January 5, 2018

Via Email

Sage-Grouse Amendment Comment
Intermountain Region
USDA Forest Service
Federal Building
324 25th Street
Ogden, UT  84401
comments-intermtn-regional-office@fs.fed.us


Dear USDA/Forest Service:

I. Introduction

The Women’s Mining Coalition (WMC) is a grassroots organization with members nationwide including the western states in the Great Basin and Rocky Mountain regions affected by the U.S. Department of Agriculture Forest Service (“USFS”) 2015 Greater Sage-Grouse (“GSG”) Land Management Plans (“LMPs”). WMC is submitting these comments in response to USFS’ request for scoping comments to amend the GSG LMPs because our members have numerous interests that are adversely affected by the current GSG LMPs.

WMC members work in all sectors of the mining industry including hardrock, industrial minerals, and coal; energy generation and mining-related distribution, manufacturing, transportation, and service industries. We actively participated in the National Environmental Policy Act (“NEPA”) 43 USC 4321-4347 environmental review process pertaining to the development of the 2015 LMPs that recommended withdrawing 2.8 million acres of land in Nevada and 10 million acres in six western states from operation of the U.S. Mining Law (20 USC 21a et seq as amended).

Most of the 2.8 million acre proposed withdrawal in Nevada is located on National Forest System lands managed by the Humboldt-Toiyabe National Forest. Consequently, the January 2016 comments WMC prepared in response to BLM’s Notice of Proposed Withdrawal; Sagebrush Focal Areas; Idaho, Montana, Nevada, Oregon, Utah, and Wyoming and Notice of
Intent to Prepare an Environmental Impact Statement ("Notice"), 80 Fed. Reg. 57,635 (Sept. 24, 2015) are relevant to USFS’ current request for scoping comments. Similarly, our March 2017, comments on the BLM’s 2016 Draft Environmental Impact Statement ("DEIS") that BLM prepared to evaluate the proposed withdrawal of 10 million acres of Sagebrush Focal Areas ("SFAs") from mineral entry. (81 Fed. Reg. 96,478 (Dec. 30, 2016), ("March 2017 DEIS Comments") are also relevant to the USFS’ current scoping effort.

Our March 2017 DEIS comments commended BLM for preparing a well written and well organized DEIS that properly disclosed that mineral activities have a miniscule impact on GSG habitat throughout the 10-million acre SFA proposed withdrawal area and the devastating socioeconomic impacts that would result from withdrawing this land. As shown in the DEIS, the footprint of mineral exploration and mining activities in the SFA proposed for mineral withdrawal is so small that there would be virtually no conservation or environmental benefits to GSG or its habitat that would result from the mineral withdrawal.

Consequently, WMC strongly supports BLM’s October 11, 2017 decision to cancel this unwarranted withdrawal application, which if implemented, would have had no measurable benefits to GSG and its habitat while at the same time would have caused significant socioeconomic hardships in the six SFA states (e.g., Idaho, Montana, Nevada, Oregon, Utah, and Wyoming). Although BLM decided to terminate the preparation of a mineral withdrawal Final EIS, WMC believes that the mineral withdrawal DEIS contained important information that should be incorporated into the Environmental Impact Statements ("EIS documents") that are the subject of this Notice of Intent.

As discussed in detail in these comments, WMC suggests USFS evaluate the following GSG land use management decisions in the LMPs, which we believe may require amendments to the 2015 LMPs:

- The SFA designations and SFA land use restrictions, which the March 31, 2017 order from the United States District Court for the District of Nevada ruled were unlawful because BLM and USFS violated NEPA by failing to prepare a Supplemental EIS for the SFA designations in the six SFA states;

- The habitat maps in the FEIS and Great Basin Region and Rocky Mountain Region Records of Decision ("RODs") and the inappropriate use of these landscape-scale maps that have not been field-verified and are inconsistent with current Executive Orders and Congressional action that have revoked landscape-scale land use planning and mitigation policies;

- The need to include Geology and Minerals sections in the Affected Environment and Environmental Consequences chapters of the SEIS. These sections were omitted from previous NEPA documents, rendering these documents incomplete and fatally flawed;

