA(s) in a single federal court with a track record for overturning BLM decisions under FLPMA and other statutes.

**Requested Action 9:** BLM needs to draft and issue individual and separate RODs for each of the 10 states. These state level RODs should be executed and issued by each respective BLM State Office.

## The Cumulative Impacts of the GrSG DRMPA/EIS's Management Decisions Will Impermissibly Restrict a Leaseholder's Ability to Meet its Lease Obligations

**Comment 16:** Cumulatively, the numerous additional measures in the GrSG DRMPA/EIS would go above and beyond the 2015 plans' management prescriptions and continue to create regulatory hurdles that would frustrate leaseholders' ability to develop their federal leases. The Alliance supports managing GrSG and its habitat for the benefit of the species and to avoid renewed consideration by the FWS for listing. However, the Alliance cannot support imposition of unduly and unnecessarily restrictive measures that are not supported by science are arbitrary and capricious, and violate valid existing lease rights. The GrSG DRMPA/EIS must be consistent in its approach to protecting the GrSG and its habitat.

BLM cannot revise or restrict a leaseholder's valid existing lease rights through imposition of conditions of approval (COAs) for drilling permits that were not contemplated at the time the leases were issued. *Colorado Environmental Coalition*, 165 IBLA at 228. Further, FLPMA's land use plan provisions require BLM to analyze economic impacts when developing or updating land use plans. 43 USC § 1712 (requiring BLM to integrate "physical, biological, economic, and other sciences" in developing land-use plans); 43 C.F.R. § 1610.4-6 (BLM land use planning regulation requiring that resource management plans "estimate and display the physical, biological, economic, and social effects of implementing each alternative considered in detail.").

With the GrSG DRMPA/EIS, however, BLM is disregarding economic impacts and instead planning to revise and restrict leaseholders' valid existing lease rights through the imposition of a no-net-loss standard, development and disturbance caps, and additional restrictive measures above and beyond the 2015 plans.

**Requested Action 10:** The GrSG DRMPA/EIS must allow for continued access to and development of valid existing rights. There are several examples where existing conditions will make continued access and development very difficult based upon the proposed prescriptive measures found across each of the proposed alternatives. In addition, some proposed restrictions are not feasible, realistic, or legally viable. The Alliance is concerned that cumulatively, the GrSG DRMPA/EIS's measures will serve to preclude a leaseholder's ability to efficiently develop its leases GrSG habitat.

**Requested Action 11:** BLM should remove or modify onerous and unreasonable or impractical stipulations or conditions of approval to create a land use plan that protects GrSG and its habitat while allowing development pursuant to valid existing rights.

## The GrSG DRMPA/EIS's "Net Conservation Gain"/"No Net Habitat Loss" Standard Violates FLPMA and Exceeds BLM's Authority

Under FLPMA, BLM is required to manage public lands under the principles of multiple use and sustained yield, and in accordance with applicable land use plans, to meet the needs of present and future generations. 43 U.S.C. § 1701(a)(7), (8) & (12); 43 U.S.C. § 1732(a) & (b); 43 C.F.R. § 1610.5-3. FLPMA's definitions of multiple use and the major uses of public lands highlight the on-going utilization of natural resources on public lands for the benefit of the American people. 43 U.S.C. § 1702(c).

Consistent with its multiple-use statutory mandate, BLM is directed to prevent "unnecessary or undue degradation of the public lands . . . ." *Colorado Envtl. Coalition*, 165 IBLA 221, 229 (2005) (explaining that "[a]s to FLPMA's prohibition against undue or unnecessary degradation of the public lands, to the extent appellants mean to suggest that surface occupancy and drilling per se constitute undue or unnecessary degradation, we do not agree. Neither FLPMA nor implementing regulations defines the term "undue or unnecessary degradation."). As recognized by established IBLA precedent, however, FLPMA's non-impairment standard "cannot be used to defeat a lessee's valid existing right to develop a lease." *Colorado Open Space Council*, 109 IBLA 274, 281 n.7 (1989).

**Comment 17:** While BLM has changed its nomenclature in the 2015 and 2019 plans from "net conservation gain" standard to a "no net habitat loss" standard, the result remains that BLM is attempting to impose a conservation standard that contradicts BLM's enabling act and land use mandate. BLM's requirement for compensatory mitigation for any disturbance within GrSG habitat in order to provide a net conservation gain or no net loss is unduly burdensome, constrains a lessee's ability to develop its federal oil and natural gas leases, is contrary to valid existing rights and exceeds BLM's authority under FLPMA's non-impairment standard.

**Comment 18:** The explanation of required mitigation for Alternatives 3, 4, 5 and 6 states that "[c]ompensatory mitigation should be completed prior to initiating the activity causing the need for compensation," creating a situation wherein a project proponent will have to mitigate for impacts before any impacts actually take place. GrSG DRMPA/EIS Table 2.5. "Comparison of Alternatives, Mitigation" at 2-23. Adding to the complexity of mitigating before impact is the requirement that compensation be "at a level and in a manner to fully offset both direct and indirect impacts to habitat function," *id.*, meaning mitigation at a greater than 1:1 ratio.

This no-net-loss standard provides no clear direction as to what measures will meet the mitigation requirement, nor when the requirement must be met. Without defined parameters, this no-net-loss standard will frustrate lessee's abilities to receive approval on near-term drilling and right-of-way (ROW) approvals. Without definition and clarification, BLM will in effect render a de facto moratorium on permitting and development until the standards and specific guidelines are issued. Without clarification and certainty, this standard will frustrate an operator's ability to meet federal lease and unit requirements because of the potential that offset mitigation measures may not be available on the timelines needed to allow for scheduled development.

