

*BLM Director's Protest Resolution
Report*

**North Dakota Greater Sage-
Grouse
Resource Management Plan
Amendment / Final
Environmental Impact
Statement**

September 15, 2015



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Reader's Guide

How do I read the Report?

The Director's Protest Resolution Report is divided into sections, each with a topic heading, excerpts from individual protest letters, a summary statement (as necessary), and the Bureau of Land Management's (BLM's) response to the summary statement.

Report Snapshot

The diagram shows a report layout with several sections and callouts:

- Issue Topics and Responses** (Section heading)
- NEPA** (Topic)
- Submission number** (Callout pointing to the submission number field)
- Issue Number: PP-ND-GRSG-15-XX** (Text, with a red box around it and a callout for "Protest issue number")
- Organization: The Forest Initiative** (Text, with a callout for "Protesting organization")
- Protester: John Smith** (Text, with a callout for "Protester's name")
- Issue Excerpt Text:** (Section heading)
- Direct quote taken from the submission** (Callout pointing to the excerpt text)
- Summary** (Section heading)
- General statement summarizing the issue excerpts (optional).** (Text, with a callout pointing to the summary text)
- Response** (Section heading)
- BLM's response to the summary statement or issue excerpt if there is no summary.** (Text, with a callout pointing to the response text)

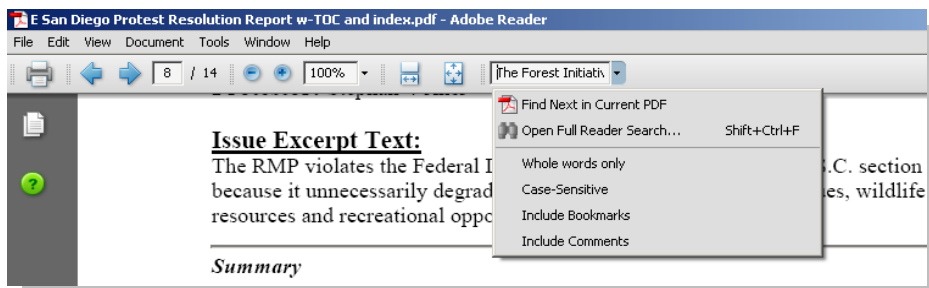
The excerpt text reads: "Rather than analyze these potential impacts, as required by NEPA, BLM postpones analysis of renewable energy development projects to a future case-by-case analysis."

The summary text reads: "There is inadequate NEPA analysis in the PRMP/FEIS for renewable energy projects."

The response text reads: "Specific renewable energy projects are implementation-level decisions rather than RMP-level decisions. Upon receipt of an application for a renewable energy project, the BLM would require a site-specific NEPA analysis of the proposal before actions could be approved (FEIS Section 2.5.2, p. 2-137). Project specific impacts would be analyzed at that time (including impacts to surrounding properties), along with the identification of possible alternatives and mitigation measures."

How do I find my Protest Issues and Responses?

1. Find your submission number on the protesting party index which is organized alphabetically by protester's last name.
2. In Adobe Reader search the report for your name, organization or submission number (do not include the protest issue number). Key word or topic searches may also be useful.



List of Commonly Used Acronyms

ACEC	Area of Critical Environmental Concern	IRA	Inventoried Roadless Area
BA	Biological Assessment	KOP	Key Observation Points
BLM	Bureau of Land Management	LMP	Land Management Plan
BMP	Best Management Practice	MIC	Management Indicator Communities
BE	Biological Evaluation	MIS	Management Indicator Species
BO	Biological Opinion	MOU	Memorandum of Understanding
CAA	Clean Air Act	MUSY	Multiple Sustained Yield Act
CEQ	Council on Environmental Quality	NEPA	National Environmental Policy Act of 1969
CFR	Code of Federal Regulations	NHPA	National Historic Preservation Act of 1966, as amended
COA	Condition of Approval	NOA	Notice of Availability
CSP	Concentrated Solar Power	NOI	Notice of Intent
CSU	Controlled Surface Use	NRHP	National Register of Historic Places
CWA	Clean Water Act	NSO	No Surface Occupancy
DEIS/DRMPA	Draft Environmental Impact Statement /Draft Resource Management Plan Amendment	OHV	Off-Highway Vehicle (also referred to as ORV, Off Road Vehicles)
DM	Departmental Manual (Department of the Interior)	PA	Preliminary Assessment
DOI	Department of the Interior	PAC	Priority Areas for Conservation
EA	Environmental Assessment	PHMA	Priority Habitat Management Area
EIR	Environmental Impact Report	PPA	Power Purchase Agreement
EIS	Environmental Impact Statement	RDF	Required Design Features
EO	Executive Order	RFDS	Reasonably Foreseeable Development Scenario
EPA	Environmental Protection Agency	RMP	Resource Management Plan
ESA	Endangered Species Act	ROD	Record of Decision
FEIS	Final Environmental Impact Statement	ROW	Right-of-Way
FEIS/PRMPA	Final Environmental Impact Statement /Proposed Resource Management Plan Amendment	RPA	Forest and Rangeland Renewable Resources Planning Act
FLPMA	Federal Land Policy and Management Act of 1976	SFA	Sagebrush Focal Area
FO	Field Office (BLM)	SO	State Office (BLM)
FWS	U.S. Fish and Wildlife Service	SUA	Special Use Authorization
GHMA	General Habitat Management Area	SUP	Special Use Permit
GIS	Geographic Information Systems	T&E	Threatened and Endangered
IB	Information Bulletin (BLM)	USC	United States Code
IM	Instruction Memorandum	USDA	U.S. Department of Agriculture
		USGS	U.S. Geological Survey
		VRM	Visual Resource Management
		WA	Wilderness Area
		WSA	Wilderness Study Area
		WSR	Wild and Scenic River(s)

Protesting Party Index

Protester	Organization	Submission(s) Number	Determination
Erik Molvar	Wild Earth Guardians et al	PP-ND-GRSG-15-01	Denied – Issues and Comments
Bret Sumner	Beatty & Wozniak on behalf of Exxon/XTO	PP-ND-GRSG-15-02	Denied – Issues and Comments
Ron Ness	North Dakota Petroleum Council	PP-ND-GRSG-15-03	Denied – Issues and Comments
Travis Bruner	Western Watersheds Project	PP-ND-GRSG-15-04	Denied – Issues and Comments
(no name given)	Public Lands Council, National Cattlemen’s Beef Association, North Dakota Stockgrowers Association	PP-ND-GRSG-15-05	Denied – Issues and Comments
Mark Salvo	Defenders of Wildlife	PP-ND-GRSG-15-06	Denied – Issues and Comments
Craig Kauffman	Safari Club International	PP-ND-GRSG-15-07	Dismissed – Comments Only

Issue Topics and Responses

FLPMA-General

Issue Number: PP-ND-GRSG-15-01-3

Organization: WildEarth Guardians

Protestor: Erik Molvar

Issue Excerpt Text: In the North Dakota FEIS, the BLM has failed in certain cases to apply the recommended GRSG protections presented to it by its own experts (the BLM National Technical Team), and as a result development approved under the proposed plan violate the directives of BLM Sensitive Species Policy and will result in both unnecessary and undue degradation of GRSG Priority Habitats and result in GRSG population declines in these areas, undermining the effectiveness of the sage grouse conservation strategy as an adequate regulatory mechanism in the context of the decision.