- The inconsistency of numerous aspects of the LMPs including the SFA designations, the net conservation gain mitigation standard, uniform lek buffer zones, disturbance and density caps, and rigid adaptive management triggers, with best available science, applicable laws including but not limited to the USFS’

- The inconsistency of the 2015 LMPs with the following Trump Administration policies, which were enacted after publication of the 2015 LMPs and RODs and must be considered in the USFS EIS documents:
  
  o Secretary Zinke’s June 2017 Secretarial Order 3353 “Greater Sage-Grouse Conservation and Cooperation with Western States, which establishes the Sage Grouse Review Team in coordination with USFS;”
  
  o The Department of the Interior’s (“DOI’s”) August 4, 2017 Report in Response to Secretarial Order 3353, which was developed with input from the USFS;
  
  o President Trump’s March 2017 Energy Independence Executive Order (EO 13783); and
  

In addition to addressing the land use management decisions listed above, this letter presents the following recommendations:

- USFS should use interim policy guidelines rather than plan amendments, wherever possible to provide immediate relief from the inappropriate implementation of the LMP restrictions that are based on the landscape-scale habitat maps rather than on site-specific, field-verified habitat data;

- The EIS documents should require the use of site-specific, field-verified habitat data in place of landscape-scale habitat maps for land use planning and project-level decisions;

- The Proposed Action in the NEPA Documents should evaluate the adequacy of the habitat management directives in existing USFS policies and manuals; and

- The NEPA Documents should eliminate any reliance on the reports and studies in the LMPs that are premised on landscape-scale land use policies and questionable science such as the National Technical Team Report, the U.S. Fish and Wildlife Mitigation Framework, the USGS Lek Buffer Study, and others.

II. The Urgent Need for Interim Policy Relief Prior to Completing the NEPA Documents

Many of the land use restrictions in the current LMPs are imposing onerous constraints on multiple use of lands with alleged GSG habitat – especially in the SFAs and lands designated asPriority Habitat Management Areas (“PHMAs”). These constraints are causing socioeconomic harms to state and local governments and to companies and individuals that use these lands for
multiple use purposes. Additionally, the current LMPs do not include optimal measures to address the greatest threat to GSG habitat – the spread of invasive species and wildfire risks.

In order to eliminate or minimize these adverse impacts while the EIS documents are being prepared, WMC urges USFS to evaluate whether some of these adverse impacts could be wholly or partially alleviated through policy changes and interim measures. Although it may be necessary to prepare plan amendments to modify some of the LMP land use management decisions, interim measures may be used to address others. We strongly urge USFS to evaluate as many near-term measures as possible to lessen the onerous impact of the LMPs while the EIS documents are being prepared. We emphasize that there is an urgent need to take immediate steps to lessen wildfire risks. Consequently, USFS should implement policy decisions and use available emergency management tools to reduce wildfire risks in the 2018 – 2019 timeframe.

As discussed in Section III, many of the LMP policies are based on the Obama administration’s landscape-scale land use planning policies that were unlawful when they were enacted and that the Trump administration and Congress have rescinded. Because many of the land use restrictions in the LMPs are premised on landscape-scale planning concepts, they are no longer authorized. USFS should use all available remedies to provide immediate regulatory relief to states, local governments, operators, and permitees that are currently being adversely impacted by these unauthorized policies. Additionally, USFS must not impose landscape-scale policies on proposed projects that are being evaluated simultaneously with development of the EIS documents.

III. Landscape-Scale Habitat Maps are Erroneous, No Longer Authorized and are the Key Problem

WMC believes that the key problem with the LMPs revolves around the landscape-scale habitat maps in the Great Basin and Rocky Mountain RODs, and in all of the EIS documents prepared for the LMPs. These maps incorrectly identify many areas as important habitat, when in fact, they are not significant habitat, and in some cases, are not habitat at all. The incorrect habitat designations are the result of USFS’ now unauthorized use of landscape-scale habitat maps that have not been field verified and thus misidentify the habitat resulting in significant misclassification of lands as important habitat. Despite the serious inaccuracies in the ROD and EIS habitat maps, the current LMPs require USFS to implement the LMP restrictions on lands with mischaracterized habitat conditions – and even on lands that are not habitat.