**Comment 19:** The GrSG DRMPA/EIS further suggests that BLM will require compensatory mitigation take place in the same area as the proposed impact, or within the same "neighborhood cluster" if not in the same area. GrSG DRMPA/EIS Table 2.5. "Comparison of Alternatives, Mitigation" at 2-23. While that may be appropriate in certain circumstances, the Alliance believes that the GrSG DRMPA/EIS must include more flexibility, especially for instances such as the Wyoming Core Area Plan that allows for compensatory mitigation through the purchase of habitat credits from an approved conservation bank that is not always in the same "area" or even the same "neighborhood" as proposed impacts.

**Comment 20:** The GrSG DRMPA/EIS ignores the fact that through bonding requirements for leases and additionally for ROWs, as well as through the added imposition of COAs requiring reclamation, BLM is assured that operators will complete reclamation on any disturbance from project development.

**Requested Action 12:** The requirement for compensatory mitigation must be removed from the GrSG DRMPA/EIS. At a minimum, the Alliance requests BLM carefully consider its ability to enforce a no-net-loss standard that conflicts with FLPMA's no unnecessary or undue degradation standard.

**Requested Action 13:** BLM must clearly define what is required to meet the no-net-loss standard, and identify mitigation options realistically available to meet this requirement. Further, BLM cannot make approval of a new project contingent on first implementing and achieving durable compensatory

mitigation before the impact occurs. There must be a balance to allow lessees to utilize their valid existing rights to development.

**Requested Action 14:** BLM must explain what the baseline reclamation standard is, who makes the determination of whether baseline reclamation is achieved, and whether compensatory mitigation measures can be in kind in the form of going above and beyond that baseline level, performing additional studies or surveys, or some additional measure not yet developed.

**Requested Action 15:** BLM must defer to state plans for compensatory mitigation programs. In Wyoming, for example, the standard for compensatory mitigation is to purchase credits from a conservation bank. BLM should respect that approach in Wyoming and not require an operator provide compensatory mitigation based on a state requirement and an additional BLM requirement when just the state's program is sufficient for the benefit of the GrSG.

**Requested Action 16:** BLM must clarify whether reclamation efforts, once established, such as a well pad reclamation or ROW reclamation, then become de facto critical habitat that cannot subsequently be disturbed, or whether reclaimed land can be re-impacted should an operator propose a pad expansion or need to perform an operation that would require such disturbance of reclaimed lands.

**Requested Action 17:** The GrSG DRMPA/EIS should include an express provision to allow for site-specific ground-truthing of habitat areas on a project-specific basis in order to allow for customized and adaptable mitigation measures at the project level to address local needs and specific conditions. These flexible management prescriptions would allow for adjustment of stipulations, conditions of approval, mitigation measures, or other limitations or restrictions based upon site-specific conditions.

## The GrSG DRMPA/EIS Unlawfully Imposes a No-Net-Loss Standard and Species Recovery Requirement for Non-Listed Species in Violation of the Endangered Species Act and FLPMA

The BLM Special Status Species Management Manual, Manual-6840, provides that BLM's objectives for special status species include "[t]o 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 [Endangered Species Act (ESA)]." Manual-6840, .02 "Objectives". The Manual notes that by preventing listing, "BLM will have greater flexibility in managing the public lands to accomplish native species conservation objectives and other legal mandates." *Id.* at .2. Importantly, BLM's management should provide flexibility, and be less burdensome than an ESA listing would be.

**Comment 21:** The Alliance is concerned that the prescriptive measures and restrictions in the GrSG DRMPA/EIS impose management restrictions that exceed the statutory authority of the BLM under FLPMA, particularly for a species not listed as threatened or endangered under the ESA.

At the project level, oil and natural gas operators on federal lands are responsible for mitigating impacts that would otherwise adversely affect or jeopardize a listed species. It is not appropriate for industry to be required to recover a listed species, let alone a species that is not listed but instead subject to the primary jurisdiction of the appropriate state game and fish agency.

In an ESA context, under Section 7 consultation, while a jeopardy analysis looks to whether affects may jeopardize the existence of an entire species, or appreciably affect the recovery of a species, there are significant legal limitations of such an analytic framework. While operators must mitigate impacts on listed species and can commit to conservation measures that would result in a benefit to the species, under the ESA, FWS and BLM cannot impose requirements that require species recovery. Yet through the multiple measures proposed across the range of alternatives in the GrSG DRMPA/EIS, it appears that BLM is imposing a recovery standard for a non-listed species.

**Requested Action 18:** BLM must modify the management prescriptions in the GrSG DRMPA/EIS to provide reasonable management for the GrSG, not management designed to achieve recovery of a not-listed species.

## The GrSG DRMPA/EIS Unduly Limits Operational Flexibility Through Restrictions on Waiver, Exception and Modification Criteria

As a general matter, waivers, exceptions and modifications (WEM) provide necessary regulatory flexibility needed by both BLM and operators to develop oil and natural gas leases on public lands. Historically, WEMs are only applied for and approved by BLM if potential adverse effects are eliminated or significantly mitigated, or if local conditions at the time render the original lease stipulations or COAs unnecessary. Approval of WEMs afford additional flexibility at the field or landscape level, and can often result in less disturbance across the landscape (*e.g*. granting an exception for a fraction of an acre on a NSO lease for a pipeline ROW may reduce overall impacts to much larger acreages if the NSO cannot be traversed).