Issue Number: PP-ND-GRSG-15-01-9

Organization: WildEarth Guardians

Protestor: Erik Molvar

Issue Excerpt Text: The BLM does not propose to seek withdrawal of important GRSG habitats from locatable mineral entry (FEIS at 2-19). Given that the BLM's position (erroneous, yet driving project policy) is that it has little to no authority to regulate the development of locatable mineral mining claims, withdrawal from future mineral entry offers the greatest certainty the agency can offer that threats to GRSG (at least in the future) will be dealt with. This represents yet another example of the BLM failing to provide adequate regulatory mechanisms to address a threat to GRSG habitats and populations in the areas where that threat is most extreme. In effect, the BLM fails to address the threats of locatable mineral development in areas

where that threat is greatest. This violates FLPMA and BLM Sensitive Species policy.

Issue Number: PP-ND-GRSG-15-02-7

Organization: Beatty & Wozniak, PC

Protestor: Bret Sumner

Issue Excerpt Text: XTO protests the RMPA's imposition of management restrictions that exceed the statutory authority of the BLM under FLPMA, particularly for a species not listed as threatened or endangered under the Endangered Species Act (ESA).

Issue Number: PP-ND-GRSG-15-02-8

Organization: Beatty & Wozniak, PC

Protestor: Bret Sumner

Issue Excerpt Text: FWS has not developed a recovery plan pursuant to the ESA, and BLM and FWS cannot utilize the NEPA process for a land use plan amendment to create a de facto recovery plan in violation of FLPMA.

Issue Number: PP-ND-GRSG-15-03-21

Organization: North Dakota Petroleum Council

Protestor: Ron Ness

Issue Excerpt Text: The provision of the Proposed RMPA requiring FWS to find that criteria related to the greater sage-grouse are met before BLM may grant an exception to an NSO stipulation is inconsistent with congressional policy regarding management of unlisted wildlife on the public and National Forest System lands.

Issue Number: PP-ND-GRSG-15-03-25

Organization: North Dakota Petroleum Council

Protestor:Ron Ness

Issue Excerpt Text: The Trades maintain the Proposed RMPA’s proposal to prioritize leasing outside of PHMA and to make PHMA open for leasing with NSO stipulations that cannot be waived or modified constitutes a de facto withdrawal under FLPMA. See 43 USC §§ 1702(j) (defining “withdrawal”), 1714(l)(1) (referencing withdrawals resulting from closure of lands to leasing under the Mineral Leasing Act of 1920). FLPMA requires that the Secretary of the Interior notify both houses of Congress of withdrawals of five

thousand acres or more no later than the effective date of the withdrawal; as part of this notification, FLPMA also imposes additional procedural requirements. *Id.* § 1713(g). At a minimum, the Secretary of the Interior must report its decision to exclude a principal or major use of the public lands (mineral leasing) from tracts of land more than 100,000 acres to the House of Representatives and Senate, and complete additional procedural requirements. *Id.* § 1712(e). Accordingly, the Secretary of the Interior must comply with FLPMA and notify Congress of the de facto withdrawals of PHMA from mineral leasing.

Summary:

The BLM has overstepped its jurisdiction and authority under FLPMA by crafting a Greater Sage Grouse management strategy that:

- creates a de facto recovery plan that exceeds the “unnecessary and undue degradation” standard; and
- abrogates the BLM’s authority over federal land by giving USFWS ESA-like authority without first making a listing determination for a species.

The BLM has failed to uphold its authority and legislated mandate under FLPMA to avoid unnecessary or undue degradation of GRSG habitat by failing to recommend the withdrawal of more hard rock minerals from development and failing to adopt all NTT measures.

Response:

The Federal Land Policy and Management Act details the BLM’s broad responsibility to manage public lands and engage in land use planning to direct that management. The BLM Land Use Planning Handbook, H-1610, directs that land use plans and plan amendment decisions are broad-scale decisions that guide future land management actions and subsequent site-specific implementation decisions. A primary objective of the BLM Special Status Species policy is to initiate proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of the species under the ESA (BLM Manual Section 6840.02.B).

The North Dakota GRSG PRMPA/FEIS is a targeted amendment specifically addressing goals, objectives, and conservation measures to conserve GRSG and to respond to the potential of its being listed (see Section 1.2, Purpose and Need). The BLM’s planning process allows for analysis and consideration of a range of alternatives to conserve, enhance, and restore GRSG habitat and to eliminate, reduce, or minimize threats to this habitat to ensure a balanced management approach.

Additionally, the BLM developed the North Dakota GRSG PRMPA/FEIS with involvement

from cooperating agencies, including Federal agencies, state agencies, and local governments to ensure that a balanced multiple-use management strategy to address the protection of GRSG while allowing for utilization of renewable and nonrenewable resources on the public lands.

The first Special Status Species goal of the North Dakota GRSG PRMPA/FEIS, detailed on Page 2-10, is to “[m]aintain and/or increase GRSG abundance and distribution by conserving, enhancing or restoring the sagebrush ecosystem upon which populations depend in collaboration with other conservation partners.”

The proposed plan does not allow unnecessary or undue degradation of the public lands. Section 302(b) of FLPMA requires that “in managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” The North Dakota GRSG PRMPA/FEIS provides for the balanced management of the public lands in the planning area. In developing the North Dakota GRSG PRMPA/FEIS, the BLM fully complied with its planning regulations (43 CFR 1610), the requirements of NEPA, and other statutes, regulations, and Executive Orders related to environmental quality. The North Dakota GRSG PRMPA/FEIS identifies appropriate allowable uses, management actions, and other mitigation measures that prevent, among other things, the unnecessary or undue degradation of public lands.

