July 31, 2018

Via Public Participation Portal at
https://cara.ecosystem-management.org/PublicCommentInput?project=52904

Mr. John Shivik
Sage-grouse Amendment Comment
USDA Forest Service Intermountain Region
Federal Building
324 25th Street
Ogden, UT 84401
johnashivik@fs.fed.us


Dear Mr. Shivik:

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. Forest Service’s (“USFS”) 2015 Greater Sage-Grouse (“GSG”) Land and Resource Management Plans (“LRMPs”) and the September 2015 Records of Decision (“RODs”) for the Great Basin and Rocky Mountain Regions. 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. Our members’ interests are adversely affected by many of the land use restrictions in the 2015 RODs.


USFS’ Supplemental Notice of Intent states the following Purpose and Need: “The purpose of the proposed action is to incorporate new information to improve the clarity, efficiency, and
implementation of affected plans, including better alignment with the Bureau of Land Management (BLM) and state plans, in order to benefit greater sage-grouse conservation on the landscape.”

WMC’s July 31, 2018 comments on BLM’s Nevada and Northeastern California Draft Resource Management Plan Amendment and Draft Environmental Impact Statement (“EIS”) for Greater Sage-Grouse Conservation provide a detailed discussion of our concerns about BLM’s Draft EIS. Because USFS’ Purpose and Need specifically states that USFS is seeking to align the LRMP with BLM’s plan, we are attaching our July 31, 2018 comments on BLM’s Draft EIS as Exhibit I and ask the USFS to consider them fully as our response to this scoping notice. As described in our comments, BLM’s Final EIS and amended Land Use Plan must be consistent with President Trump’s March 2017 Energy Independence Executive Order (EO 13783). USFS’ amended LRMP must also comply with EO 13783.

On July 31, 2018 the U.S. Fish and Wildlife Service (“FWS”) published in the Federal Register two decisions to withdraw its previous net conservation gain/compensatory mitigation policy, which it determined was unconstitutional and in error. This withdrawal is significant new information that the USFS must consider in developing its Draft and Final EIS documents and the amended LRMPs.

Section II describes several key issues in our comments on BLM’s Draft EIS that we wish to emphasize as being important and relevant to USFS’s efforts to prepare a Draft and Final EIS and the future RODs to amend the GSG LRMPs.

II. Additional Comments

A. Land Use Restrictions Cannot Materially Impair Claimants’ Mining Law Rights

The land use restrictions in the amended LRMP cannot substantially interfere with mining claimants’ rights pursuant to the U.S. Mining Law (20 USC 21a et seq as amended) and the USFS’ Organic Act to explore and develop its mining claims or to enter and occupy public lands for mining purposes. Lek buffers, seasonal restrictions, noise restrictions, disturbance caps, and required design features are examples of land use restrictions in the USFS’ 2015 GSG LRMP that cannot be applied to mineral exploration and development activities conducted under the Mining Law.

B. USFS Must Not Rely on Documents Used for the 2015 RODs and LRMPs

The USFS needs to substantially revise – and in some cases eliminate – that land use restrictions that are based on the landscape-scale management and net conservation gain/compensatory mitigation principles embraced in the following documents:

- The National Technical Team (“NTT”) Report;
- The Conservation Objectives Team (“COT”) Report;
- The October 2014 SFA Memo from the U. S. Fish and Wildlife (“FWS”) Director to the BLM Director and the U.S. Forest Service Chief;
The September 2014 U.S. FWS 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 compensatory mitigation policies, they are no longer consistent with current policy. Consequently, USFS must eliminate any future reliance on the findings or recommendations in these documents. The one-size-fits-all, landscape-scale land use restrictions based on the NTT Report such as uniform lek buffers, seasonal restrictions, noise restrictions, disturbance caps, and required design features need to be eliminated and replaced with project-specific conditions based on actual site habitat conditions.

Despite the compensatory mitigation provisions in the State of Nevada’s 2014 State GSG Conservation Plan, this is one aspect of the NV State GSG Conservation Plan that must not be incorporated into USFS’ Draft and Final EIS documents and the amended LRMPs.

C. Removing Sagebrush Focal Area Designations

WMC strongly supported 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). BLM’s 2016 SFA Withdrawal DEIS presents overwhelming documentation of the miniscule impact that mineral activities within the SFAs would create over the next 20 years and the enormous economic harm that the proposed withdrawal would cause in Nevada that justifies jettisoning the SFA withdrawals.\(^1\) As further documentation of the insignificant footprint of mineral activities within the SFAs, WMC recommends that the USFS’ Draft and Final EIS documents incorporate by reference the October 2016 Mineral Potential Report and Sagebrush Mineral Resource Assessment\(^2\) that the U.S. Geological Survey (“USGS”) prepared for BLM.

As documented in BLM’s 2016 SFA Withdrawal DEIS, the footprint of mining and mineral exploration activities in the SFAs as designated in the 2015 RODs and LRMPs 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. (2016 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), which is now BLM’s Preferred Action in the 2018 DEIS:

\(^1\) The 2016 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.


\(^3\) 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 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. This is an especially important finding for the Humboldt-Toiyabe National Forest where most of the 2.8 million acres of Nevada SFA are located. In light of this information, USFS must exclude the SFA mineral withdrawal from its Draft and Final EIS documents and the RODs/amended LRMPs. For this reason, USFS must reject the No Action Alternative, which would be to continue to manage National Forest System lands pursuant to the 2015 RODs and LRMPs.

WMC wants to emphasize that the lands formerly classified as SFA must be managed according to their actual habitat conditions based on site-specific habitat data. The SFA lands must not be automatically reclassified as Priority Habitat Management Areas (“PHMA”) because the record in Western Exploration, LLC v. U.S. Dep’t of the Interior, 250 F. Supp. 3d 718, (“Nevada litigation”) documents that the SFA in the 2015 LUPs include areas of non-habitat and areas that should be classified as General Habitat Management Areas (“GHMA”) and Other Habitat Management Areas (“OHMA”). 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.
Future land use restrictions on lands formerly designated as SFA must be applied surgically on a case-by-case basis using actual, field-verified habitat conditions. Additionally, such restrictions, if warranted, cannot substantially interfere with a claimants’ rights under the Mining Law and FLPMA to explore for and develop minerals or to access and occupy public lands for mineral purposes.

D. Modifying Habitat Management Area Designations

WMC’s January 2018 scoping comments emphasized that the inflexible application of the habitat maps in the 2015 FEIS and RODs was inappropriate because these landscape-scale maps have not been field-verified. WMC is thus pleased that the USFS’ proposed changes to the Nevada GSG Plan Amendment recognizes the need for site-specific habitat data to inform land use decisions. However, we have concerns that the Habitat Management Area Map Update Process is still cumbersome and will not provide USFS with sufficient flexibility to use new, on-the-ground habitat data in making project-specific land use management decisions.

Site-specific, field-verified habitat data should be required to make project-specific land use decisions. Consequently, USFS needs to improve its process for using new habitat data, like that provided in baseline studies for a proposed project, to allow that data to be used in making project-specific decisions. Regional habitat classification maps should not to be used to make site-specific land use decisions.