President Trump’s March 28, 2017 EO 13783, “Promoting Energy Independence and Economic Growth” rescinded the landscape-scale mitigation policy in the November 3, 2015 Presidential Memorandum \(^1\) entitled “Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment.” Additionally, Congress rejected and repealed BLM’s landscape level land use planning regulations under BLM Planning Regulation 2.0 – which was

\(^1\) This now rescinded Presidential Memorandum directed BLM and the U.S. Fish and Wildlife Service to develop mitigation policies that incorporated compensatory mitigation into the planning and permitting processes.
an attempt after the completion of the LMPs to legalize the landscape scale planning approach used in the GSG LMPs.

Because Congress rejected the landscape level planning proposal by the BLM and the Trump Administration has revoked the Obama Administration’s policy directives pertaining to landscape-scale land use planning, the landscape-scale habitat maps that are the foundation upon which the LMP land use decisions are based, are not consistent with current law. There is thus a compelling reason for USFS to take all appropriate short-term and long-term measures to address this inconsistency using a combination of issuing immediate policy guidelines and developing plan amendments as necessary. This approach would provide states, local governments, companies, and individuals with as much relief as possible as soon as possible for those issues that may ultimately require plan amendments before they can be fully addressed.

Specifically, WMC urges USFS to develop policy guidance to require site-specific, field-verified habitat data prior to making future land use decisions. This guidance could serve as an interim “umbrella” solution to alleviate many of the problems states, counties, companies, and individuals are experiencing with the 2015 LMPs. The EIS documents could subsequently incorporate clarification and amendments in order to make the future LMPs consistent with current law.

Additionally, the 2015 FEIS and associated RODs rely on the following documents that are premised upon landscape-scale planning and mitigation principles:

- The National Technical Team Report;
- The Conservation Objectives Team Report;
- The October 2014 SFA Memo from the U. S. Fish and Wildlife Director to the BLM Director and the U.S. Forest Service Chief;
- The September 2014 U.S. Fish and Wildlife Service Mitigation Framework;
- The November 2014 USGS Lek Buffer Study; and

Because all of these documents were developed to implement the Obama Administration’s landscape-scale land use and mitigation policies, they were never lawful and are no longer consistent with current policy. Consequently, USFS must eliminate any future reliance on the findings or recommendations in these documents.

IV. USFS’ Proposed Action Should Use Site-Specific Habitat Data Rather than Landscape-Scale Habitat Maps

Because the use of landscape-scale land use planning and mitigation is not consistent with the law or current policies, the landscape-scale habitat maps in the RODs are no longer viable. Consequently, the EIS documents cannot rely on broad landscape-scale maps that have not been field verified and should not include a Proposed Action premised on such a map.
WMC suggests that:

1) USFS establish that site-specific, field verified habitat data represent the Best Available Scientific Data, which must be used in making land use decisions; and

2) The Proposed Action in the EIS documents require the use of site-specific, field-verified habitat data for making land use decisions rather than using landscape-scale (i.e., statewide or regional) habitat maps.

In order to comply with E.O. 13783 and in light of Congress’ rejection of BLM’s landscape-scale planning principles in the Planning 2.0 regulations, it is clear that future land use decisions pertaining to the Nation’s public lands and National Forest System lands must not be based on landscape-scale habitat maps. Consequently, USFS’ Proposed Action should require the use of Best Available Scientific Data comprised of site-specific, field-verified habitat maps on a project-by-project basis rather than on landscape-scale habitat maps based on remote sensing data and modeling. The EIS documents should evaluate procedures that would base land use decisions using site-specific, field-verified habitat data.

If land use restrictions such as lek buffer zones, travel and access restrictions, seasonal use constraints, noise limits, Required Design Features, and other land use decisions that impede or affect multiple uses are warranted, their application should be limited to areas with verified important habitat and based on scientifically established protocols. Similarly, any required or voluntary mitigation should reflect actual on-the-ground habitat conditions. Land use restrictions and mitigation measures must not be based on unconfirmed landscape-scale habitat designations. In the case of mineral exploration and development projects, land use restrictions and mitigation requirements must not interfere with claimants’ rights to enter, occupy, and use the public lands for mineral purposes pursuant to the U.S. Mining Law.