In Section 2.4, the North Dakota GRSG PRMPA/FEIS describes the rationale used for determining a range of alternatives. For this planning effort, the BLM considered a wide range of alternatives for mineral development, from a no-action alternative that would leave all lands not currently withdrawn available for mineral entry to more restrictive alternatives that would withdraw as much as 49,970 acres from mineral entry. Action SM-1.4, detailed on pages 2-24, provides additional information on how the BLM would manage mineral resources in to avoid, minimize, and mitigate impacts of that resource use on the GRSG habitat.

For the development of fluid minerals under existing leases, the North Dakota GRSG PRMPA/FEIS details BLM’s objectives in FM-1 (page 2-22) to “work with the lessees, operators, or other project proponents to avoid, minimize, and compensate for adverse impacts to the extent compatible with lessees’ rights to drill and produce fluid mineral resources.” Action FM-1.5 details the BLM’s approach for managing existing fluid mineral leases in GRSG habitats, including unitization, mitigation, master development plans, Conditions of Approval, and other tools that the agency can use to minimize impacts while respecting valid, existing rights. Any conditions of approval for permits to drill on existing leases, including measures necessary to prevent unnecessary or undue degradation, will be evaluated at the project level.

The North Dakota GRSG PRMPA/FEIS will not result in “unnecessary or undue degradation of public lands.

The BLM is not violating FLPMA’s reporting requirements. FLPMA requires the Secretary of the Interior to provide notice to Congress when making certain decisions regarding land use planning. Specifically, Section 202(e)(2) states “[a]ny management decision or action pursuant to a management decision that excludes (that is, totally eliminates) one or more of the principal

or major uses for two or more years with respect to a tract of land of one hundred thousand acres or more shall be reported by the Secretary to the House of Representatives and the Senate.” The North Dakota PRMP/FEIS does not make the decision to exclude any major use of public lands (defined in FLPMA as domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production). Moreover, under 43 CFR 1610.6, which addresses the implementation of this requirement, the BLM is not required to provide such a report until the LUPA is signed and the BLM begins implementation.

In addition, the management actions governing oil and gas leasing are not “withdrawal” decisions triggering compliance with the withdrawal provisions of section 204 of FLPMA. While a withdrawal may be one tool to close areas to oil and gas leasing, it is not the only one. The proposed plan’s actions with respect to oil and gas leasing invoke the BLM’s planning authority under section 202 of FLPMA, not the withdrawal authority of section 204. There is no “de facto” withdrawal.

Finally, as described and analyzed in the PRMPA/FEIS, the BLM considered relevant baseline information and studies about GRSG, including the NTT report and proposed conservation measures to address GRSG and its habitat for all alternatives, and focused on a proposed plan that would reduce or eliminate the threat to the species and minimize the likelihood for listing.

In Chapter 2, the BLM describes in detail its effort in analyzing the management for the conservation of GRSG and the information it relied on in such analysis. Specifically, the BLM incorporated conservation measures identified in the NTT and analyzed them as Alternative B (described in brief from 2-34 through 2-36)); Alternative D and the Proposed Plan include many of these conservation measures as well.

Valid Existing Rights

Issue Number: PP-ND-GRSG-15-02-1

Organization: Beatty & Wozniak, PC

Protestor:Bret Sumner

Issue Excerpt Text: Here, the North Dakota RMPA proposes to impose new lease stipulations through permit COAs on valid existing leases, action that vastly exceeds XTO’s original lease contract terms. For example, the RMPA proposes requiring NSO requirements during lekking, nesting, and early brood rearing; requiring compensatory mitigation to a net conservation gain standard; and imposing disturbance and density caps on development. These management prescriptions would unduly and

unreasonably restrict XTO’s right and ability to develop its leases.

Issue Number: PP-ND-GRSG-15-03-26

Organization:North Dakota Petroleum Council

Protestor:Ron Ness

Issue Excerpt Text: The BLM has not adequately explained or justified the proposal to designate all PHMA as right-of-way avoidance areas. Lessees’ ability to develop their leases could be significantly impacted if BLM inappropriately limits access to these leases. BLM must be willing to work with oil and gas lessees and operators to design access routes to proposed oil and gas development projects.

If reasonable access is denied, operators cannot develop their leases and significant resources will be lost, in turn, hurting the local economy and federal treasury. While the issuance of an oil and gas lease does not guarantee access to the leasehold, a federal lessee is entitled to use such part of the surface as may be necessary to produce the leased substance. 43 CFR § 3101.1-2 (2006).

Issue Number: PP-ND-GRSG-15-02-2
Organization:Beatty & Wozniak, PC
Protestor:Bret Sumner

Issue Excerpt Text: In addition, specific and seemingly arbitrary restrictions based on disturbance thresholds are inconsistent with the BLM's own regulations that authorize lessees to use as much of the surface as is reasonable necessary to develop its minerals. 43 CFR § 3101.1-2.

Issue Number: PP-ND-GRSG-15-02-3
Organization:Beatty & Wozniak, PC
Protestor:Bret Sumner

Issue Excerpt Text: The North Dakota RMPA's mandate for compensatory mitigation for any disturbance within GRSG habitat in order to provide a net conservation gain is unduly burdensome, constrains XTO's ability to develop its Federal oil and gas leases, is contrary to valid existing rights and exceeds the BLM's authority under FLPMA.

Issue Number: PP-ND-GRSG-15-02-4
Organization:Beatty & Wozniak, PC
Protestor:Bret Sumner

Issue Excerpt Text: With the North Dakota RMPA, however, the BLM is, in effect, disregarding economic impacts and instead planning to revise and restrict XTO's valid existing lease rights through the

imposition of a net conservation gain standard, development and disturbance caps, and additional restrictive measures added to the proposed RMPA since release of the draft document.

Issue Number: PP-ND-GRSG-15-03-15
Organization:North Dakota Petroleum Council
Protestor:Ron Ness

Issue Excerpt Text: The Trades protest the BLM's decision to impose new restrictions on existing federal oil and gas leases. The Proposed RMPA attempts to impose new conditions on existing oil and gas leases.

Issue Number: PP-ND-GRSG-15-03-16
Organization:North Dakota Petroleum Council
Protestor:Ron Ness

Issue Excerpt Text: The Trades protest the BLM's imposition of new restrictions that are inconsistent with existing leases for three primary reasons. First, BLM does not have the authority to impose new restrictions on valid existing leases under FLPMA. Second, the BLM cannot unilaterally modify federal leases, which are valid existing contracts. Third, the BLM cannot impose new restrictions on existing leases that render development uneconomic or impossible.