BLM regulation specifically directs that lease stipulations “shall be subject to modification or waiver” in certain circumstances. 43 C.F.R. § 3101.1-4. The Alliance is unclear how BLM can modify its existing regulations through a plan amendment in order to entirely eliminate a leaseholder’s ability to obtain WEMs where they would otherwise be available.

**Comment 22:** The GrSG DRMPA/EIS proposes 52-pages of limited waivers, exceptions, and modifications to no surface occupancy (NSO) stipulations, disturbance caps, and seasonal timing limitations only. GrSG DRMPA/EIS at Section 2.5.7 "Fluid Mineral Lease Stipulation Waivers, Exceptions, and Modifications" at 2-47. The Alliance is concerned with BLM's continued decision to limit its and lessees' operational flexibility by only allowing limited WEMs to certain restrictions within the GrSG DRMPA/EIS.

**Comment 23:** As proposed, the process for evaluation of WEM requests embeds compliance with the HAF process, including compliance with all indicators and achievement of all defined benchmarks. This overly complex process ensures that BLM will not be able to process and approve WEMs.

**Comment 24:** The GrSG DRMPA/EIS fails to provide an efficient and timely process for processing exceptions to seasonal stipulations, and have a documented track record of success in allowing exceptions in a manner that does not result in any significant or adverse impact to the wildlife resources of the subject stipulation.

**Comment 25:** The WEM criteria are too stringent, afford no flexibility, and are based upon a series of unrelated criteria (e.g. non-habitat criteria, adaptive management thresholds, suitable habitat). The criteria ensure that BLM can never provide an exception.

**Requested Action 19:** BLM should revert to its existing policy on WEM to allow for flexibility and local discretion based on site-specific circumstances. GrSG management should not require a more stringent standard that is already required of WEM requests.

## The GrSG DRMPA/EIS Revises Valid Existing Lease Terms in Violation of Pre-FLPMA Lease Rights

Importantly, pre-FLPMA leases, issued before October 21, 1976, are not subject to BLM's regulations created to implement FLPMA (*e.g.,* land use planning regulations for the promulgation of RMPs). FLPMA expressly recognizes and protects these pre-existing lease rights. The statute states that nothing "in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act [October 21, 1976]." 43 U.S.C. § 1701 note (a). Moreover, FLPMA provides that all "actions by the Secretary concerned under this Act shall be subject to valid existing rights." *Id.* § 1701 note (h).

Under the plain language of the statute and well-established legal precedent, operators are allowed to develop their pre-FLPMA leases even if development impairs sensitive resources. *Colorado Envtl. Coalition v. Bureau of Land Mgmt.*, 932 F. Supp. 1247, 1251 (D. Colo. 1996) (explaining that "those who held existing mineral leases when FLPMA was enacted are exempt from the standard in § 603(c) that

requires management of such leases in such a way as not to impair suitability for preservation of wilderness."); *see also Virgil Schuette,* 131 IBLA 332, 336 (1994); *Colorado Open Space Council*, 109 IBLA 274, 281 n.7 (1989); "The Bureau of Land Management Wilderness Review and Valid Existing Rights," 88 I.D. 909, 912–13 (1981) (Solicitor's Op. M-36910 (Supp.)) (Solicitor's Opinion explaining that "the holder of an oil and gas lease or a right-of-way authorization issued prior to the enactment of FLPMA may develop the leasehold or right-of-way to the extent authorized by the issuance or approval document.").

Courts have long upheld pre-FLPMA lease rights, recognizing the express and unequivocal Congressional intent to protect and preserve those rights when it enacted FLPMA. *See e.g., The Wilderness Soc'y v. Kane County, Utah*, 632 F.3d 1162, 1166 (10th Cir. 2011) (citing § 1701 notes (a) and (h) to state that FLPMA expressly preserved rights existing prior to the enactment of FLPMA, including rights-of-way); *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1104 (9th Cir. 2006) (citing § 1701 notes (a) and (h) to show Congress chose to preserve and protect rights vested prior to the enactment of FLPMA); *County of Okanogan v. Nat'l Marine Fisheries Serv.,* 347 F.3d 1081, 1085 (9th Cir. 2003) (citing § 1701 notes (a) and (h) to show that the government could not divest a private party of an existing land use right or other valid existing right).

**Comment 26:** The GrSG DRMPA/EIS proposes lease stipulations through permit COAs on valid existing leases, an action that vastly exceeds pre-FLPMA lease contract terms. For example, NSO requirements during lekking, nesting, and early brood rearing; requiring compensatory mitigation to a no-net-loss standard; and imposing disturbance and density caps on development. These management prescriptions would unduly and unreasonably restrict the rights of pre-FLPMA leaseholders and their ability to develop their leases.

**Requested Action 20:** Before the GrSG DRMPA/EIS is finalized through the issuance of a ROD, BLM must clearly articulate and document that valid existing lease rights will not be subject to the RMPA's management restrictions via imposition of new COAs on existing leases or otherwise.

## The GrSG DRMPA/EIS Fails to Adequately Substantiate Proposed Lease Restrictions and COAs, and Utilize Least Restrictive Measures

BLM is required by statute to utilize the least-restrictive management practices with respect to oil and natural gas development. Pursuant to Section 363 of the Energy Policy Act of 2005, lease restrictions are "only as restrictive as necessary to protect the resource for which the stipulations are provided." 42 USC § 15922(b)(3)(C). With respect to oil and natural gas resources, BLM's Manual 1601 on Land Use Planning, and Manual 1624 on Planning for Fluid Minerals, specifically direct BLM not only to identify which areas would be subject to different categories of restrictions as included in the GrSG DRMPA/EIS,

but also to show that "the least restrictive constraint to meet the resource protection objection [is] used." See BLM Handbook H-1601-1, App. C.II.H. at 24.