WMC’s recommendation to base land use decisions on field-verified habitat data would improve the protection of actual and important GSG habitat while eliminating arbitrary and unnecessary restrictions on lands with less important habitat – or even no habitat. The use of field-verified maps will insure that USFS’ management of GSG habitat will focus on protecting the “best-of-the-best” habitat by applying appropriate land use restrictions and mitigation measures to address site-specific conditions and basing these measures on the best way to protect identified important GSG habitat.

Basing land use decisions on actual habitat conditions stands in marked contrast to the “numbers game” in the current LMPs, which apply land use restrictions to millions of acres of supposed GSG habitat identified in the habitat management area maps in the RODs, resulting in onerous and unnecessary socioeconomic impacts. WMC’s recommendation to take a more surgical approach based on actual habitat conditions will ensure protection of important habitat areas while reducing the broad and serious economic hardships to state and local governments and companies and individuals who use public lands for mineral exploration and development, renewable and conventional energy development, grazing, hunting, guiding, recreation, and other uses.
WMC’s suggestion to eliminate the use of the landscape-scale habitat maps and use instead site-specific, field-verified habitat maps is directly relevant to all of the scoping issues on which USFS is seeking comments:

**SFA Designation** – As discussed above, the SFA designations should be eliminated because they are based on faulty landscape-scale habitat maps that include areas of marginal habitat and areas of non-habitat. Moreover, as discussed below, the SFA designation is not necessary to protect important GSG habitat from the impacts associated with mineral exploration and development.

**Mitigation Standards** – The net conservation gain mitigation standard required in the current LMPs is unlawful and inconsistent with the Trump Administration’s policies and Congressional directives that reject landscape-scale land use planning and mitigation requirements premised upon landscape-scale planning. As discussed in more detail below, appropriate mitigation measures should be developed on a project-by-project basis based on site-specific factors and must respect claimants’ rights under the U.S. Mining Law and be consistent with the multiple use land use policies in the USFS’ Organic Act and the National Forest Management Act.

**Lek Buffer Zones** – The lek buffer zone restrictions in Appendix B of the 2015 LMPs are rigid, distance-based, one-size-fits-all measures premised on landscape-scale land use planning concepts as presented in the 2014 USGS report entitled “Conservation Buffer Distance Estimates for Greater Sage-Grouse – A Review” (Open File Report 2014 – 1239). The current lek buffer zones restrict infrastructure related to energy development within 3.1 miles of leks, tall structures within 2 miles of leks, low structures within 1.2 miles of leks, surface disturbance that alters vegetation within 3.1 miles of leks, and projects creating noise to at least 0.25 miles from leks. (Appendix B at B-1). These restrictions have the potential to put millions of acres of land off-limits to multiple use. USFS should eliminate the current lek buffer zone restrictions because they are premised on landscape-scale land use polices that this administration and Congress have revoked.

WMC recognizes that it may be appropriate to evaluate potential impacts of certain activities near active leks during the active breeding season. However, the LMP applies outright restrictions throughout the year. Moreover, the one-size-fits-all, distance-based buffer zone management directives in Appendix B of the current LMPs are completely inappropriate because the specified distances for each disturbance type embrace a “flat Earth” theory that ignores important site-specific features such as topography, which may shield some leks, lessening or even eliminating any impacts from nearby land use activities. If restricting nearby land uses is necessary to protect certain leks, USFS must apply such restrictions on a limited, project-by-project basis using field-verified data regarding the location and actual use of the lek. Rather than simplistically drawing a radius around an active lek and restricting activities within the area circumscribed by that radius, USFS must take into consideration the surrounding terrain and other site-specific conditions that reduce or remove impacts when strutting male GSG occupy the lek. At many sites the resulting buffer zone can be much smaller than the current one-size-fits all
approach. Additionally, any restrictions that are warranted to protect leks during the breeding season must respect claimants’ rights under the U.S. Mining Law.

Disturbance and Density Caps – Because this land management concept is premised on unlawful landscape-scale land use management principles that Congress has rejected and the Trump Administration has rescinded, it must be eliminated from the LMPs.