The Draft and Final EIS documents and the RODs for the amended LRMPs should establish that Best Available Scientific Data comprised of site-specific, field-verified habitat maps are to be used in making project-specific land use decisions. Land use decisions including but not limited to lek buffer zones, seasonal and temporal travel restrictions, required design features, noise limits, and disturbance caps that impose land use restrictions that impede or affect multiple uses should be limited to areas with field-verified important habitat. Land use restrictions must not be based solely on landscape-scale habitat maps developed with modeling based mainly on remote sensing data (e.g., the USGS’ Coates map). In the case of mineral exploration and development projects, land use restrictions must not interfere with claimants’ rights to enter, occupy, and use National Forest System lands for mineral purposes pursuant to the U.S. Mining Law.

WMC’s recommendation to base land use decisions on field-verified habitat data will 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 habitat 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. Using field-verified data will also ensure that any necessary restrictions and mitigation measures reflect the best way to protect important GSG habitat. Basing land use decisions on actual habitat conditions will protect priority habitat areas while reducing the broad and serious economic hardships to state and local governments, companies, and individuals who use National Forest System lands for mineral exploration and development, renewable and conventional energy development, grazing, hunting, guiding, recreation, and other uses.
E. Mitigation

The USFS must not include a requirement for net conservation gain or compensatory mitigation in the Proposed Action/Preferred Alternative in the Draft and Final EIS documents or in the RODs for the amended LRMPs. As explained below, the FWS has withdrawn its compensatory mitigation policy. Consequently, net conservation gain and compensatory mitigation are no longer consistent with the Trump Administration’s policies. This also means that USFS cannot select the No Action Alternative in the Draft and Final EIS documents, which would perpetuate the compensatory mitigation requirements in the 2015 Final EIS and RODs.

USFS’ scoping notice specifically asked for public comments on the mitigation standard in the LRMPs, which requires compensatory mitigation that produces a net conservation gain. USFS defines net conservation gain as “[t]he actual benefit or gain above baseline conditions.” (USFS Great Basin ROD at 96). As discussed in our January 2018 response to USFS’ first NOI, applying a net conservation gain standard to operations under the Mining Law violates the Mining Law, USFS’ Organic Act, and Executive Order 13783.

In enacting the Organic Act in 1897, Congress explicitly acknowledged the continued applicability of the Mining Law by providing access (egress or ingress) to lands for mineral exploration and development purposes:

“Nothing in sections 473 to 478, 479, to 482 and 551 of this title shall be construed as prohibiting…egress or ingress…Nor shall anything in such sections 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. Such persons must comply with the rules and regulations covering such national forests.” 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 (italics emphasis added).

The net conservation gain standard requires mining operators to improve GSG habitat somewhere else, which exceeds USFS’ authority pursuant to its Organic Act and 36 C.F.R. § 228.8, which requires operators to “minimize adverse environmental impacts where feasible” (emphasis added), and only applies to onsite impacts. Thus, USFS lacks the authority to require offsite compensatory mitigation for impacts that cannot be avoided or fully minimized within the boundaries of a Plan of Operations for mineral exploration or mining. Additionally, the net conservation gain/compensatory mitigation requirement diminishes claimants’ Mining Law. Therefore, USFS must remove the net conservation gain standard from its future RODs and amended LRMPs.

Executive Order 13783 also renders net conservation gain/compensatory mitigation unlawful. On March 29, 2017, Department of the Interior Secretary Ryan Zinke issued Secretarial Order 3349, which implemented Executive Order 13783 by directing “a reexamination of the mitigation policies and practices across the Department of the Interior...in order to better balance...”
conservation strategies and policies with the equally legitimate need of creating jobs for hard-working American families.” (Secretarial Order 3349, § 1). Importantly, Secretarial Order 3349 revoked former Secretary of the Interior Sally Jewell’s October 2013 Secretarial Order 3330, which directed the development and implementation of a landscape-scale mitigation policy for the Department. WMC respectfully suggests that U.S. Department of Agriculture Secretary Sonny Perdue issue a similar policy to clarify that net conservation gain and compensatory mitigation cannot be required to mitigate unavoidable impacts to GSG habitat for authorized uses of National Forest System lands.

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 standards 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 National Forest System 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.

Much of the surface disturbance associated with a mining operation can be effectively reclaimed to provide future habitat. Surface disturbance at exploration projects can typically be fully reclaimed. On-site reclamation of mining-related disturbances is a form of required mitigation. However, it is not compensatory mitigation.

Although WMC appreciates USFS’ efforts to align the amended GSG LRMP with the State of Nevada’s 2014 GSG Conservation Plan, the State’s net benefit (net conservation gain) standard and compensatory mitigation requirement are elements of the State’s Plan that cannot be applied to mineral projects on National Forest System lands.
F. There is an Urgent Need for Measures to Reduce Wildfire Risks

Based on the discussion at the July 17, 2018 Nevada Sagebrush Ecosystem Council meeting, it is clear that BLM’s adaptive management procedures are not effective at preventing or minimizing wildfire risks in northern Nevada. Several people commented that the fire risks in the area that was burned in the July 2018 Martin Fire in Humboldt and Elko Counties, Nevada were well known and included areas of cheat grass invasion where targeted, managed grazing could have reduced the flammable fuel load comprised of annual grasses. The area also had a significant buildup of woody-fuel comprised of sagebrush that provided GSG habitat. The Martin Fire burned approximately 26 million acres of GSG habitat which was comprised of 12 million acres of PHMA, 8 million acres of GHMA, and 6 million acres of OHMA. Although most of the burned acres in this fire affected BLM-administered lands, roughly 3,052 acres of lands in the Humboldt-Toiyabe National Forest burned.4

In the Draft and Final EIS documents and the RODs for the amended LRMPs, USFS should include proactive measures to prevent and minimize wildfire, which is the greatest threat to GSG and its habitat – especially in Nevada. The adaptive management provisions in the 2015 RODs are not proactive because they focus on problems that have already happened (e.g., population declines and habitat loss); they do not minimize risks due to wildfire which causes devastating habitat loss.

Unfortunately, as proven in the case of the Martin Fire, the adaptive management policies in the 2015 RODs are not effective at preventing catastrophic wildfire and the concomitant enormous loss of GSG habitat. The adaptive management measures need to be revised to provide USFS with the necessary flexibility and nimbleness to implement site-specific measures to reduce identified wildfire risks.

G. Lek Buffer Zones

WMC recognizes that it may be appropriate to limit or even preclude certain activities near active leks during the active breeding season. However, the lek buffer restrictions in the 2015 RODs apply throughout the year. Once the lek breeding season is over for the year, the lek buffer zone restrictions should not apply.

Consistent with the provisions for modifying habitat management area designations based on field-verified habitat data, implementing the lek buffer zone restrictions should require current lek occupation data, which should be defined as Best Available Science in the context of imposing a lek buffer zone. Consequently, the numerous references to “pending leks” in USFS’ proposed changes to the Nevada Plan Amendment must be eliminated. The lek buffer zone restrictions should only be applicable to leks that have had recent field-verified documentation that they are active. Speculation that a lek may be active (i.e., a “pending lek”) is not Best Available Science and cannot be used as the basis for imposing the lek buffer restrictions.

4http://sagebrusheco.nv.gov/uploadedFiles/sagebrusheconygov/content/Meetings/2018/Martin%20Fire.pdf
Additionally, other site characteristics including landscape features (e.g., topography) which shield a project from a nearby lek and lessen or even eliminate any impacts from the proposed land use activities must be considered in the lek buffer zone determination. At many sites the resulting buffer zone could be much smaller than the current one-size-fits all approach.