**Comment 27**: BLM has failed to meet its statutory obligation under Section 363 of the Energy Policy Act of 2005 to utilize least restrictive measures to protect GrSG and its habitat in the GrSG DRMPA/EIS. BLM has failed to analyze whether it is utilizing the least restrictive measures that will achieve the same overall goal of conservation of GrSG and its habitat

**Comment 28:** The GrSG DRMPA/EIS fails to recognize scientific studies providing a basis for rational and supportable GrSG management measures that are less restrictive and as effective from a biological basis; unjustifiably limits surface disturbance without a legal basis or other justification; and seeks to impose compensatory mitigation on lessees' valid existing lease rights. The management prescriptions contained in the GrSG DRMPA/EIS far exceed what is required under FLPMA, NEPA, and even the ESA if the species were listed.

It is well established that at the project level, upon a specific proposed action and analyses under an EIS, it is permissible for a lessee's operations to have significant impacts on the environment. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). The Supreme Court has plainly stated that so long as BLM identifies and evaluates the potential adverse environmental impacts, BLM is under no obligation to avoid impacts to environmental resources. *Id.*

In contrast, here, the GrSG DRMPA/EIS could be interpreted as imposing a "no significant impact" standard for oil and natural gas operations. This de facto insignificance standard violates BLM's statutory mandate under FLPMA to manage public lands for multiple use, and its recognition of oil and natural gas resources as a "major use" of public lands. It also is contrary to the basic tenets of NEPA and long established legal precedent.

**Requested Action 21:** The GrSG DRMPA/EIS must be revised to include least restrictive protective measures for the GrSG pursuant to BLM's Land Use Planning Handbook and the statutory requirement of Section 363 of the Energy Policy Act of 2005. In the alternative, the Alliance requests that the ROD reject unduly restrictive and unsupportable measures in the GrSG DRMPA/EIS and adopt more measured and consistent GrSG lease stipulations, COAs, and management prescriptions similar to those adopted in the 2019 plans.

**Comment 29:** The Alliance is concerned that BLM failed to recognize existing science, data, and design management prescriptions based on sound, supportable, viable and effective strategies for the benefit of the GrSG and its habitat.

**Requested Action 22:** BLM must revise the GrSG DRMPA/EIS to provide reasonable, science-based and record-supported protective measures for the GrSG. In the alternative, the Alliance requests that BLM expressly reject these measures in the ROD and rely upon rational, supportable, and viable GrSG management prescriptions.

## BLM Must Frame Prioritization Within FLPMA and BLM's Multiple-Use Mandate

BLM's use of "prioritization" stems from the language of one of the objectives in the 2015 plans. As background, the 2015 GrSG RMPAs provided a series of Goals, Objectives, and Management Decisions. *See e.g.* Wyoming RMPA at 22. The goals and objectives (desired outcomes), including the prioritization objective were considered "in the development of the management actions." *Id.* Thus, the specific management decisions were the action items that BLM imposed to meet the desired outcomes in the goals and objectives. The goals and objectives were not, therefore, binding actions in themselves. *Id.*

The objective related to prioritization states that, through the implementation of the specific management decisions,

> [p]riority will be given to leasing and development of fluid mineral resources, including geothermal, outside of PHMAs and GHMAs. When analyzing leasing and authorizing development of fluid mineral resources, including geothermal, in PHMAs and GHMAs, and subject to applicable stipulations for the conservation of GRSG, priority will be given to development in non-habitat areas first and then in the least suitable habitat for GRSG. The implementation of these priorities will be subject to valid existing rights and any applicable law or regulation, including, but not limited to, 30 U.S.C. 226(p) and 43 C.F.R. 3162.3-1(h). Where a proposed fluid mineral development project on an existing lease could adversely affect GRSG populations or habitat, the BLM will work with the lessees, operators, or other project proponents to avoid, reduce and mitigate adverse impacts to the extent compatible with lessees' rights to drill and produce fluid mineral resources. The BLM will work with the lessee, operator, or project proponent in developing an application for permit to drill (APD) for the lease to avoid and minimize impacts to sage-grouse or its habitat and will ensure that the best information about the GRSG and its habitat informs and helps to guide development of such federal leases.

After finalizing the RMPAs, BLM developed a series of guidance documents to assist BLM staff in implementing the RMPAs. The first related to prioritization was Instruction Memorandum 2016-143 (IM 2016-143) "Implementation of Greater Sage-grouse Resource Management Plan Revisions or

Amendments: Oil & Gas Leasing and Development Sequential Prioritization") which BLM issued on September 1, 2016.

IM 2016-143 provided for a three-tiered prioritization sequence for considering leasing in or near GrSG habitats, and seven factors to consider while evaluating expressions of interest (EOIs) in each tier.

On December 27, 2017, BLM rescinded IM 2016-143 and replaced it with IM 2018-026 ("Implementation of Greater Sage-grouse Resource Management Plan Revisions or Amendments - Oil & Gas Leasing and Development Prioritization Objective"). IM 2018-026 also provided for a prioritization framework for working through EOIs starting with those parcels outside of habitat first, then parcels in GHMA, and then PHMA parcels.