Habitat Boundaries to Reflect New Information – Eliminating the faulty landscape-scale maps, which USFS must do to comply with the Court order in Western Exploration, LLC v. U.S. Dep’t of the Interior, 250 F. Supp. 3d 718, (“Nevada litigation”) and existing federal law, will facilitate the development of accurate habitat maps based on site-specific, field-verified data. This approach will result in much more accurate habitat maps that will be continually updated using new on-the-ground data collected in conjunction with specific project proposals. USFS should use project-specific habitat maps to make decisions regarding necessary GSG conservation measures. This eliminates the current delays and confusion surrounding changes to the map and whether a plan amendment is needed to incorporate new data.

Reversing Adaptive Management Responses – The current LMPs treat adaptive management responses as a one-way-street that are designed solely to address adverse impacts to GSG habitat rather than to respond to monitoring data that indicate habitat conditions have improved. Curiously, this policy appears to be premised on the notion that there will be continual habitat degradation, belying the underlying purpose of the LMPs, which is to protect and enhance GSG habitat.

USFS must modify this inappropriate requirement that assumes failure and ignores success. USFS should use site-specific habitat monitoring data to adjust USFS’ management approach on a case-by-case, project-specific basis. Because the LMP conservation measures should be designed for success to protect and enhance GSG habitat, adaptive management should focus on refining mitigation measures to improve – or at least stabilize – habitat conditions based on site-specific monitoring data.

It is inappropriate to create a one-size-fits-all adaptive management response to monitoring data – which defeats the purpose of site-specific monitoring in the first place. The appropriate response to project-specific monitoring data (i.e., adaptive management) must be determined on a case-by-case basis that carefully considers site monitoring data.

State Specific Issues – WMC’s recommended approach to eliminate landscape-scale maps and to base land use decisions on site-specific data addresses the question of how to deal with state-specific issues and whether to amend the LMPs for the Great Basin and Rocky Mountain regions or prepare state-specific LMPs. It is not necessary to create separate LMPs for each state. However, at a minimum, the two regional LMPs must be amended to eliminate the use of landscape-scale habitat maps and instead require site-specific habitat data. Focusing on site-specific conditions will effectively address the differences in habitat conditions and threats from state to state and eliminates the need for state-specific LMPs to accommodate these differences.
V. The EIS Documents Must Eliminate the Unlawful SFA Designations

In the Nevada litigation, the United States District Court for the District of Nevada ruled on March 31, 2017 that the SFA are unlawful because BLM and USFS violated NEPA by failing to prepare a Supplemental EIS for the designation of SFAs in the 2015 Nevada LMP/Land Use Plan. One of the purposes of USFS’ scoping notice is to comply with the Court’s order to prepare a Supplemental EIS to evaluate the SFA. In response to this order, USFS is seeking public comment on the SFA designation and whether USFS should retain, modify, or eliminate the SFA designations.

The SFA designation is based on the landscape-scale habitat maps, which have not been field verified and therefore incorrectly characterize GSG habitat as discussed in Sections II and III. As noted above, most of the Nevada SFA affects lands within the Humboldt – Toiyabe National Forest.

The record in the Nevada litigation documents that the maps in the RODs overlook important habitat areas, fail to identify the “best-of-the-best” habitat, and include areas of non-habitat within the SFAs, PHMA, GHMA. For example, during preparation of the FEIS, BLM ignored the advice from Nevada’s wildlife experts at the Nevada Department of Wildlife (“NDOW”) regarding the location of the most important GSG habitat areas:

“Top Nevada BLM officials knew that roughly 26 percent (723,000 acres) of the 2.8 million acre Nevada SFA was not priority habitat – it included lower priority habitat and 75,100 acres of non-habitat. They also knew from NDOW’s comments…that the State’s wildlife experts said the SFAs “do not fully represent the most important landscapes.” NDOW expressed concerns about the re-prioritization of management actions to the SFA given the lack of state input and that the “conservation priorities may be misplaced as a result of policy-based, rather than science-based, planning.” Nevada litigation, Motion for Summary Judgment, Case 3:15-cv-00491-MMD-VPC, Document 67 at 6 – 7, 04/01/16.