Issue Number: PP-ND-GRSG-15-03-17
Organization:North Dakota Petroleum Council
Protestor:Ron Ness

Issue Excerpt Text: The proposed addition of new restrictions to existing leases exceeds BLM's legal authority under FLPMA. The BLM may not modify existing lease rights through its land use planning process because FLPMA expressly states that all BLM actions, including authorization of

RMPs, are “subject to valid existing rights.” 43 USC § 1701 note (h); see also 43 CFR § 1610.5-3(b) (BLM is required to recognize valid existing lease rights). Thus, pursuant to federal law, the BLM cannot terminate, modify, or alter any valid or existing rights.

Issue Number: PP-ND-GRSG-15-03-18

Organization:North Dakota Petroleum Council

Protestor:Ron Ness

Issue Excerpt Text: The BLM’s Land Use Planning Manual reinforces that RMPs must respect existing lease rights. “All decisions made in land use plans, and subsequent implementation decisions, will be subject to valid existing rights. This includes, but is not limited to, valid existing rights associated with oil and gas leases...” See BLM Manual 1601 – Land Use Planning, 1601.06.G (Rel. 1-1666 11/22/00). The BLM must comply with the provisions of its planning manual and recognize existing rights. Any attempts to modify a federal lessee’s existing rights would violate the terms of its leases with the BLM and the BLM’s own policies.

Issue Number: PP-ND-GRSG-15-03-19

Organization:North Dakota Petroleum Council

Protestor:Ron Ness

Issue Excerpt Text: The BLM Instruction Memorandum 92-67 reinforces the contractual rights conferred by an oil and gas lease. This Instruction Memorandum states that “[t]he lease contract conveys certain rights which must be honored through its term, regardless of the age of the lease, a change in surface management

Summary:

The North Dakota GRSG PRMPA/FEIS violates valid, existing rights by imposing disturbance cap restrictions, lek buffer distance requirements, additional conditions of approval, timing

conditions, or the availability of new data or information. The contract was validly entered based upon the environmental standards and information current at the time of the lease issuance.” Thus, judicial and administrative authorities recognize that a federal oil and gas lease constitutes a contract between the federal government and the lessee, which cannot be unilaterally altered or modified by the United States.

Issue Number: PP-ND-GRSG-15-03-20

Organization:North Dakota Petroleum Council

Protestor:Ron Ness

Issue Excerpt Text: Section 3101.1-2, 43 CFR states that the BLM may impose “reasonable mitigation measures...to minimize adverse impacts...to the extent consistent with lease rights granted.” The BLM, however, has expressly recognized that this regulation does not allow the agency to expand the scope of stipulations attached to leases upon issuance. In the Federal Register preamble to the rule finalizing 43 CFR § 3101.1-2, the BLM unequivocally stated that this regulation “will not be used to increase the level of protection of resource values that are addressed in lease stipulations.” 53 Fed. Reg. 17,340, 17,341-42 (May 16, 1988). BLM further explained that “the intent of the proposed rulemaking” was not to impose measures that, for example, “might result in an unstipulated additional buffer around an area already stipulated to have a buffer.” *Id.* Any attempts by BLM to impose measures that expand express stipulations attached to leases is inconsistent with the leases’ contractual terms.

stipulations, and requiring compensatory mitigation.

Response:

The North Dakota GRSG PRMPA/FEIS is subject to valid existing rights (FLPMA, Section 701(h)). “The Proposed Plan would apply management actions, subject to valid existing rights, to other uses and resources” (FEIS, p. ES - 11). For example, p. 2-17 includes the following direction that would be applied regarding the disturbance cap: “Action SS-1.3—If the 3% anthropogenic disturbance cap is exceeded on lands (regardless of land ownership) or if anthropogenic disturbance and habitat loss associated with conversion to agricultural tillage or fire exceed 5% within a project analysis area in PHMA, then no further discrete anthropogenic disturbances (subject to applicable laws and regulations, such as the 1872 Mining Law, valid existing rights, etc.) will be permitted by the BLM within PHMA in a project analysis area until the disturbance has been reduced to less than the cap”. Additionally, the following language is also found on p. 2-17: “Action TM-1.5: In PHMA, use existing routes, or realignments as described above to access valid existing rights that are not yet developed. If valid existing rights cannot be accessed via existing routes, then build any new route constructed to the absolute minimum standard necessary.”

With respect to oil and gas leasing specifically, the BLM may restrict development of an existing oil and gas lease through Conditions of Approval (COA). However, the application of specific COAs to specific projects is outside the scope of the land use planning process; rather, the BLM analyzes and develops COAs at a site-specific level once a project is proposed. When making a decision regarding discrete surface-disturbing activities [e.g. Application for Permit to Drill] following site-specific environmental review, BLM has the authority to impose reasonable measures [e.g. COA] to minimize impacts on other resource values, including restricting the siting or timing of lease activities (43 CFR 3100; 43 CFR 3160; IBLA 2006-213, 2006-226; IBLA 2008-197, 2008-200). In its RMPs, the BLM may identify “general/typical conditions of approval and best management practices” that may be employed in the planning area (BLM Handbook H-1601-1, p. C-24). While the North Dakota LUPA provides management direction for conditions of approval on valid existing leases it does so only consistent with lessees’ valid existing rights (see FEIS, p. 2-22).

The North Dakota GRSG PRMPA/FEIS does not violate valid existing rights.

Multiple Use Mandate

Issue Number: PP-ND-GRSG-15-02-11

Organization: Beatty & Wozniak, PC

Protestor: Bret Sumner

Issue Excerpt Text: The North Dakota RMPA could be interpreted as imposing a “no significant impact” standard for oil and gas operations. This de facto insignificance standard violates BLM’s statutory mandate

under FLPMA to manage public lands for multiple use, and its recognition of oil and gas resources as a “major use” of public lands. It also is contrary to the basic tenets of NEPA and long established legal precedent.

Issue Number: PP-ND-GRSG-15-05-2

Organization: Public Lands Council / NCBA / NDSA

Issue Excerpt Text:

Reducing grazing for the sole benefit of the GRSG is inconsistent with the multi-use

mandate of NFMA, FLPMA and the balanced grazing program outlined in the Taylor Grazing Act, as it prioritizes wildlife use over other productive uses.

Summary:

The North Dakota GRSG PRMPA/FEIS violates the TGA and the multiple use provisions of NFMA and FLPMA by:

- Imposing a “no significant impact” standard for oil and gas operations; and
- Prioritizing wildlife over other uses (e.g., livestock grazing).

Response:

Unlike other RMPAs, or revisions, that are part of the National GRSG Planning Strategy, for this amendment, the US Department of Agriculture (USDA), Forest Service (Forest Service) is not a cooperating agency; therefore, the North Dakota GRSG PRMPA/FEIS does not address a range of alternatives for Forest Service surface/federal minerals (p. 1.6) and the provisions of NFMA do not apply.