Finally, any restrictions that are warranted to protect occupied leks during the breeding season must respect claimants’ rights under the U.S. Mining Law. For exploration programs this may mean limiting the hours of operation or short-term seasonal restrictions during the active lekking season if impacts from the drilling activities are not reduced by topography. For an active mining operation, it may not be feasible to eliminate or minimize direct or indirect adverse impacts to leks. The USFS’ Organic Act and the 36 C.F.R. 228 Subpart A regulations authorize unavoidable impacts for mining activities pursuant to the U.S. Mining Law. USFS is not authorized to prohibit such activities or to require mitigation of unavoidable impacts from mining activities to occupied leks.

H. Valid Existing Rights

The USFS’ current definition of Valid Existing Rights (“VER”) is defined in the September 2015 RODs as:

**Valid existing rights.** Documented, legal rights or interests in the land that allow a person or entity to use said land for a specific purpose and that are still in effect. Such rights include but are not limited to fee title ownership, mineral rights, rights-of-way, easements, permits, and licenses. Such rights may have been reserved, acquired, leased, granted, permitted, or otherwise authorized over time. (September 2015 ROD for Idaho, Southwest Montana, Nevada, and Utah at 199).

The future Draft and Final EIS documents and the RODs for the amended LRMPs need to state that mineral activities conducted pursuant to the U.S. Mining Law are non-discretionary. WMC requests that the Glossary in the future Draft and Final EIS documents and in the RODs for the amended LRMPs be expanded to include a modified VER definition to clarify that all rights pursuant to the U.S. Mining Law, including the access rights at 30 U.S.C. § 22 and in 16 U.S.C. § 478 are included in the definition of VER. The modified definition should also clarify that for rights pursuant to the U.S. Mining Law and 16 U.S.C. § 478, a VER is not synonymous with a “valid claim” (i.e., a claim with a discovery of a valuable mineral deposit). Nor is validity of a claim a prerequisite to a VER.

A valid claim is one kind of a VER. However, the universe of VERs under the U.S. Mining Law is much broader than a valid claim. Both 30 U.S.C. § 22 and 16 U.S.C. § 478 specifically establish rights of ingress and egress on National Forest System lands with or without a mining claim that are a VER.

WMC recommends the definition of VER be modified as shown below:

**Valid existing rights.** Documented, legal rights or interests in the land that allow a person or entity to use said land for a specific purpose and that are still in effect. Such rights include but are not limited to fee title ownership, mineral rights *pursuant to the U.S. Mining Law*
Law as amended, rights-of-way, easements, permits, and licenses. Such rights may have been reserved, acquired, leased, granted, permitted, or otherwise authorized over time. Although a valid mining claim is one type of a valid existing right, the term “valid existing right” is not synonymous with a valid claim. The U.S. Mining Law grants valid existing rights, including rights of ingress and egress (e.g., 30 U.S.C. § 22) as preserved by 43 U.S.C. § 1732(b), that apply to the public lands with or without a mining claim. (Suggested modifications shown in italics).

III. New Policy Developments

There have been three Department of the Interior (“DOI”) policy developments since USFS published its supplementary Notice of Intent that need to be considered in the development of the Draft and Final EIS documents and the RODs for the amended LRMPs. First, BLM issued Instruction Memorandum (“IM”) 2018-093 on Compensatory Mitigation. This IM concludes that FLPMA does not authorize compensatory mitigation and that previous policies requiring compensatory mitigation did so in error and are now revoked:

“FLPMA does not explicitly mandate or authorize the BLM to require public land users to implement compensatory mitigation as a condition of obtaining authorization for the use of the public lands…the conclusion that FLPMA authorized BLM to impose mandatory compensatory mitigation to achieve a “net conservation gain” was in error. While FLPMA in some instances may be interpreted to authorize various forms of the mitigation hierarchy, such as avoidance and minimization, it cannot reasonably be read to allow BLM to require mandatory compensatory mitigation for potential temporary or permanent impacts from activities authorized on public lands.” (IM at 3.)

Because USFS is seeking to align its amended LRMPs with BLM’s Land Use Plans, USFS must similarly eliminate compensatory mitigation. As discussed above, the Forest Service’s Organic Act at 16 U.S.C. § 478 and the 36 CRF Subpart 228A surface management regulations do not require or authorize compensation or offsite mitigation for unavoidable onsite impacts that must occur in association with a specific authorized use of public lands.

The second and third DOI policy developments issued after USFS’ supplemental NOI was published are the FWS’ withdrawals of the previous Administration’s FWS-wide Mitigation Policy and the Endangered Species Act – Compensatory Mitigation Policy. (See 83 Fed. Reg. Vol 83, 36469, July 31, 2018 and 83 Fed. Reg., 36472, July 30, 2018.). Both of these withdrawal decisions state that FWS is: “…withdrawing this policy as it is no longer appropriate to retain the “net conservation gain” standard throughout various Service-related activities and is inconsistent with current Executive branch policy.”

FWS’ withdrawal documents explain that compensatory mitigation interferes with private property rights pursuant to the Takings Clause of the Fifth Amendment of the United States Constitution, which “limits the ability of government to require monetary exactions as a condition of permitting private activities, particularly on private property.” (83 Fed. Reg. at 36469 and 83 Fed. Reg. at: 36472). This finding is especially relevant to activities conducted on unpatented mining claims
pursuant to the U.S. Mining Law in light of claimants’ property rights to the minerals on their unpatented mining claims.

IV. Conclusions

WMC commends USFS for its efforts to align the amended LUPs with the States’ GSG conservation plans and to respond to the Court order in the Nevada litigation to prepare a Supplemental EIS. We also support USFS’ decision to eliminate the SFA mineral withdrawals in light of the overwhelming data in BLM’s 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. USFS must also incorporate the DOI’s prohibition against compensatory mitigation in the three recently published policy decisions described in Section III.

Finally, WMC strongly urges USFS to use all available management tools to reduce wildfire risks and to revise its adaptive management protocols to emphasize proactively reducing wildfire risks in areas where buildup of flammable annual grasses like cheat grass and woody fuels create increased wildfire risks. 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 of developing the Draft and Final EIS documents.

Respectfully submitted:

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

Debra W. Struhsacker
WMC Co-Founder and Director
debra@struhsacker.com

Attachment: Exhibit I - Women’s Mining Coalition’s July 31, 2018 Comments on BLM’s Draft EIS
EXHIBIT I

Women’s Mining Coalition’s July 31, 2018 Comments on BLM’s Draft EIS in Response to:

July 31, 2018

Submitted Online at: https://goo.gl/uz89cT

Mr. Michael C. Courtney
BLM Acting State Director
Nevada State Office
1340 Financial Boulevard
Reno, NV 89502

Mr. Matt Magaletti
Nevada Project Lead
Nevada State Office
1340 Financial Boulevard
Reno, NV 89502
mmagalet@blm.gov

Mr. Brian Steed
BLM Acting Director
U.S. Bureau of Land Management
1849 C Street, NW
Washington, DC 20240
blm_sagegrouseplanning@blm.gov


Dear Mr. Courtney, Mr. Magaletti, and Mr. Steed:

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 BLM’s 2015 Greater Sage-Grouse (“GSG”) Land Use Plans (“LUPs”). 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.