The Nevada litigation record also reveals that the SFA designation did not reflect actual habitat conditions because BLM officials inappropriately “turned” lower priority habitat and non-habitat into SFAs:

“The FEIS designated 2.8 million acres as SFA, which caused an additional 722,800 acres to be designated as PHMA, turned 436,000 acres of GHMA into PHMA, turned 211,100 acres of OHMA into PHMA, and turned 75,100 acres of non-habitat into PHMA.” Nevada litigation, Order, Case 3:15-cv-00491-MMD-VPC Document 126 at 37, 03/31/17.

The SFA habitat classification is a special subset of PHMA as shown on the landscape-scale habitat maps in the RODs. As discussed in Sections II and III, a current Executive Order and Congress have rescinded the Obama Administration’s landscape-scale land use management policies. Consequently, USFS must jettison all of the landscape-scale habitat maps in the RODs
that include the SFA designations. Land use restrictions, if warranted, must be applied surgically on a case-by-case basis based on actual, field-verified habitat conditions.

VI.  The NEPA Documents Must Include Sections on Geology and Minerals in the Affected Environment and Environmental Consequences Chapters

The complete absence of sections on Geology and Minerals in the Affected Environment and Environmental Consequences chapters of the 2013 DEIS and the 2015 FEIS are a glaring deficiency and fatal flaw. USFS must correct this deficiency in the NEPA Documents being prepared in response to this scoping notice.

Fortunately, USFS can go a long way to address this deficiency by tiering to or incorporating the information in two recent documents:

1. The October 2016 Mineral Potential Report and Sagebrush Mineral Resource Assessment\(^2\) that the U.S. Geological Survey (“USGS”) prepared for BLM; and


Together, the October 2016 USGS report and BLM’s 2016 SFA Withdrawal DEIS present much of the information that should have been included in the 2013 DEIS and the 2015 FEIS. Specifically, the information in the USGS report should have been included in the DEIS and FEIS and used as the basis for evaluating the impacts associated with the proposed withdrawal of the SFA from operation of the Mining Law. That analysis would have presented the findings that were ultimately unveiled in BLM’s 2016 SFA Withdrawal DEIS.

As noted in our March 30, 2017 comments, the 2016 SFA Withdrawal DEIS provides well-organized, useful, and compelling information about the adverse socioeconomic impacts that would result from implementing the proposed SFA mineral withdrawal. The SFA Withdrawal DEIS documents that the proposed 20-year withdrawal would cause a staggering aggregate adverse impact of $14 billion in reduced economic output, $2.4 billion in less labor compensation, and 34,000 fewer jobs in five of the six SFA states, with Nevada, Idaho, and Wyoming bearing the brunt of these impacts. USFS must consider these enormous adverse impacts when evaluating whether to retain any aspect of the SFA.

Because most of the 2.8 million acre Nevada SFA is located on USFS-administered lands in the Humboldt – Toiyabe National Forest in Humboldt and Elko counties, the socioeconomic impact analysis for Nevada in the 2016 SFA Withdrawal DEIS is especially relevant to USFS’ EIS evaluation. In response to USFS’ request for comments on the SFA designation, USFS must fully consider the impact analysis in the 2016 SFA Withdrawal DEIS which revealed that the footprint of mining and mineral exploration activities in the SFAs was projected to amount to a

---

mere 2,620 acres\(^3\) across the six SFA states. BLM quantifies these impacts as affecting only about 0.026 percent of the 10-million acre SFAs. (SFA Withdrawal DEIS at 4-75). The 2016 SFA Withdrawal DEIS also includes important information about the scope of mining impacts under a No Action Alternative (i.e., without the SFA withdrawals):

“…the total amount of mining related disturbance in sagebrush habitat under the No Action Alternative would be 9,554 acres, or **approximately one-tenth of 1 percent of the total withdrawal area**...These disturbances could impact vegetation communities on 0.1 percent of the SFAs with the majority of the impacts estimated to occur in Nevada and Idaho.” (SFA Withdrawal DEIS at 4-71 and 4-72, bold emphasis added.)