On May 22, 2020, a court in the District of Montana (Montana Wildlife Federation v. Bernhardt, 4:18-cv-00069-BMM) vacated IM 2018-026, finding that the IM and leasing decisions that took place in the vicinity of its enactment violated FLPMA in that they were inconsistent with the governing land use plans in two distinct ways. First, the Court found the IM improperly limited prioritization obligations only to situations when BLM faces a backlog of EOIs. Second, the Court found that the 2018 IM "renders the prioritization requirement a mere procedural requirement, even though the 2015 plans require the prioritization requirement also to have some sort of substantive thrust." *Mont. Wildlife Fed'n v. Bernhardt*, No. CV-18-69-GF-BMM, 2020 U.S. Dist. LEXIS 90571, at *23 (D. Mont. May 22, 2020).

As a result of this Montana decision, BLM's Wyoming State Office deferred the planned June 2020 BLM Wyoming Oil and Gas Lease Sale. It also deferred 157 of the 165 nominated parcels to be offered at the September 2020 BLM Wyoming lease sale, pending BLM's development of an approach to prioritization that is in line with the Montana Court's decision. *See* Decision Record, Third Quarter 2020 Competitive Oil and Gas Lease Sale EA, DOI-BLM-WY-0000-2020-0009-EA.

In December of 2020, BLM Wyoming developed a prioritization scheme to comply with the Montana Court's Opinion, and incorporated that approach to its decision to offer parcels for sale in the Fourth Quarter Wyoming lease sale. In so doing, it deferred all nominated parcels within PHMAs. On January 19, 2021, plaintiffs in the Montana federal district court action amended their complaint to challenge the Wyoming BLM December 2020 lease sale on the same grounds that they challenged the previous actions, alleging that even the new prioritization method applied by Wyoming BLM did not comport with the 2015 GrSG RMPAs.

**Comment 30:** The Alliance recognizes that Alternatives 5 and 6 do not purport to include "prioritization" when it comes to oil and natural gas leasing. However, Alternatives 5 and 6 share a similar objective with Alternative 4 which does include prioritization, incorporated with a HAF analysis at the fine, mid,

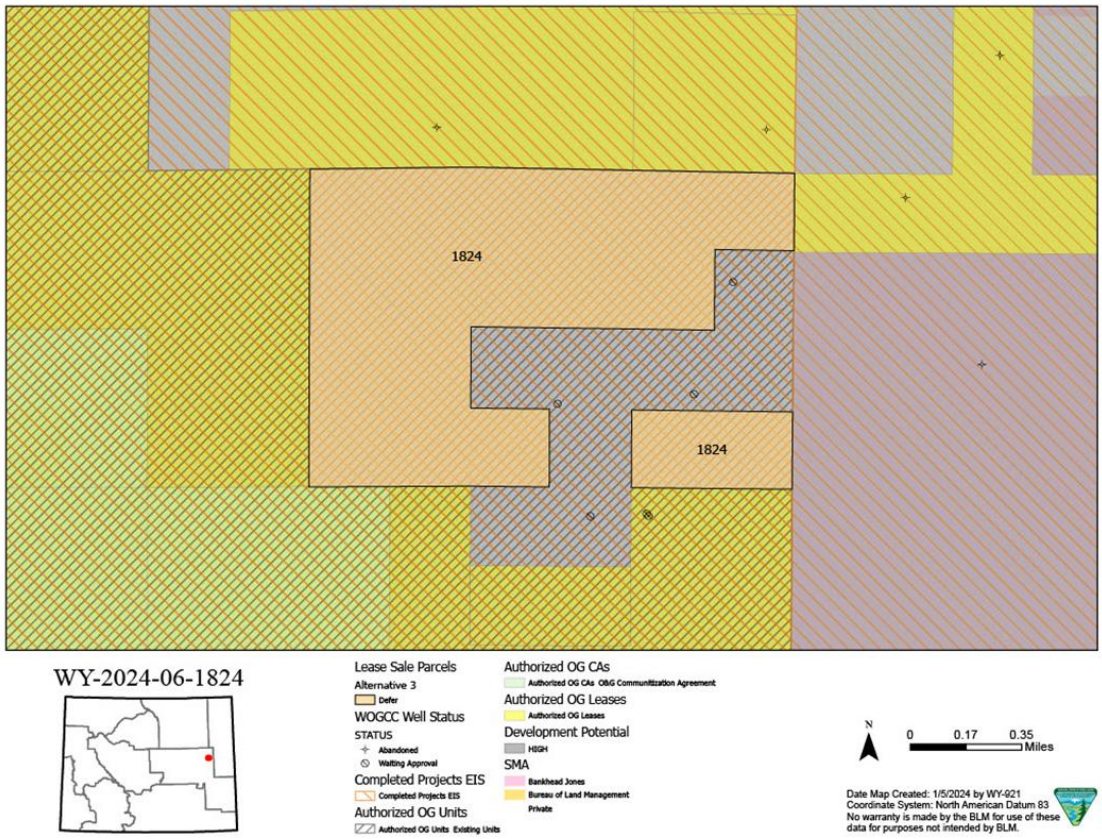
and site-scales and an analysis of whether the lands are "low preference" value for impacts to GrSG habitats (leasing allowed) or "high preference" value for impacts to GrSG habitats (leasing not allowed).

Additionally, the Alliance is fully aware that BLM's recent final rule titled "Fluid Mineral Leases and Leasing Process," 89 Fed. Reg. 30916 (April 23, 2014) (effective June 22, 2024), includes a new regulation at 43 C.F.R. § 3120.32 titled "Expression of interest leasing preference", which allows BLM to determine not to offer lands with "important fish and wildlife habitats or connectivity areas" when considering EOIs. *See* 89 Fed. Reg. 30986, § 3120.32(b). Based on this mechanism in the new BLM regulations, the Alliance is concerned that with or without BLM's selection of proposed Alternative 3, there will be no new leasing in GrSG habitat.