Although the elimination of the Sagebrush Focal Area (“SFA”) mineral withdrawal alleviates one of WMC’s main concerns with the 2015 LUPs, WMC has ongoing concerns about specific aspects of the 2018 DEIS because of their potential adverse impact on mineral exploration and development, access to public lands, the unauthorized adoption of the State of Nevada’s requirement for net conservation gain and compensatory mitigation, and the ongoing use of landscape-scale planning principles despite the fact that Congress has rejected these principles and they are no longer consistent with the Department of the Interior’s policies.
A. WMC’s Previous Greater Sage Grouse Comments

Starting in 2012, we have actively participated in the National Environmental Policy Act (“NEPA”) 43 USC 4321-4347 environmental review process pertaining to the development of the 2015 LUPs. We submitted comments on BLM’s 2012 request for public comments (scoping notice) and on BLM’s 2013 DEIS.


Our March 2017 comments on the 2016 SFA Withdrawal DEIS 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 2016 Withdrawal 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. WMC thus supports the elimination of the SFA mineral withdrawal in the Management Alignment/Preferred Alternative in the 2018 DEIS.

In November 2017, we submitted comments in response to BLM’s Notice of Intent to prepare this DEIS which we incorporate by reference as if fully set forth herein.

II. Discussion of Alternatives

A. The No Action Alternative is Not Selectable

The 2018 Final EIS (“FEIS”) needs to articulate that the No Action Alternative is not selectable because it is premised on landscape-scale planning concepts that are no longer consistent with the Department of the Interior’s (“DOI’s”) policies and that Congress rejected when it used the Congressional Review Act (5 U.S.C. §801 et seq. “CRA”) to rescind BLM’s Planning 2.0 Rule1. Congress may use the CRA and an expedited joint resolution legislative process to overturn last minute regulations from the previous Administration.

As one of the last rules promulgated during the Obama administration, BLM published the Resource Management Planning Rule (Planning 2.0 Rule) on December 12, 2016 (81 FR 89580). The rule became effective on January 11, 2017. BLM’s Planning 2.0 Rule, which was developed after the 2015 LUPs, was a reverse-engineered, after-the-fact regulation designed to require BLM

1 See joint resolution, H.J., Resolution 44, which President Trump signed into law on March 27, 2017.
to use the landscape-scale land use planning principles that are the foundation of the 2015 GSG LUPs in all future resource management planning efforts.

In overturning the Planning 2.0 Rule, Congress reaffirmed its intent that DOI must develop resource management plans like the GSG LUPs in compliance with the land management principles in the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701 et seq. FLPMA does not authorize the landscape-scale planning measures embraced in the Planning 2.0 Rule and the 2015 GSG LUPs. Because the CRA prohibits agencies from reinstating a similar rule through rulemaking, BLM must not replicate the now defunct policies in its Planning 2.0 Rule in the 2018 amended GSG LUPs. Congress has made it clear that FLPMA does not authorize landscape-scale management of public lands. Therefore, the GSG Land Use Plans ("LUPs") must not be based on landscape-scale management philosophies.

The SFA designations, the net conservation gain mitigation standard, uniform lek buffer zones, disturbance and density caps, rigid adaptive management triggers, and travel restrictions in the No Action Alternative/2015 LUPs are landscape-scale management provisions that are unauthorized in light of Congress’ revocation of the Planning 2.0 Rule, violate FLPMA, and are inconsistent with the following Secretarial and Executive Orders:

- Secretary Zinke’s June 2017 Secretarial Order 3353 “Greater Sage-Grouse Conservation and Cooperation with Western States;”
- President Trump’s March 2017 Energy Independence Executive Order (EO 13783); and
- Secretary Zinke’s March 2017 Secretarial Order 3349 implementing EO 13783.

The 2018 FEIS should clearly explain that the No Action Alternative in the 2018 DEIS and the 2015 LUPs are not consistent with FLPMA and DOI policies. Consequently, BLM cannot select the No Action Alternative as the Preferred Alternative in the 2018 FEIS. Additionally, BLM cannot incorporate elements of the alternatives considered in detail in the 2015 FEIS that are based on landscape-scale management into the Preferred Alternative in the 2018 FEIS.

B. The Management Alignment Alternative Must Eliminate all Landscape-Scale Provisions

WMC appreciates BLM’s efforts to align its GSG LUPs with the States’ GSG Plans and acknowledges that the Management Alignment Alternative addresses some of WMC’s concerns about the 2015 FEIS/LUPs. However, WMC remains concerned about the aspects of the Management Alignment Alternative that are based on the landscape-scale management and mitigation principles embraced in the following documents:

- The National Technical Team ("NTT") Report;
- The Conservation Objectives Team ("COT") Report;
- The October 2014 SFA Memo from the U. S. Fish and Wildlife ("FWS") Director to the BLM Director and the U.S. Forest Service Chief;
- The September 2014 U.S. FWS 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 are no longer consistent with current policy and the law as Congress clarified in its rejection of BLM’s Planning 2.0 Rule. Consequently, BLM must eliminate any future reliance on the findings or recommendations in these documents.

This is another compelling reason why the No Action Alternative, which uses these documents as a foundation, is not selectable. However, it also means that elements of the Management Alignment Alternative in the 2018 DEIS that are based on the above-listed documents must be eliminated from BLM’s Preferred Alternative in the 2018 FEIS and the amended LUP. Specifically, the one-size-fits-all, landscape-scale land use restrictions based on the NTT Report such as uniform lek buffers, seasonal restrictions, noise restrictions, disturbance caps, and required design features need to be eliminated and replaced with project-specific conditions based on actual site habitat conditions. Additionally, as discussed in detail in Section IX, these land use restrictions cannot substantially interfere with mining claimants’ rights pursuant to the U.S. Mining Law (20 USC 21a et seq as amended) and FLPMA Section 302(b) to explore and develop its mining claims or to enter and occupy public lands for mining purposes.

As discussed in Section V, FLPMA does not authorize compensatory mitigation for unavoidable impacts to GSG. Thus, BLM’s Preferred Alternative in the 2018 FEIS cannot include compensatory mitigation on public lands in the Nevada LUP despite the compensatory mitigation provisions in the State of Nevada’s 2014 State GSG Conservation Plan. Although WMC appreciates BLM’s efforts to work closely with the State of Nevada to align the amended LUP with the Nevada State Plan, this is one aspect of the Nevada State GSG Conservation Plan that must not be incorporated into BLM’s 2018 GSG LUP amendments.

III. Removing Sagebrush Focal Area Designations

WMC strongly supported 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). Because the 2016 Withdrawal DEIS contained important information on geology, mineral resources, and the beneficial socioeconomic impacts of mining, we are pleased that the 2018 DEIS is tiered to and incorporates this document by reference.

We also recommend that the 2018 FEIS incorporate by reference the October 2016 Mineral Potential Report and Sagebrush Mineral Resource Assessment2 that the U.S. Geological Survey (‘USGS”) prepared for BLM. In our comments on the 2015 FEIS, we stressed that one of the many reasons the document was insufficient and did not comply with NEPA was because it lacked

---
sections describing the Affected Environment and Environmental Consequences to Geology and Mineral Resources. Incorporating the October 2016 USGS Mineral Potential Report would cure this deficiency. It is not currently included in the references section in the 2018 DEIS or specifically incorporated by reference and needs to be added.