The 2016 SFA Withdrawal DEIS clearly documents that mineral activities do not adversely impact GSG or its habitat and that the proposed withdrawal was unwarranted.

WMC applauds BLM’s October 11, 2017 decision to cancel the proposed SFA withdrawal. We strongly suggest that the EIS documents that USFS will be preparing in response to the Court’s order in the Nevada litigation include the information presented in the 2016 SFA Withdrawal DEIS, which clearly illustrates that mineral activities are not a threat to GSG habitat and that the proposed mineral withdrawal would have resulted in devastating socioeconomic impacts in Nevada, Idaho, and Wyoming. This information should have been included in the 2015 FEIS. Incorporating the findings of the 2016 SFA Withdrawal DEIS into the USFS’ EIS documents will cure this deficiency.

**VII. Mitigation Standards**

USFS’ scoping notice specifically asks for public comments on the mitigation standard in the LMPs, which requires compensatory mitigation that produces a net conservation gain. In the LMPs, USFS defined the net conservation gain standard as “[t]he actual benefit or gain above baseline conditions.” USFS Great Basin ROD at 96.

The application of the net conservation gain standard to operations under the Mining Law violates the Mining Law, USFS’ Organic Act, and Executive Order 13783. When Congress enacted the Organic Act in 1897, Congress explicitly acknowledged the continued applicability of the Mining Law by providing: “[n]or shall anything in [the Organic Act] prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof.” 16 U.S.C. § 478. Pursuant to the Organic Act, USFS’ surface management regulations for hardrock minerals require that “[a]ll [mining] operations shall be conducted so as, **where feasible**, to minimize adverse environmental impacts on National Forest surface resources ....” 36 C.F.R. § 228.8 (emphasis added).

\(^3\) The 2,620 acres is comprised of 187 acres in Idaho, 81 acres in Montana, 2,285 acres in Nevada, 66 acres in Oregon, 1 acre in Wyoming, and 0 acres in Utah. (SFA Withdrawal DEIS at 2-10).
The net conservation gain standard requires mining operators to *improve* GSG habitat, which exceeds USFS’ authority to “*minimize* adverse environmental impacts *where feasible*” pursuant to 36 C.F.R. § 228.8 (emphasis added). Thus, USFS lacks the authority to diminish rights granted by the Mining Law. Moreover, no other federal statute or regulation allows USFS to implement the net conservation gain standard. Therefore, USFS must remove the net conservation gain standard from the RODs/LMPs through the LMP amendment process.

The net conservation gain standard was not lawful at the time at which it was imposed because it violated the Mining Law and the Organic Act. Additionally, the agencies’ (e.g., BLM and USFS) unlawful addition of this standard to the 2015 FEIS and the RODs without giving the public an opportunity to comment on this new standard violated NEPA.

Executive Order 13783 and Congress’ revocation of BLM’s 2.0 Planning Rule further render the net conservation standard unlawful and demand that it be eliminated from the USFS’ amended LMPs. These recent rejections of the Obama administration’s landscape-scale land use planning and mitigation directives that are the foundation of the LMP’s net conservation gain mitigation requirement dictate that USFS must thus amend the GSG LMPs to eliminate the net conservation gain mitigation standard.

Additionally, because net conservation gain does not comply with existing laws or current land use management policies, USFS must not impose the net conservation gain requirement on projects undergoing evaluation while the EIS documents are being prepared. Prior to finalizing the NEPA process to amend the LMPs to remove the net conservation standard, USFS should develop an interim policy directive to clarify that net conservation gain is no longer required for proposed projects. Similarly, operators of projects authorized under the current LUPs where the net conservation gain standard was imposed should no longer be required to comply with the net conservation mitigation standard.

USFS’ surface management regulations include the following provision specifically applicable to wildlife:

> Fisheries and Wildlife Habitat. In addition to compliance with water quality and solid waste disposal standards required by this section, operator shall take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations. 36 C.F.R. § 228.8(e)

This regulatory provision coupled with the requirement at 36 C.F.R. 228.8 that requires all operations to “be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest surface resources” provides USFS with ample authority to protect GSG habitat on National Forest System lands. Moreover, these are the only USFS environmental protection and mitigation standard consistent with claimants’ rights under the U.S. Mining Law. USFS does not have the authority to require mineral project proponents to provide mitigation that exceeds the requirements in the 36 C.F.R. 228 Subpart A regulations.