**Comment 31:** The Alliance opposes the criteria for leasing detailed in Alternative 4. These criteria prohibit multiple use of public lands in violation of FLPMA. Indeed, FLPMA does not allow for a single use, including managing for GrSG habitat, to be mutually exclusive to all other uses over a broad geographic range that is the 121 million acres of public lands analyzed in the GrSG DRMPA/EIS.

**Requested Action 23:** BLM must make clear that any use of prioritization—either from the new leasing regulation perspective or the GrSG DRMPA/EIS perspective—will not entirely preclude future leasing of parcels in GrSG habitat.

**Requested Action 24:** BLM must ensure that its decisions on whether to offer a parcel for lease take into account the surrounding area such that a parcel is not offered because it is in GrSG habitat yet surrounding acreage is all leased, creating the potential for double surface disturbance as developers must stop wells short on either side of the unleased parcel instead of allowing a developer the opportunity to drill through a section to fully produce the minerals. An example of this situation is BLM Wyoming's determination to not lease parcel 1824 in the second quarter 2024 lease sale because it is in GrSG habitat. Yet as is evident in the below diagram, the surrounding lands are fully leased for oil and natural gas development.




## The Habitat Assessment Framework Is an Unlawful, De Facto Regulation that Imposes Draconian Mandatory Requirements and Impermissibly Removes Flexibility from the Land Use Management Process

The GrSG DRMPA/EIS incorporates and utilizes a new concept, the HAF, with multiple scales that then focus on management objectives, triggers, and prescriptions. The three scales are: (1) First Order, broad scale, physical or geographical range of a species; (2) Second order, mid-scale, population areas and dispersal between subpopulations; and (3) Third order, fine-scale, home range of isolated populations, subpopulations, or an individual, and may include seasonal habitats within a home range. GrSG DRMPA/EIS Section 3.2.2 at 3-7.

**Comment 32:** As utilized throughout the range of alternatives and within PHMA and GHMA designations, the HAF scales are much smaller and more focused, creating a narrower look at GrSG habitat when operators are faced with disturbance caps or mitigation requirements. Throughout the GrSG DRMPA/EIS, BLM uses the HAF fine-scale as a metric or trigger for mitigation, restrictions, and

other management prescriptions. Very few if any exceptions or flexibility are provided at the HAF fine scale because it is so very narrow in its scope. This narrow focus threatens to hinder valid existing rights even when stating that the GrSG DRMPA/EIS will recognize such rights.

**Comment 33:** The Alliance is concerned that the HAF will unduly restrict BLM's flexibility or ability to grant WEMs. For example, looking at disturbance caps with the HAF fine-scale applied, Alternative 3 provides that "If disturbance from existing infrastructure developments exceeds 3% of habitat at the project scale or HAF fine scale area, new infrastructure associated with pre-existing authorizations would be deferred. The smaller size of most HAF fine-scale areas compared to BSU-scales might result in the cap being reached more quickly. This may prevent some development and associated impacts to GRSG." GrSG DRMPA/EIS Section 4.2.4 at 4-22 (emphasis added).

Alternative 4 explains that "[i]mpacts from applying a 3% disturbance cap at the project scale and within HAF fine scale habitat selection area would be similar as to those described for Alternative 3, however, the cap would apply to both existing and proposed infrastructure authorizations (subject to valid existing rights)." GrSG DRMPA/EIS Section 4.2.5 at 4-25. However, the section goes on to explain that "[t]here would be no exceptions to the 3% PHMA (and IHMA) disturbance cap at the HAF fine scale habitat selection area, which would limit the overall level of disturbance at this scale." *Id.* (emphasis added). Tied to the proposed adaptive management, where more than 3% of habitat within a HAF fine-scale area is damaged from fire or other non-development disturbance, no new projects would be approved until the habitat is restored. *Id.*

Alternatives 5 and 6 would apply the 3% disturbance cap at the HAF fine scale across the planning area, despite the fact that in Wyoming and Montana, for example, the proposed disturbance cap is proposed at 5%. GrSG DRMPA/EIS Section 4.2.6 at 4-30.

**Requested Action 25:** The HAF fine scale provides the most restrictions and the least amount of flexibility when applied to management objectives, triggers, and prescriptions, and will require BLM to deny many proposed projects based on the HAF without allowing any further explanation or justification in violation of valid existing rights and contrary to FLPMA's multiple use mandate. BLM must remove the HAF fine scale or significantly revise it in order to allow local flexibility and consistency with state plans for GrSG management.

## Revised Adaptive Management Standards are Confusing and Rely on Data that BLM Does Not Collect nor Manage

The adaptive management program as provided in Alternatives 3, 4, 5 and 6 incorporates thresholds to indicate to BLM a potential need for further conservation measures for the protection of GrSG and its habitat. The proposed program relies on state data, and implementing the Targeted Annual Warning System (TAWS) to notify when such thresholds have been met.

**Comment 34:** The Alliance is concerned that adaptive management as proposed in Alternatives 3, 4, 5 and 6 relies on state population data, collected and maintained by states. This is somewhat ironic in that BLM is relying on the states to provide population data in order to make each and every project approval decision within GrSG habitat, yet throughout the GrSG DRMPA/EIS, BLM refuses to adapt its proposed management plans to be consistent with state-led GrSG management plans.

Further, while BLM may want population data, there is no guarantee that the states are required to give BLM such data. Lower population could mean greater restrictions on development projects, which could in turn lead to less revenue from oil and natural gas development in the state from taxes, royalties, and employment, which in turn could lead to less funding for GrSG conservation efforts. It may not always be in the best interests of the respective states to provide such population numbers to BLM.