As explained in our March 2017 comments, the 2016 SFA Withdrawal DEIS presents overwhelming documentation of the miniscule impact that mineral activities within the SFAs would create over the next 20 years and the enormous economic harm that the proposed withdrawal would cause in Nevada that justifies BLM’s selection of the Preferred Alternative in the 2018 DEIS to jettison the SFA withdrawals.³

As documented in the 2016 SFA Withdrawal DEIS, the footprint of mining and mineral exploration activities in the SFAs as designated in the 2015 LUPs was projected to amount to a mere 2,620 acres⁴ across the six SFA states. BLM quantifies these impacts as affecting only about 0.026 percent of the 10 million-acre SFAs. (2016 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), which is now BLM’s Preferred Action in the 2018 DEIS:

“…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. In light of this information, BLM is completely correct and justified in excluding the SFA mineral withdrawal from its Preferred Alternative in the 2018 DEIS and must reject the No Action Alternative considered in the 2018 DEIS which would preserve the SFA withdrawals.

WMC wants to emphasize that the lands formerly classified as SFA must be managed according to their actual habitat conditions based on site-specific habitat data. The SFA lands must not be automatically reclassified as Priority Habitat Management Areas (“PHMA”) because the record in Western Exploration, LLC v. U.S. Dep’t of the Interior, 250 F. Supp. 3d 718, (“Nevada litigation”) documents that the SFA in the 2015 LUPs include areas of non-habitat and areas that should be classified as General Habitat Management Areas (“GHMA”) and Other Habitat Management Areas (“OHMA”). For example, during preparation of the FEIS, BLM ignored the advice from

³ The 2016 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.

⁴ 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).
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.

There are inconsistencies in the discussion of future management of the former SFA in the 2018 DEIS. The description in Table 2-2 on Page 2-8 states “Lands previously identified as SFA would be managed according to their underlying habitat management area designation (PHMA, GHMA, or OHMA…)”. However, Pages 4-12, through 4-19 include text that implies that SFA would be automatically designated as PHMA: “[SFA] would still be managed according to their underlying Greater Sage Grouse habitat management area and associated allocations and management decisions (e.g., PHMA).” DEIS at 4-12. The DEIS needs to clarify that the SFA would be managed according to actual habitat characteristics based on site-specific, on-the-ground habitat data.

The blanket, one-size-fits-all restrictions on mineral exploration and development, grazing, renewable and conventional energy development, transmission lines and pipelines, and access and travel in the SFA are inappropriate. Future land use restrictions on lands formerly designated as SFA must be applied surgically on a case-by-case basis based on actual, field-verified habitat conditions. Additionally, such restrictions, if warranted, cannot substantially interfere with claimants’ rights under the Mining Law and FLPMA to explore for and develop minerals or to access and occupy public lands for mineral purposes.

IV. Modifying Habitat Management Area Designations

WMC’s November 2017 scoping comments emphasized that the inflexible application of the habitat maps in the 2015 FEIS and Great Basin Region and Rocky Mountain Region Records of Decision (“RODs”) was inappropriate because these landscape-scale maps have not been field-verified. As discussed in Section II. B., these landscape-scale maps are inconsistent with Congress’
rejection of BLM’s Planning 2.0 Rule and current Executive and Secretarial Orders that have revoked landscape-scale land use planning and mitigation policies. WMC is thus pleased that the 2018 DEIS recognizes the need for site-specific habitat data to inform land use decisions. We also strongly support BLM’s proposal to use plan maintenance to incorporate new, on-the-ground habitat data rather than requiring a plan amendment.

WMC would like to embrace and emphasize the importance of BLM’s acknowledgement that “…the habitat management area designations (Figure 2-1b) do not constitute a land use plan decision but rather a landscape level reference of relative habitat suitability.” (DEIS at 2-6). This is a key element of BLM’s Preferred Alternative that must be included in the Preferred Alternative in the FEIS. WMC recommends that the legend on the maps in Appendix A be modified to include a statement that site-specific, field-verified habitat data are required to make project-specific land use decisions and that these maps are not to be used to make site-specific land use decisions.

The 2018 FEIS and amended LUP should establish that Best Available Scientific Data comprised of site-specific, field-verified habitat maps are to be used in making project-specific land use decisions. Land use decisions that impose land use restrictions that impede or affect multiple uses including but not limited to lek buffer zones, seasonal and temporal travel restrictions, required design features, noise limits, and disturbance caps should be limited to areas with field-verified important habitat. Land use restrictions must not be based solely on landscape-scale habitat maps developed with remote sensing data and modeling. In the case of mineral exploration and development projects, land use restrictions 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 will 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 habitat maps will insure that BLM’s 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. Using field-verified data will also ensure that any necessary restrictions and mitigation measures reflect the best way to protect important GSG habitat. Basing land use decisions on actual habitat conditions will ensure protection of priority habitat areas while reducing the broad and serious economic hardships to state and local governments, companies, and individuals who use public lands for mineral exploration and development, renewable and conventional energy development, grazing, hunting, guiding, recreation, and other uses.

The Management Alignment Alternative in the 2018 DEIS states that the habitat management maps would be refined and updated with new spatial and telemetry data every three to five years or when new data are incorporated into the model. (DEIS at 2-7). WMC suggests that BLM should continually refine the map with on-the-ground data that would help ground-truth the habitat model data. BLM should capitalize upon the site-specific GIS-based habitat baseline data that permit applicants provide in conjunction with their project proposals. For example, mineral exploration and development proposals submitted pursuant to the 43 CFR Subpart 3809 regulations typically include biological resources baseline studies that contain information on the presence or absence of GSG and GSG habitat. BLM typically uses these data in the NEPA analyses prepared to evaluate these proposals. The GIS-based habitat data collected by project proponents are valuable
information that BLM should use to update and refine its habitat classification maps on a more regular basis than every three to five years.

V. Mitigation

As shown in Table 2-2 (DEIS at 2-10), the net conservation gain mitigation standard, which requires compensatory mitigation, is included in both the No Action and the Management Alignment Alternative/Preferred Alternative in the DEIS. In conjunction with the Management Alignment Alternative/Preferred Alternative, BLM is specifically seeking public comment on “whether the implementation of a compensatory mitigation standard on public lands is appropriate and consistent with applicable legal authorities” (DEIS at 2-17). WMC finds that compensatory mitigation on public lands is not consistent with FLPMA, which does not authorize compensatory mitigation. In fact, FLPMA is silent on the issue of mitigation. The statute does not include the word “mitigate” and mentions “mitigation” only once in FLPMA Section 603 pertaining to Wilderness Study Areas specifically in the context of the management directives for the Fossil Forest Research Natural Area.

FLPMA Section 302 (43 U.S.C §1732(b)) establishes the environmental protection standard that public land uses must prevent unnecessary or undue degradation (“UUD”). It does not require or authorize compensation or offsite mitigation for unavoidable onsite impacts (e.g., necessary and due impacts) associated with the use of public lands.