Section 302 of FLPMA provides that the Secretary shall manage the public lands under principles of multiple use and sustained yield. Section 103(c) of FLPMA defines “multiple use” as the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people and a combination of balanced and diverse resource uses that takes into account the long term needs of future generations for renewable and non-renewable resources, including, among many other things, wildlife and fish and natural scenic, scientific, and historical values.

FLPMA’s multiple use mandate does not require that all uses be allowed on all areas of the public lands. Through the land use planning process, the BLM evaluates and chooses an appropriate balance of resource uses which involves tradeoffs between competing uses. Rather, the BLM has wide latitude to allocate the public lands to particular uses, including conservation values, and to employ the mechanism of land use allocation to protect for certain resource values, or, conversely, develop some resource values to the detriment of others, short of unnecessary or undue degradation. Similarly, the TGA does not require the BLM to allow grazing or particular levels of grazing on all public lands and provides wide discretion to protect other resource values.

All alternatives considered in the North Dakota GRSG PRMPA/FEIS, as described in Chapter 2 (Vol. 1. P. 2-1 through 2-94), provide an appropriate balance of uses on the public lands. All alternatives allow some of level of all uses present in the planning area, in a manner that is consistent with applicable statutes, regulations, and BLM policy.

The North Dakota GRSG PRMPA/FEIS complies with FLPMA’s multiple use mandate.

Consistency with State and Local Plans

Issue Number: PP-ND-GRSG-15-03-1

Organization:North Dakota Petroleum Council

Protestor:Ron Ness

directives, North Dakota's determined effort to conserve the greater sage-grouse through the ND Plan, BLM is obligated to ensure that the Proposed RMPA is consistent with the ND Plan's existing greater sage-grouse management program.

Issue Excerpt Text: Given FLPMA's clear

Summary:

Per FLPMA's directives, BLM must ensure that the North Dakota GRSG PRMPA/FEIS is consistent with the State of North Dakota's existing GRSG management plan.

Response:

Section 202 (c)(9) of FLPMA (43 USC 1712 (c) (9)) requires that "land use plans of the Secretary under this section shall be consistent with state and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act." However, BLM land use plans may be inconsistent with state, local, and Tribal plans where it is necessary to meet the purposes, policies, and programs associated with implementing FLPMA and other Federal laws and regulations applicable to public lands (43 CFR. 1610.3-2(a)).

In accordance with these requirements, the BLM has given consideration to state, local and Tribal plans that are germane to the development of the North Dakota GRSG PRMPA/FEIS. The BLM has worked closely with state, local, and Tribal governments during preparation of the PRMPA/FEIS. Chapter 6 describes coordination that has occurred throughout the development of the North Dakota GRSG PRMPA/FEIS.

A list of the local, state, and Tribal plans that the BLM considered can be found in Chapter 1, Section 1.8. The BLM conducted an review process, in which representatives from NDGF participated, for identifying any potential inconsistencies between the plan and local, state, and Tribal plans. The agency will discuss why any remaining inconsistencies between the North Dakota GRSG PRMPA/FEIS and relevant local, state, and Tribal plans cannot be resolved in the Record of Decision (ROD). Additionally, all BLM land use plans or plan amendments and revisions must undergo a 60-day Governor's consistency review prior to final approval. BLM's procedures for the Governor's consistency review are found in the planning regulations in 43 CFR 1610.3-2(e).

Range of Alternatives

Issue Number: PP-ND-GRSG-15-03-8

Organization:North Dakota Petroleum Council

Protestor:Ron Ness

the Proposed RMPA. First, the Final EIS does not analyze an alternative to the Proposed RMPA's lek buffers. Second, the Final EIS does not analyze any alternatives to the mitigation standard of a "net conservation gain" for the GRSG. Finally, the Final EIS does not analyze any alternative to the Proposed RMPA's

Issue Excerpt Text: The Final EIS fails to analyze a reasonable range of alternatives to

monitoring framework, including alternatives that BLM has the resources to implement.

Issue Number: PP-ND-GRSG-15-04-11
Organization: Western Watersheds Project
Protestor: Travis Bruner

Issue Excerpt Text: We protest the failure to consider an alternative that would remove livestock grazing from the entirety of GRSG habitat, including all of the priority and important habitats. None of the alternatives consider eliminating livestock grazing across the range. There is no true analysis of the beneficial impacts of removing livestock grazing from GRSG habitat entirely, or seasonally in accordance with the best available science.

Issue Number: PP-ND-GRSG-15-04-7
Organization: Western Watersheds Project
Protestor: Travis Bruner

Issue Excerpt Text: The need for seasonal restrictions has been affirmed by leading

GRSG scientists and the courts. Dr. Clait Braun identified the need for the seasonal restrictions in 2006: “Grazing should not be allowed until after June 20 and all livestock should be removed by August 1 with a goal of leaving at least 70% of the herbaceous production each year to form residual cover to benefit GRSG nesting the following spring.”⁴⁸ The courts have also established that “to avoid conflicts with GRSG nesting and late brood-rearing habitat grazing should be limited to mid-summer (June 20 to August 1), and to minimize impacts on herbaceous vegetation prior to the next nesting seasons it should be limited to late fall and winter months (November 15 to March 1).” WWP v. Salazar, 843 F.Supp.2d 1105, 1123 (D. Idaho 2012). The absence of the analysis of any such restrictions under any of the alternatives and under the proposed plan is a serious deficiency, but even more so, the failure to restrict grazing in accordance with these guidelines is a failure to conserve, protect, and enhance GRSG habitats.

Summary:

The North Dakota GRSG PRMPA/FEIS failed to analyze an adequate range of alternatives by not considering:

- alternatives to the BLM’s goal of achieving a “net conservation gain” on GRSG habitat;
- alternatives to the proposed plan’s monitoring framework;
- removing livestock grazing from the entirety of GRSG habitat or apply seasonal restrictions on livestock grazing; and
- alternative lek buffer distances.

Response:

General

When preparing an EIS, NEPA requires an agency to rigorously explore and objectively evaluate reasonable alternatives, and, for alternatives which were eliminated from detailed study, to briefly discuss the reasons for their having been eliminated (40 CFR 1502.14(a)) (North Dakota GRSG PRMPA/FEIS, Section 1.6.4 Issues Considered but Not Furthered Analyzed (p. 1-10)). When there are potentially a very large number of alternatives, the BLM may only analyze a reasonable number to cover the full spectrum of alternatives (BLM Handbook H-1790-1, Section 6.6.1 quoting Question 1b, CEQ, Forty Most Asked Questions Concerning CEQ's NEPA Regulations, March 23, 1981).