**Comment 35:** Adaptive management in the 2015 and 2019 plans incorporated a component of cooperation with state wildlife agencies that also allowed for adaptive management across a habitat area instead of one set of requirements on federal lands and a different set of requirements when population or habitat triggers are met. This allowed for consistency and understanding of expectations.

**Comment 36:** The Alliance is concerned that the adaptive management proposal is confusing and will be near-impossible to implement, with hard and soft triggers, analysis deadlines, and possibilities where BLM may still approve projects during and after a causal factor analysis (CFA) in some instances but not in other instances, and a clear statement that triggers only apply in PHMA except when they do not. The adaptive management proposal is contradictory and lacks controls to ensure that BLM will meet any set CFA deadlines in order to provide certainty to operators proposing projects in areas that have hit a trigger. BLM already struggles to meet its permitting and leasing obligations. It would be hamstrung wading through all the permutations, conditions, and exceptions contemplated. As explained, "adaptive management responses are directed to addressing habitat concerns on BLM lands and are limited to PHMA . . . [though] [l]ocal responses to thresholds reached in GHMA can be considered if deemed necessary . . . ." GrSG DRMPA/EIS Section 2.5.13, at 2-120.

**Comment 37:** BLM cites "habitat fragmentation, loss and disturbance" as the primary "influences" on GrSG population trends. This statement ignores annual precipitation, which studies show is a major contributing factor to GrSG habitat and species population.

**Requested Action 26:** BLM should revise its adaptive management program to rely on a habitat scale which BLM itself can collect data to support, instead of relying on population data that BLM has no control over.

**Requested Action 27:** BLM must clarify whether the adaptive management program is looking range-wide or at a narrow, HAF fine-scale. The explanation is unclear and could have different results depending on the scale utilized.

**Requested Action 28:** BLM must explain the science supporting modification of the adaptive management system from the 2015 and 2019 plans to the currently proposed system. Alternative management in previous versions did not include the obstructive triggers that stop development while ongoing studies and analysis are performed.

**Requested Action 29:** BLM must clarify how the adaptive management and CFA components work, and whether and how existing permitted projects determine whether they can continue during the CFA process. A broad statement that "permitted activities can continue unless those activities are causing mortality to GRSG or direct loss or degradation of occupied GRSG habitat" does not give anyone any assurances as to what will or will not be allowed activities during the CFA process. GrSG DRMPA/EIS Table 2-15 at 2-125.

**Requested Action 30**: BLM should remove the concept of hard and soft triggers in order to allow BLM to appropriately analyze, along with state game and fish agencies, anomalies in habitat and population numbers as appropriate. This would ensure the most current and accurate data are used, and contain the analysis to site-specific concerns instead of an unnecessarily broad range-wide review.

**Requested Action 31:** Any final management decisions related to adaptive management analysis should include input from affected stakeholders and allow such stakeholders to provide voluntary or compensatory mitigation efforts for the benefit of the GrSG, in order to improve habitat and reverse any negative trends.

**Requested Action 32:** In areas of habitat loss due to fire, BLM again reiterates that project approvals may be deferred until habitat is restored. Such deferral is in violation of valid existing rights and BLM must ensure that it is respecting leaseholders' rights to develop pursuant to FLPMA's multiple use mandate. Further, requiring delay of projects in areas no longer suitable as GrSG habitat is inappropriate

as the lands are, at that point, no longer suitable habitat and may need years of rehabilitation in order to once again become viable habitat. BLM should not defer new projects in such areas, but should also consider that operators could help provide restoration while developing their lease rights.

## The GrSG Draft RMPA/EIS Ignores the Inflation Reduction Act's Directive to Lease

The Inflation Reduction Act (IRA) includes a provision that ties the amount of oil and natural gas onshore lease acreage BLM offers for sale on an annual basis as a prerequisite for issuance of a right-of-way for wind or solar energy projects. The IRA states "the Secretary may not issue a right-of-way for wind or solar energy development on Federal land unless (A) an onshore lease sale has been held during the 120-day period ending on the date of the issuance of the right-of-way for wind or solar energy development; and the sum total of acres offered for lease in onshore lease sales during the 1-year period ending on the date of the issuance of the right-of-way for wind or solar energy development is not less than the lesser of (i) 2,000,000 acres; and (ii) 50 percent of the acreage for which expressions of interest have been submitted for lese sales during that period . . . ." Section 50265, Pub. L. No. 117-169, 136 Stat. 1818 (2022).

**Comment 38:** To be incompliance with Sec. 50265 of the IRA, BLM must offer either a sum total of 2,000,000 acres or 50% of the acreage nominated through expressions of interest (whichever is lesser) must be offered for sale through the competitive lease sale process.

**Comment 39:** BLM's GrSG DRMPA/EIS fails to analyze or even address whether the significant restrictions on oil and natural gas leasing proposed under each alternative will adversely impact BLM's ability to meet its statutory requirements under the IRA regarding oil and natural gas leasing.

**Requested Action 33:** Given the wide-ranging scope of the GrSG DRMPA/EIS, and the significant restrictions on oil and natural gas leasing, even under the least restrictive alternative, this analysis is important for purposes of compliance with the IRA. Moreover, BLM needs to detail in the GrSG DRMPA/EIS a process for BLM to conduct a similar analysis at the lease sale stage to inform whether BLM is going to meet its IRA requirements, and to what extent the proposed acreage being offered for sale goes towards BLM meeting its mandatory statutory requirements.