In the case of mineral activities conducted pursuant to the Mining Law, FLPMA specifically prohibits impairment of a claimant’s rights under the Mining Law of 1872:

“Except as provided in section 314, section 603, and subsection (f) of section 601 of this Act and in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress. In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b)

Pursuant to this FLPMA directive and the U.S. Mining Law, BLM’s discretionary authority is limited to preventing UUD, making the UUD standard the only mitigation standard consistent with claimants’ rights under the U.S. Mining Law as amended by FLPMA. BLM does not have the authority to require mineral project proponents to provide mitigation, including compensatory and/or offsite mitigation, that exceeds the UUD standard.

UUD must be determined on a project-specific basis to determine which impacts are avoidable (i.e., unnecessary and undue) and which impacts are unavoidable (i.e., necessary and due) in order

---

5 The statement: “The mitigation standard (net conservation gain) would be retained in the Management Alignment Alternative (and the No-Action Alternative) is repeated throughout Chapter 4 of the DEIS.
to develop the mineral project. Consequently, there is no one-size-fits-all mitigation standard or uniform ratio that is applicable to mineral projects.

The requirement to provide compensatory mitigation impairs a claimant’s Mining Law rights to access, use, and occupy public lands for mineral purposes. BLM’s 43 CFR Subpart 3809 surface management regulations for locatable minerals. In the preamble to the November 2000 revision to these regulations (65 Fed. Reg. 70012, November 21, 2000), BLM clearly stated that it has no authority to require offsite or compensatory mitigation, although BLM may accept compensatory mitigation if a project proponent voluntarily offers same. Moreover, nothing in FLPMA, any other federal statute, or the regulations, allow BLM to implement the net conservation gain standard.

43 CFR §§ 3809.414, .420, and .421 implement FLPMA’s UUD environmental protection standard. In the context of GSG habitat, BLM may require a mining claimant to avoid and minimize impacts to GSG habitat so long as avoiding and minimizing impacts does not materially interfere with or compromise the claimant’s rights under the Mining Law. If habitat is co-located with mineralization, it is not possible to avoid impacting the habitat in order to pursue mineral exploration and development activities. In this case, the impact to habitat is necessary and due and does not require mitigation.

The reclamation requirements in the 43 CFR Subpart 3809 regulations provide for mitigation of impacts to GSG habitat wherever possible. Specifically, the definition of reclamation at 43 CFR § 3809.5 includes “rehabilitation of wildlife habitat.” In order to comply with this definition, 43 CFR § 3809.401(b)(3)(v) requires mineral operators to prepare reclamation plans that include a plan for wildlife habitat rehabilitation. Operators must also provide detailed baseline information about wildlife habitat (43 CFR § 3809.401(c)) within their project boundary that BLM uses to prepare the NEPA analysis and to determine an appropriate post-mining wildlife rehabilitation plan.

Much of the surface disturbance associated with a mining operation can be effectively reclaimed to provide future habitat. Surface disturbance at exploration projects can typically be fully reclaimed. On-site reclamation of mining-related disturbances is a form of required mitigation. However, it is not compensatory mitigation as contemplated in the 2018 DEIS. If BLM concludes there are specific circumstances in which compensatory mitigation is authorized for certain public land uses, the FEIS should clarify that compensatory mitigation does not apply under any circumstances to activities conducted pursuant to the U.S. Mining Law and authorized under the 43 CFR Subpart 3809 regulations.

Although WMC appreciates BLM’s efforts to align the amended GSG LUP with the State of Nevada’s 2014 GSG Conservation Plan, the State’s net benefit (net conservation gain) standard and compensatory mitigation requirement are elements of the State’s Plan that cannot be applied to projects on public lands. The Management Alignment/Preferred Alternative in the 2018 DEIS includes the State’s net conservation gain/compensatory mitigation requirement. Because FLPMA does not authorize compensatory mitigation, the Preferred Alternative in the 2018 FEIS and the 2018 amended LUP must clarify that BLM does not have the authority to require compensatory mitigation on public lands.
Additionally, Appendix F of the 2018 DEIS, “Nevada and Northeastern California Mitigation Strategy” requires substantial modification to eliminate the references to compensatory mitigation. It must also explicitly state that compensatory mitigation does not apply to mineral activities on public lands. Appropriate mitigation measures for public land uses other than mining should be determined on a project-by-project basis based on site-specific factors, must be consistent with FLPMA’s multiple use land use policies, and must not involve unauthorized compensatory mitigation.

WMC believes that acquiescing to the State of Nevada and incorporating the Nevada net conservation gain/compensatory mitigation policies violates federalism principles. While the states may manage sage grouse, the states have no legal authority to dictate how federal lands are to be managed or to impose conditions like compensatory mitigation on federal land users. FLPMA does not authorize BLM to accept or substitute state standards that are inconsistent with federal policies such as landscape-scale land management and net conservation gain. BLM’s mitigation authority is strictly and explicitly limited to the FLMP mandate to prevent onsite UUD at projects on BLM-administered lands. It has absolutely no authority to require or sanction offsite compensatory mitigation for necessary and due impacts associated with authorized uses of public lands.

VI. Allocation Exception Process

BLM acknowledges that “…landscape level mapping may not accurately reflect on-the-ground conditions.” (DEIS at 2-6) and states “[ ] Need for adjusting habitat management areas (HMAs) so that they reflect the best available science” (DEIS at ES-3). WMC is concerned that the Allocation Exception Process is too narrow and rigid to give BLM the necessary flexibility to use best available science (e.g., field-verified habitat data) and to make project-specific decisions in GSG habitat based on actual, field-verified habitat data.

The allocation exception process needs to state clearly that one of the circumstances which always requires an allocation exception is when a project applicant provides on-the-ground habitat data collected by a qualified biologist using BLM-approved data collection protocols that documents different habitat conditions than on Figure 1-2b. BLM should be required to base project decisions on actual field-verified habitat conditions rather than on the habitat management classifications shown on Figure 2-1b. Therefore, whenever BLM has field-verified habitat data that have been provided by a project proponent, the State of Nevada, or otherwise obtained by BLM, BLM must use this information in making land use decisions. In these circumstances, the landscape management area classification map (e.g., Figure 2-1b) cannot be used as the basis for BLM’s decision.

The restrictions that apply to the PHMA management classification must not be required on lands that are GHMA, OHMA, or non-habitat based on field-verified habitat conditions. Similarly, the restrictions that apply to GHMA must not be required on lands that are OHMA or non-habitat based on field-verified habitat conditions.

Because BLM is compelled to use best available science, granting an allocation exception should be the standard operating procedure that does not require the State Director’s authorization. BLM
District Managers should be authorized to grant allocation exceptions whenever BLM is provided with field-verified habitat data that conflicts with Figure 2-1b.

As stated elsewhere, the land use restrictions in the amended 2018 GSG LUP cannot substantially interfere with a claimant’s rights under the U.S. Mining Law including the rights of ingress and egress, and reasonable use and occupancy for mineral exploration and development purposes.

The following discussion of the Allocation Exception Process as presented in Table 2-2 is poorly worded and confusing: “Verify use of landscape-scale mapping of PHMA, GHMA, and OHMA in regards to the application of allocations and stipulations.” (DEIS at ES-3 and 2-12). As written, this appears to contradict the DEIS provisions pertaining to modifying habitat management area designations based on field-verified habitat data and diminish or even eliminate the need for an exception process. To make the allocation exception process consistent with the procedures outline to modify habitat management area designations WMC suggests this sentence needs to be re-written to say: “Use field-verified habitat data whenever available to make project-specific decisions and to apply allocation exceptions and stipulations.” Similarly, the sentence on Table 2-2 stating “In PHMA and GHMA, the State Director may grant an exception to the allocations and stipulations described in Section 2-5 if one of the following applies…” is circular and confusing because Table 2-2 is the only content in Section 2.5.