The BLM developed a range of reasonable alternatives that meet the purpose and need (North Dakota GRSG PRMPA/FEIS, p. 1-4) and address resource issues identified during the scoping period. The North Dakota GRSG PRMPA/FEIS analyzed four distinct alternatives in detail, which are described in Table 2-4, Description of Alternatives A, B, C, and D (p. 2-45). The alternatives cover the full spectrum by varying in: (1) degrees of protection for each resource and use; (2) approaches to management for each resource and use; (3) mixes of allowable, conditional, and prohibited uses in various geographic areas; and (4) levels and methods for restoration.

Net Conservation Gain - Monitoring Framework

Net conservation gain is described in Chapter 2, the Glossary (Glossary-20) and Appendix E of the North Dakota GRSG PLUPA/FEIS as “The actual benefit or gain above baseline conditions.” and is also addressed in the section 1.1.1 Changes From Draft RMPA to the Proposed RMPA (p. 1-22). The net conservation gain strategy responds to the landscape-scale goal to enhance, conserve, and restore GRSG and its habitat. The North Dakota GRSG PRMP/ FEIS provides management direction to meet this landscape-scale goal (Table 2-3 in the Draft RMP/FEIS). In addition, net conservation gain is derived from the purpose and need which calls for the agencies to incorporate measures to “conserve, enhance and/or restore GRSG habitat”; and accounts for uncertainty associated with the effectiveness of mitigation.

The Monitoring Framework (Appendix F) for Greater sage-grouse habitat management describes a methodology to ensure consistent assessments about GRSG habitats across the species range. This framework describes the methodology—at multiple scales—for monitoring of implementation and disturbance and for evaluating the effectiveness of actions to conserve the species and its habitat. Being a methodology for monitoring implementation of the PRMPA does not require it to be varied between the action alternatives.

Livestock Seasonal Restrictions

As identified in 2.4 Description of Alternatives s (p. 2-50), management to meet seasonal GRSG habitat requirements to conserve, protect, and enhance GRSG habitat vary by alternative. Approaches as to how this is accomplished depends upon the nature of each particular alternative. For Alternative B, GRSG conservation measures in A Report on National GRSG Conservation Measures (GRSG National Technical Team 2011, also referred as to the NTT Report) were used to form management direction.

For alternative C individuals and conservation groups submitted management direction recommendations for protecting and conserving GRSG and habitat range-wide. The recommendations, in conjunction with resource allocation opportunities and internal sub-regional BLM and Forest Service input, were reviewed in order to develop management direction for GRSG. Conservation measures under Alternative C focus on both PHMA and GHMA.

Alternative D describes conservation measures to conserve, enhance, and restore GRSG habitat while balancing resources and resource use among competing human interests, land uses, and the conservation of natural and cultural resource values. This alternative incorporates the NTT strategy and includes local adjustments and habitat boundaries to provide a balanced level of

protection, restoration, enhancement, and use of resources and services to meet ongoing programs and land uses. Conservation measures are focused on both PHMA and GHMA.

Table 2-2 describes guidelines that would be applied in each of the identified seasonal habitats. If guidelines cannot be achieved based upon a site-specific analysis using Ecological Site Descriptions, long-term ecological site capability analysis, or other similar analysis, grazing management would be adjusted to move towards desired habitat conditions consistent with the ecological site capability. Moving towards desired habitat conditions would conserve, protect and enhance GRSG habitat.

Eliminate Grazing from BLM Public Lands or GRSG Habitats

Section 2.11 Alternatives Eliminated from Detailed Analysis (p.2-63) provides a succinct discussion as to why an alternative to make the entire planning area unavailable to livestock grazing was not analyzed in detail (section 2.11.2 Eliminate Livestock Grazing from BLM-Administered Lands, (p. 2-63)). NEPA requires agencies to study, develop and describe appropriate alternatives that involve unresolved conflicts concerning resource uses. The CEQ guidelines for compliance with NEPA require that agencies analyze the “No Action Alternative” in all EISs (40 CFR 1502.14(d)). For the purposes of this NEPA analysis, the “no action alternative” is to continue the status quo, which includes livestock grazing. In addition, Alternative C reduces grazing use by 50% in the Big Gumbo area (p. 2-49) and where appropriate, removal of livestock and adjustments to livestock use, have been incorporated into the various alternatives considered in this PRMPA/FEIS. Thus, the North Dakota GRSG PRMPA/FEIS dismissed a no grazing alternative for the entire planning area from further consideration.

Lek Buffer Distances

A variety of approaches to managing disturbances near leks, including varying buffer distances, were evaluated in the North Dakota GRSG PRMPA/FEIS, as documented in Table 2-11 - Management Actions by Alternative.

The BLM considered a reasonable range of alternatives in the North Dakota GRSG PRMPA/FEIS in full compliance with NEPA.

Purpose and Need

Issue Number: PP-ND-GRSG-15-01-2

Organization: WildEarth Guardians

Protestor: Erik Molvar

Issue Excerpt Text: Many aspects of the proposed RMP do not conform to the best available science or the recommendations of BLM’s own experts regarding necessary measures to protect GRSG habitats and prevent population declines, and therefore

do not meet the Purpose and Need to “conserve, enhance, and/or restore GRSG Habitat.”

Issue Number: PP-ND-GRSG-15-05-1

Organization: Public Lands Council / NCBA / NDSA

Issue Excerpt Text: As addressed in our comments, we reiterate that the purpose and need of the Proposed LUPA/FEIS is

misleading and arbitrary and capricious in the context of livestock grazing and range management. The purpose and need given to augment grazing regulation is “Loss of habitat components due to livestock and large wildlife use.” (FEIS at ES.2) However, neither the U.S. Fish and Wildlife Service (FWS) nor the BLM have found that the

existing regulatory mechanisms applicable to livestock grazing and range management pose a threat to GRSG habitat or populations. Therefore, imposing regulatory change on the grazing livestock industry is arbitrary and capricious and without factual basis.

Summary:

The purpose and need to conserve, enhance, and/or restore GRSG habitats for the North Dakota GRSG PRMPA/FEIS is narrowly defined or has not been met because:

- the best available science has not been used;
- the plan delays any substantive changes to livestock grazing until sometime in the indefinite future, which will not be effective immediately to conserve, enhance, and restore GRSG habitats; and
- protecting GRSG habitat from the effects of livestock grazing is without factual basis.