Determining how to protect wildlife and minimize adverse impacts must be determined on a site-specific basis that evaluates the feasibility of minimizing adverse impacts. Consequently, there is
no one-size-fits-all mitigation standard or uniform ratio that is applicable to mineral projects. The appropriate mitigation measures must be determined on a site-specific basis in concert with determining how to minimize adverse impacts. For mineral projects on public lands, the mitigation policies in the States’ GSG conservation plans must be consistent with the 36 C.F.R. 228 Subpart A regulations pertaining to minimizing adverse impacts.

VIII. Critical Minerals Executive Order

USFS’ EIS documents must evaluate the USFS’ Proposed Action and alternatives for consistency with President Trump’s December 2017 Critical Minerals Executive Order (“EO”). The following land use restrictions in the 2015 LMPs are inconsistent with this new Critical Minerals EO because they impede the development of critical minerals:

- **SFAs** – This special land use designation puts lands with critical minerals off limits to the operation of the Mining Law and/or imposes onerous restrictions that will impede exploration and development of critical minerals and is thus inconsistent with the Critical Minerals EO;
- **Lek Buffer Zones** – The spatial and temporal (i.e., seasonal) lek buffer zone land use restrictions and noise limitations constitute *de facto* mineral withdrawals that functionally put lands that may contain critical minerals off limits and is thus inconsistent with the Critical Minerals EO;
- **Density and Disturbance Caps** – These limitations on land use violate the Mining Law and constitute *de facto* mineral withdrawals of lands that may contain critical minerals and are thus inconsistent with the Critical Minerals EO;
- **Travel Restrictions** – The widespread travel restrictions in the LMPs create broad spatial and seasonal restrictions that impede access, exploration, and development of lands that may contain critical minerals and are thus inconsistent with the Critical Minerals EO; and
- **Net Conservation Gain Mitigation Standard** – This unlawful standard interferes with the exploration and development of lands that may contain critical minerals and is thus inconsistent with the Critical Minerals EO.

The USFS’ amended LMPs must eliminate or substantially modify the above-listed land use restrictions in order to come into compliance with the new Critical Minerals EO.

IX. Conclusions

WMC commends USFS for taking the necessary steps to eliminate the inconsistencies in the 2015 LMPs with the law and current policies, and to respond to the Court order in the Nevada litigation to prepare a Supplemental EIS. We believe USFS’ EIS documents must incorporate and fully evaluate the overwhelmingly conclusive data in the 2016 SFA Withdrawal DEIS that the withdrawal was not warranted to protect GSG habitat and would cause substantial socioeconomic harm in the six SFA states.
As described above, the landscape-scale policies in the current LMPs are no longer viable because the Trump administration has revoked the previous administration’s landscape-scale land use planning and mitigation policies and Congress has rejected landscape-scale land use planning. Consequently, USFS must eliminate the landscape-scale habitat maps, the net conservation gain standard, the SFA designations, the disturbance and density caps, the uniform lek buffer distances, and the one-size-fits-all adaptive management responses because all of these measures are premised upon landscape-scale land use planning. Although formal LMP amendments may be required to eliminate these measures and make the LMPs consistent with the law and the Trump administration’s land use planning policies, WMC encourages USFS to use policy guidance wherever possible to eliminate the use of the LMP landscape-scale land use policies in order to provide land users with immediate regulatory relief while the EIS documents are being prepared.

Finally, WMC strongly urges USFS to use all available management tools to reduce wildfire risks in the 2018 – 2019 wildfire seasons. We ask that USFS immediately authorize targeted and managed grazing to reduce the buildup of highly flammable annual non-native grasses as an emergency measure to address wildfire risks.

WMC appreciates the opportunity to provide these comments and stands ready to work with USFS during the process to develop the EIS documents.

Respectfully submitted:

Barbara Coppola
WMC President
Barbara.Coppola@duke-energy.com

Debra W. Struhsacker
WMC Co-Founder and Director
(775) 826-3800
dstruhsacker@sbcglobal.net