VII. Adaptive Management

Based on the discussion at the July 17, 2018 Nevada Sagebrush Ecosystem Council meeting, it is clear that BLM’s adaptive management procedures are not effective at preventing or minimizing wildfire risks in northern Nevada. Several people commented that the fire risks in the area that was burned in the July 2018 Martin Fire in Humboldt and Elko Counties, Nevada were well known and included areas of cheat grass invasion where targeted, managed grazing could have reduced the flammable fuel load comprised of annual grasses. The area also had a significant buildup of woody-fuel comprised of sagebrush that provided GSG habitat. The Martin Fire burned approximately 26 million acres of GSG habitat which was comprised of 12 million acres of PHMA, 8 million acres of GHMA, and 6 million acres of OHMA. Most of the burned acres in this fire affect BLM-administered lands.6

Because wildfire is the greatest threat to GSG and its habitat in Nevada, BLM’s adaptive management procedures should focus more on pre-fire measures that reduce wildfire risks. The adaptive management provisions in Appendix D of the 2018 DEIS are not proactive because they focus on problems that have already happened (e.g., population declines and habitat loss) but they do not minimize risks due to wildfire which cause devastating habitat loss. WMC disagrees with BLM’s position that “Adaptive management, with specific triggers (signals), provide additional certainty that the regulatory mechanisms included in the LUPA are robust and able to respond to a variety of conditions and circumstances quickly and effectively to conserve Greater Sage-Grouse habitat and populations.” (DEIS at D-1).

6http://sagebrusheco.nv.gov/uploadedFiles/sagebrusheconygov/content/Meetings/2018/Martin%20Fire.pdf
Unfortunately, as proven in the case of the Martin Fire, BLM’s adaptive management policies are not effective at preventing catastrophic wildfire and the concomitant enormous loss of GSG habitat. The adaptive management measures need to be revised to provide BLM with the necessary flexibility and nimbleness to implement site-specific measures to reduce identified wildfire risks. If this means that some fuel reduction is warranted in GSG habitat areas in order to reduce wildfire risks, BLM should be authorized to implement appropriate measures to minimize the buildup of flammable fuels. Fuel reduction activities that impact selected habitat areas is a far preferable outcome to losing over 26 million acres of habitat as occurred in the Martin fire.

Additionally, there are a number of provisions in the adaptive management protocols in Appendix D that cannot be applied to mineral projects because they are not consistent with claimants’ rights pursuant to FLPMA and the U.S. Mining Law. Appendix D needs to be modified to clarify that the following adaptive management triggers (DEIS at D-6) do not apply to mining projects:

- Delaying issuance of new permits and authorizations;
- Delaying issuance of new or pending ROWs outside of designated existing corridors;
- Increasing enforcement efforts on travel restrictions;
- Limiting noise and/or light pollution;
- Temporary closures; and
- Eliminating allocation exception decisions in areas that have tripped a hard trigger.

These measures have the potential to substantially interfere with a claimant’s rights under FLPMA and the U.S. Mining Law. Consequently, they cannot be applied indiscriminately to mineral exploration and development projects. It may be possible to mitigate concerns about travel and noise and light pollution at some mineral projects based on project-specific circumstances. However, permit delays and temporary closures are not consistent with FLPMA and the U.S. Mining Law, which provide for ingress and egress and use and occupancy of public lands for mineral purposes. They are also inconsistent with the Executive and Secretarial Orders discussed in Section II.B.

VIII. Lek Buffer Zones

The lek buffer zone restrictions in Appendix B of the 2018 DEIS are an improvement over Appendix B in the 2015 FEIS/LUPs, because the 2018 version of Appendix B does not include compensatory mitigation. Nonetheless, the lek buffers 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. BLM should eliminate
the lek buffer zone restrictions outlined in Appendix B 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 limit or even preclude certain activities near active leks during the active breeding season. However, the 2018 DEIS applies these restrictions throughout the year. Once the lek breeding season is over for the year, the lek buffer zone restrictions should not apply.

Consistent with the provisions for modifying habitat management area designations based on field-verified habitat data, implementing the lek buffer zone restrictions should require current lek occupation data, which should be defined as best available science in the context of imposing a lek buffer zone. Other site characteristics including landscape features (e.g., topography) which shield a project from a nearby lek and lessen or even eliminate any impacts from the proposed land use activities must be considered in the lek buffer zone determination. At many sites the resulting buffer zone could be much smaller than the current one-size-fits all approach.

Additionally, any restrictions that are warranted to protect occupied leks during the breeding season must respect claimants’ rights under the U.S. Mining Law. For exploration programs this may mean limiting the hours of operation or short-term seasonal restrictions during the active lekking season if impacts from the drilling activities are not reduced by topography. For an active mining operation, it may not be feasible to eliminate direct or indirect impacts to leks. FLPMA Section 302(b) authorizes such unavoidable impacts for mining activities pursuant to the U.S. Mining Law. BLM is not authorized to prohibit such activities or to require mitigation.

IX. Valid Existing Rights

The current definition of Valid Existing Rights ("VER") is in the 2015 FEIS/LUPs and is thus incorporated by reference in the 2018 DEIS:

Valid existing rights. Documented, legal rights or interests in the land that allow a person or entity to use said land for a specific purpose and that are still in effect. Such rights include but are not limited to fee title ownership, mineral rights, rights-of-way, easements, permits, and licenses. Such rights may have been reserved, acquired, leased, granted, permitted, or otherwise authorized over time. (2015 FEIS at 8-37 and September 2015 Record of Decision and Approved Resource Management Plan Amendments for the Great Basin GRSG Sub-Regions at 2-1)

The 2018 FEIS and amended LUP need to state that mineral activities conducted pursuant to the U.S. Mining Law are non-discretionary. BLM has appropriately acknowledged this in recent mining project NEPA documents including the Bald Mountain EIS and the Gold Bar EIS. Both of these documents include the following statement: “The proposed project is a non-discretionary 43 CFR 3809 action, with discretion limited to preventing unnecessary and undue degradation to a resource.”

---

7 See Bald Mountain EIS, Appendix A (August 2015). See also, Gold Bar Mine Project EIS, Volume 2 at 4-272 (March 2017).
WMC requests that the Glossary in the 2018 FEIS and amended LUP be expanded to include a modified VER definition to clarify that all rights pursuant to the U.S. Mining Law, including the access rights at 30 U.S.C. § 22 and reiterated at 43 U.S.C. § 1732(b) are included in the definition of VER. The modified definition should also clarify that for rights pursuant to the U.S. Mining Law and FLPMA, a VER is not synonymous with a “valid claim” (i.e., a claim with a discovery of a valuable mineral deposit). Nor is validity of a claim a prerequisite to a VER.