Response:

CEQ regulations direct that an EIS “...shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action” (40 CFR 1502.13). Also, under the CEQ regulations, the BLM and the Forest Service are required to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act [NEPA].” (40 CFR 1501.2(c)). The range of alternatives developed are intended to meet the purpose and need and address the issue; thereby, providing a basis for eventual selection of an alternative in a decision (BLM NEPA handbook and Forest Service Handbook 1909.15 – National Environmental Policy Act Handbook Chapter 10 – Environmental Analysis).

For detailed discussion related to the need to use the Best Available Science and use of the COT and NTT reports, please refer to the response to those specific protests (Category or Section 3.7). The management actions developed and analyzed in the alternatives for this Proposed RMP Amendment included actions as recommended in the COT and NTT reports. The management actions proposed are within the range of alternatives that respond to the purpose and need. In the NTT report, livestock grazing is identified as a diffuse disturbance, rather than a discrete disturbance. According to the NTT Report (BLM, 2011,p. 8):

“GRSG are extremely sensitive to discrete disturbance (Johnson et al. 2011, Naugle et al. 2011a, b) although diffuse disturbance over broad spatial and temporal scales can have similar, but less visible effects.”

Substantive changes to livestock grazing are not made in the PLUPA. Changes that are necessary to conserve, enhance, and restore GRSG habitats would be made during the permit renewal process. Grazing permit renewals and land health assessments would be prioritized

consistent with management area prioritization, unless other higher priority considerations exist or other factors.

Though grazing is not identified as a discrete threat, there are provisions and management actions proposed in the NTT Report and incorporated in the Proposed RMPA that address these impacts. The livestock grazing measures are supported by the NTT and COT reports, utilize the best available science, are within the range of alternatives, and meet the Purpose and Need for this PRMP Amendment.

The BLM applied the best information available when it developed the North Dakota GRSG PRMPA/FEIS and alternatives as they include recommendations from the NTT and COT reports. Therefore these management actions do meet the purpose and need and are within the range of alternatives that addresses such.

Cumulative Effects

Issue Number: PP-ND-GRSG-15-03-13

Organization:North Dakota Petroleum Council

Protestor:Ron Ness

Issue Excerpt Text: Finally, the Proposed RMPA/FEIS does not adequately analyze the cumulative impacts of the Proposed RMPA because it does not consider the impacts of the Proposed RMPA together with the impacts of the at least 13 other GRSG LUPA EISs. See 80 Fed. Reg. 30,676 (May 29, 2015). The CEQ regulations require agencies to analyze the “incremental impact of the action” together with “other past, present, and reasonably foreseeable future actions.” 40 CFR § 1508.7. In this case, the BLM should have analyzed the cumulative impacts of the Proposed RMPA with the other 13 LUPAs. Clearly, development of the EISs was a coordinated effort by BLM and the Forest Service. BLM and the Forest Service announced the LUPAs and made them available on the same day. See 80 Fed. Reg. 30,718 (May 29, 2015); 80 Fed. Reg. 30,716 (May 29, 2015); 80 Fed. Reg. 30,714 (May 29, 2015); 80 Fed. Reg. 30,711 (May 29, 2015); 80 Fed. Reg. 30,709 (May 29, 2015); 80 Fed. Reg. 30,707 (May 29, 2015); 80

Fed. Reg. 30,705 (May 29, 2015); 80 Fed. Reg. 30,703 (May 29, 2015); see also Dep’t of the Interior Press Release, BLM, USFS Plans for Western Public Lands Provide for GRSG Protection, Balanced Development (May 28, 2015). Moreover, many of the Proposed LUPAs contain consistent—if not standardized—provisions, such as the monitoring framework, mitigation framework, and lek buffer distances. All of the LUPAs propose to impose NSO stipulations with limited waiver and modification on new leases in PHMA. All of them require that compensatory mitigation yield a “net conservation gain.” The BLM must analyze the cumulative impacts of these nation-wide management actions on the GRSG and, in particular, the cumulative impacts on mineral leasing and development. In the planning area for the Proposed RMPA alone, 61,197 acres are designated for leasing subject to NSO. See Proposed RMPA, Table 2-3 at 2-41. Nationwide, BLM and the Forest Service have proposed to prohibit surface occupancy on 31 million acres of mineral estate to conserve the GRSG. Throughout greater sage-grouse range, the cumulative amount of land leased with NSO (and therefore effectively rendered inaccessible) and closed to leasing could have significant impacts on

the development of federal oil and natural gas resources. The BLM has not, however, examined the cumulative impacts of its management actions on federal oil and

natural gas leasing and development. See Proposed RMPA at Chapter 5. BLM must analyze these cumulative impacts in an EIS before it issues a ROD and Final RMPA.

Summary:

The BLM is in violation of the CEQ regulations because it has not adequately analyzed cumulative impacts related to:

- the proposed RMP amendments and revisions nationwide; and
- impacts to mineral leasing and development

Response:

The BLM must discuss the cumulative effects of the proposed action and the alternatives when preparing an EIS (BLM Handbook H-1790-1, Section 6.8.3). The CEQ regulations define cumulative effects as "...the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions" (40 CFR 1508.7). It is neither practical nor required to exhaustively analyze all possible cumulative impacts. Instead, CEQ (1997) indicates the cumulative impact analysis should focus on meaningful impacts. The BLM identified key planning issues (see Chapter 1) to focus the analysis of environmental consequences in Chapter 4 on meaningful impacts.

The BLM has complied fully with the requirements of 40 CFR 1508.7 and prepared a cumulative impact analysis based on the broad nature and scope of the proposed management options under consideration at the land use planning level. The cumulative impact analysis considered the effects of the planning effort when added to other past present and reasonably foreseeable (not highly speculative) Federal and non-Federal actions. The cumulative impacts section (Chapter 5) identifies all actions that were considered in the cumulative impacts analysis, and provides a basis for the cumulative impacts analysis for each affected resource. Sections 5.7-5.10 discuss cumulative impacts to minerals.

The geographic scope for the cumulative impact analysis extends to the planning area boundary. In Chapter 5, Section 5.3, Special Status Species, GRSG, the cumulative impact analysis includes an analysis at the WAFWA Management Zone 1 level, in addition to the planning area analysis. WAFWA management zones are biologically based delineations that were determined by GRSG populations and sub-populations identified within seven floristic provinces. Analysis at this level enables the decision maker to understand the impacts on GRSG at a biologically meaningful scale.

The analysis took into account the relationship between the proposed action and these reasonably foreseeable actions. This served as the determining factor as to the level of analysis performed and presented. The information presented in the North Dakota GRSG PRMPA/FEIS enables the decision-maker to make a reasoned choice among alternatives.