## BLM Fails to Provide Useable Maps to Provide Meaningful Information to the Public

**Comment 40:** The GIS mapping layers for all alternatives appear to be based on additional resources beyond GrSG leks and habitat. It is hard for the public to determine if these areas were truly intended to be part of the management described within the alternatives as GrSG habitat or if there is some error.

When comparing GIS layers for GrSG leks and habitat from the GrSG DRMPA/EIS to GrSG habitat identified by the WGFD, for example, there is some correlation. However, there are additional habitat designations presented in the GrSG DRMPA/EIS which do not include known GrSG habitat at all. For example, in the Wyoming maps, there are several polygon features that do not correlate with any known lek or habitat data but appear to be based on raptor nests such as golden eagles and burrowing owls. Likewise, there are line features that include major stipulations that correlate to historic trails. Both are presented as if they were GrSG habitat, which is not factually accurate and inappropriate for inclusion in the GrSG DRMPA/EIS. Further, a proposed NSO stipulation seems to have been applied randomly to the boundaries of permitted oil and natural gas EIS project areas. These boundaries do not warrant habitat being deemed GrSG in all instances and may be devoid of leks.

**Requested Acton 34:** BLM's maps do little to inform the public on specific habitat areas within each state, let alone within a county or locality. BLM must provide state and Field Office level maps based on actual GrSG data for each resource area.

## The GrSG DRMPA/EIS's Proposed Use of ACECs is Contrary to FLPMA and Unlawful under the APA

FLPMA defines an ACEC as an area "within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards." 43 U.S.C. § 1702(a). The Secretary of the Interior has the ability to "designat[e] . . . areas of critical environmental concern" under FLPMA Section 202. *See* 43 U.S.C. § 1712(c)(3). BLM regulations implementing FLPMA instruct that areas having potential for ACEC designation "shall be considered during the development and revision of resource management plans and during amendments to resource management plans . . . ." 43 C.F.R. § 1610.7-2(b).[13]

As reflected by FLPMA, and expressly stated in FLPMA's implementing regulations and BLM policy, to qualify for consideration of the ACEC designation, identified resources and values must have substantial significance and values with "qualities of special worth, . . . national or more than local importance . . . ." 43 C.F.R. § 1610.7-2(d)(2). Further, an area must meet relevance and importance criteria, and require special management attention. 43 C.F.R. § 1610.7-2(d).

[13] As effective on June 10, 2024.

**Comment 41:** An ACEC must protect unique resources that are more than locally significant. In Wyoming, for example, GrSG habitat is commonplace and not even locally significant. As BLM explains in the GrSG DRMPA/EIS, this planning process touches and concerns approximately 69 million acres across 10 states. The sheer size of the sagebrush sea and the expansive coverage of the GrSG DRMPA/EIS demonstrate that GrSG habitat is not unique and does not warrant ACEC designation.

**Comment 42:** The lands proposed for ACEC designation do not meet BLM's relevance and importance criteria, and do not require special management attention afforded by ACEC designation. As an initial matter, the multiple proposed ACEC locations do not meet BLM's relevance criteria. While proposed to protect GrSG, the proposed lands are within PHMA areas which already receive the most restrictive management prescriptions within GrSG habitat. These lands are not unique among other PHMA lands and should not be so designated.

**Comment 43:** The areas proposed for ACEC designation do not meet importance criteria. While the revised regulations[14] provide a broad definition for importance criteria, BLM cannot designate *all* of GrSG habitat as an ACEC, and has not justified smaller subsets for additional designation. Further, in order to designate lands as ACECs, they must meet relevance and importance criteria *and* require special management attention.

The revised ACEC regulations explain that an area requires special management attention if ACEC protections are necessary to prevent irreparable damage such that restoration would otherwise be impossible. With this added requirement for ACEC designation, BLM should restrict such designations to lands and resources that are not already protected by a multitude of stipulations, limitations, best management practices and other efforts devised to protect the species and its habitat as is the case with GrSG.

BLM fails to analyze how the proposed ACEC designations across Alternatives 3 and 6 would provide protections different from the management prescriptions that would be imposed under each of the management alternatives. Further, BLM does not analyze the impacts of the proposed ACEC designations on other resources and other uses of public lands.

BLM has failed to prove how additional management prescriptions in the form of ACEC designation are needed, and has failed to explain how oil and natural gas development would impair GrSG conservation.

[14] As provided in BLM's Conservation and Landscape Health final rule, 89 Fed. Reg. 40308, 40338 (May 9, 2024) (effective June 10, 2024).

BLM has not shown in the GrSG DRMPA/EIS how the ACECs contemplated in Alternatives 3 and 6 meet the relevance and importance criteria necessary under FLPMA.

**Requested Action 35:** The Alliance reiterates its May 14, 2024 comments on BLM's proposal to include ACECs in the GrSG planning process and requests that BLM withdraw the ACEC designations in each of the management alternatives. BLM should provide an informative analysis to describe impacts of ACEC designations for Alternatives 3 and 6. BLM must analyze the incremental difference in land use management that would result from the proposed ACEC designations for each management alternative.

## Conclusion

The GrSG DRMPA/EIS presents numerous fundamental legal and technical flaws that render it inoperative and incapable of being administered in a rational and consistent manner where BLM decision-making complies with the legal standards of the APA, FLPMA, and its governing resource use statutes such as the MLA. To provide regulatory certainty, and to provide effective conservation for the GrSG and its habitat, BLM must withdraw the GrSG DRMPA/EIS and significantly revise and rework it to fix the extensive flaws.

**Sincerely,**

**Kathleen M. Sgamma**
President