A valid claim is one kind of a VER. However, the universe of VERs under the U.S. Mining Law is much broader than a valid claim. For example, 30 U.S.C. § 22 specifically establishes rights of ingress and egress on public lands with or without a mining claim that are a VER. FLPMA explicitly preserves the Section 22 Mining Law access VER: “… no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress.” 43 U.S.C. § 1732(b)

WMC recommends the definition of VER in the 2018 FEIS Glossary be modified as shown below:

Valid existing rights. Documented, legal rights or interests in the land that allow a person or entity to use said land for a specific purpose and that are still in effect. Such rights include but are not limited to fee title ownership, mineral rights pursuant to the U.S. Mining Law as amended, rights-of-way, easements, permits, and licenses. Such rights may have been reserved, acquired, leased, granted, permitted, or otherwise authorized over time. Although a valid mining claim is one type of a valid existing right, the term “valid existing right” is not synonymous with a valid claim. The U.S. Mining Law grants valid existing rights, including rights of ingress and egress (e.g., 30 U.S.C. § 22) as preserved by 43 U.S.C. § 1732(b), that apply to the public lands with or without a mining claim. (Suggested modifications shown in italics).

X. Other Issues

A. Travel Management Seasonal and Spatial Restrictions

As discussed in Section IX, VERs granted by the U.S. Mining Law at 30 U.S.C. § 22 and FLPMA at 43 U.S.C. § 1732(b) provide rights of ingress and egress for the purpose of exploring for or developing minerals. The travel management restrictions and seasonal and spatial use and occupancy constraints in the GSG LUPs cannot substantially interfere with these ingress and egress rights. Consequently, the travel restrictions applicable to PHMA and GHMA shown on Figure 2-13b cannot apply to travel that is necessary for mineral purposes under the U.S. Mining Law.

The 2018 FEIS and LUP need to make it clear that the restrictions shown on Figure 2-13b cannot be applied as 24/7 access restrictions precluding travel that is necessary for mineral exploration and development. On a project- and site-specific basis, certain time of day or seasonal restrictions of a limited duration may be appropriate. However, these restrictions cannot create significant barriers to mineral activities.

B. Required Design Features Worksheets
Although the DEIS states throughout Chapter 4 that no allocation decisions are tied to OHMA (see, for example, DEIS at 4-19), the Required Design Features (“RDFs”) worksheets show that they are applicable to OHMA. This needs to be clarified. Additionally, many of the RDFs are not applicable to non-discretionary activities pursuant to the U.S. Mining Law and the 43 CFR 3809 regulations, which also needs to be clarified.

Finally, some of the locatable minerals RDFs are impractical and as currently written would substantially interfere with claimants’ rights under the Mining Law. For example, RDF LOC 3 stipulates “restrict pit or impoundment construction to reduce or eliminate augmenting threats from West Nile Virus”. Pits and impoundments (i.e., tailings impoundments) are necessary for mining to occur and cannot be eliminated. Similarly, the requirement to cover pits “regardless of size” with netting in the RDFs for locatable minerals (RDF LOC 7) needs to be clarified to pertain to small pits like drilling sumps and not to open pit mines or pit lakes in open pit mines. It is obviously impractical to cover a large pit with netting.

XI. New Policy Developments

Since BLM published the DEIS on May 4, 2018, there have been three DOI policy developments that need to be reflected in the FEIS and amended LUP for the Nevada-Northeastern California region as well as for the other GSG states and regions. First, BLM issued Instruction Memorandum (“IM”) 2018-093 on Compensatory Mitigation. This IM concludes that FLPMA does not authorize compensatory mitigation and that previous policies requiring compensatory mitigation did so in error and are now revoked:

“FLPMA does not explicitly mandate or authorize the BLM to require public land users to implement compensatory mitigation as a condition of obtaining authorization for the use of the public lands…the conclusion that FLPMA authorized BLM to impose mandatory compensatory mitigation to achieve a “net conservation gain” was in error. While FLPMA in some instances may be interpreted to authorize various forms of the mitigation hierarchy, such as avoidance and minimization, it cannot reasonably be read to allow BLM to require mandatory compensatory mitigation for potential temporary or permanent impacts from activities authorized on public lands.” (IM at 3.)

Consistent with our discussion in Section V that the FLPMA UUD environmental protection standard does not require or authorize compensation or offsite mitigation for unavoidable onsite impacts that are necessary and due impacts associated with a specific authorized use of public lands, IM 2018-093 states:

“BLM is committed to meeting its statutory obligations to prevent unnecessary or undue degradation and protecting resources by incorporating onsite mitigation measures into use authorizations prior to approval…Unnecessary and undue degradation implies that there is also necessary and due degradation.” (IM at 3.)
The second and third DOI policy developments issued after publication of the DEIS are the FWS’ withdrawals of the previous Administration’s FWS-wide Mitigation Policy and the Endangered Species Act – Compensatory Mitigation Policy. (See 83 Fed. Reg. Vol 83, 36469, July 31, 2018 and 83 Fed. Reg., 36472, July 30, 2018.). Both of these withdrawal decisions state that FWS is: “…withdrawing this policy as it is no longer appropriate to retain the “net conservation gain” standard throughout various Service-related activities and is inconsistent with current Executive branch policy.”

FWS’ withdrawal documents explain that compensatory mitigation interferes with private property rights pursuant to the Takings Clause of the Fifth Amendment of the United States Constitution, which “limits the ability of government to require monetary exactions as a condition of permitting private activities, particularly on private property.” (83 Fed. Reg, at 36469 and 83 Fed. Reg. at: 36472). This finding is especially relevant to activities conducted on unpatented mining claims pursuant to the U.S. Mining Law and FLPMA in light of claimants’ property rights to the minerals on their unpatented mining claims.

In the FEIS and amended LUPs, BLM must acknowledge the clear prohibition against compensatory mitigation in its Preferred Alternative/Proposed Action. Consequently, the Management Alignment Alternative/Preferred Alternative in the DEIS will need to be substantially revised to eliminate all requirements for compensatory mitigation.

XII. Conclusions

WMC commends BLM for its efforts to respond to the Court order in the Nevada litigation to prepare a Supplemental EIS. We also support BLM’s decision to cancel the proposed SFA mineral withdrawals in light of the overwhelming 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, landscape-scale land use management principals are still infused throughout the 2018 DEIS. Because Congress rejected BLM’s Planning 2.0 Rule and current DOI policies do not sanction landscape-scale land use management, many aspects of the 2018 DEIS need to be revised to eliminate the land use restrictions premised in the NTT Report, the COT Report and the other reports listed in Section II.B. BLM must thus eliminate the net conservation gain standard, the SFA designation, the disturbance and density caps, and the uniform lek buffer distances because all of these measures are premised upon unlawful landscape-scale land use planning. BLM must also incorporate the DOI’s prohibition against compensatory mitigation in the three recently published policy decisions described in Section XI.

Finally, WMC strongly urges BLM to use all available management tools to reduce wildfire risks and to revise its adaptive management protocols to emphasize proactively reducing wildfire risks by immediately implementing appropriate pre-fire suppression measures in areas where dangerous buildup of flammable fuels are creating increased wildfire risks. We ask that BLM immediately authorize targeted and managed grazing and brush thinning or removal to reduce fuel loads as an emergency measure to address wildfire risks.
WMC appreciates the opportunity to provide these comments and stands ready to work with BLM during the process to develop the NEPA Documents.

Respectfully submitted:

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

Debra W. Struhsacker  
WMC Co-Founder and Director  
debra@struhsacker.com