The BLM adequately analyzed cumulative effects in the North Dakota GRSG PRMPA/FEIS.

Public Comments

Issue Number: PP-ND-GRSG-15-03-24

Organization:North Dakota Petroleum Council

Protestor:Ron Ness

Issue Excerpt Text: The Trades protest the RDFs listed in Appendix B of the Proposed RMPA. Although the Trades extensively commented on the RDFs in the Draft RMPA, BLM did not adjust any of the RDFs in response to the Trades’ comments. Furthermore, as explained in section IV.C, supra, BLM did not respond to the Trades’ comments as required by 40 CFR § 1503.4(a).

Issue Number: PP-ND-GRSG-15-03-9

Organization:North Dakota Petroleum Council

Summary:

The BLM did not adequately address comments that were received on the North Dakota GRSG PRMPA/FEIS. The BLM received comments on the Required Design Features but did not make any substantive changes to the RDFs between draft and final and did not explain why the comments do not warrant further response.

Response:

The CEQ regulations at 40 CFR 1503.4 recognize several options for responding to comments. The BLM reviewed comments, grouped similar substantive comments under an appropriate topic heading, and evaluated and wrote summary responses addressing the comment topics. The response indicated whether the commenters’ points would result in new information or changes being included in the North Dakota GRSG PRMPA/FEIS.

Section 6.5.3, Summary of Comments Received on the Draft RMPA/EIS, provides a detailed description of the comment analysis methodology and an overview of the public comments received on the Draft RMPA/EIS. Complete comment summaries and responses, including rationale and any associated changes made in the North Dakota GRSG PRMPA/FEIS, can be found in Appendix L, Response to Comments on the Draft Resource Management Plan Amendment/Environmental Impact Statement.

As a result of public comments, best science, cooperating agency coordination, and internal review of the Draft RMPA/EIS, the BLM has developed the North Dakota GRSG PRMPA/FEIS

Protestor:Ron Ness

Issue Excerpt Text: With respect to the Proposed RMPA, the Trades submitted extensive and detailed comments on the RDFs listed in Appendix B. See Trade Comments at 20 – 25. The BLM, however, did not make any substantive changes to the RDFs between draft and final, except to add language to the noise RDFs. Compare Proposed RMPA, app. B at 6, with Draft RMPA, app. B at B-6. Additionally, the BLM did not acknowledge the Trades’ comments on the RDFs in Appendix L and did not “[e]xplain why the comments do not warrant further response.” See 40 CFR § 1503.4(a). Therefore, BLM has not provided the response to comments as required by the CEQ regulation.

for managing BLM administered lands in the North Dakota GRSG sub-region. The North Dakota GRSG PRMPA/FEIS focuses on addressing public comments, while continuing to meet the BLM's legal and regulatory mandates. The Proposed Plan Amendment is a variation of the preferred alternative D and is within the range of alternatives analyzed in the Draft RMPA/EIS. The BLM adequately responded to and adequately addressed comments received for the North Dakota GRSG PRMPA/FEIS.

Supplemental EIS

Issue Number: PP-ND-GRSG-15-02-5

Organization: Beatty & Wozniak, PC

Protestor: Bret Sumner

Issue Excerpt Text: The RMPA reflects a significant new alternative and proposed management structure that was not previously provided to the public, including state and local agencies and other cooperating agencies and stakeholders. Nor was this significantly revised RMPA developed with the benefit of supplemental NEPA analysis. These failures violate FLPMA and NEPA, as well as this Administration's policy on transparent and open government. Under NEPA, the BLM is required to supplement existing NEPA documents when, as it has done for the RMPA, it makes substantial changes to the proposed action. 40 CFR § 1502.9(c)(1)(i); *Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1151 (10th Cir. 2004). Here, the RMPA reflects an entirely new management structure, premised primarily upon the GRSG Conservation Objectives Team report (COT report), which had not been previously analyzed in detail or provided to the public, and cooperating agencies, for review and comment. Yet, the RMPA, as significantly revised, was issued without supplemental NEPA analysis, and without additional public review or comment. This failure by BLM is a plain violation of NEPA. Moreover, President Obama issued an Executive Order on January 18, 2011 directing all federal agencies, including the BLM, to exercise regulatory authority "on the open exchange

of information and perspectives among State, local and tribal officials" in a manner to promote: "economic growth, innovation, competitiveness and job creation." The BLM has not complied with this Executive Order with respect to the issuance of the significantly new and different RMPA which reflects a management structure substantively and substantially different from the draft released for public review and comment.

Issue Number: PP-ND-GRSG-15-03-14

Organization: Ron Ness

Protestor: North Dakota Petroleum Council

Issue Excerpt Text: The BLM's own planning handbook unequivocally directs the agency to issue a supplement to a draft EIS when "substantial changes to the proposed action, or significant new information/circumstances collected during the comment period" are presented (BLM Land Use Planning Handbook H- 1610-1, III.A.10, pg. 24 (Rel. 1-1693 03/11/05)). Because the requirement that mitigation produce a net conservation gain, the mitigation plan, the monitoring plan, and the lek distance buffers unquestionably are a "substantial change" when compared to the alternatives included in the Draft RMPA, BLM should have prepared and released for comment a supplement to the Draft RMPA and must do so prior to signing the Final ROD.

Issue Number: PP-ND-GRSG-15-03-6

Organization:Ron Ness

Protector:North Dakota Petroleum Council

Issue Excerpt Text: Furthermore, the Proposed RMPA also contains wholly new components. None of the alternatives presented in the Draft LUPA included the requirements that mitigation produce a net conservation gain, the revised mitigation plan, the revised monitoring plan, and the lek distance buffers. The BLM first presented the public with these components when it released the Proposed RMPA. Most troubling is the fact that the net conservation gain requirement, revised mitigation plan, revised monitoring plan, and lek distance buffers were not incorporated into the Proposed RMPA and Final EIS in response to public comment on the Draft RMPA or in response to environmental impacts disclosed in the Draft RMPA. See Forty Questions, 46 Fed. Reg. at 18,035 (explaining that agencies may adjust the alternatives analyzed in response to comments). Rather, the BLM appears to have incorporated the net conservation gain requirement, revised mitigation plan, and revised monitoring plan to respond to national policies by the BLM and the FWS that were released after the Draft RMPA was published and that were never formally offered for public comment. See U.S. Fish & Wildlife Serv., GRSG Mitigation Framework (2014); BLM, The GRSG Monitoring Framework (2014). Similarly, the lek buffer distances appear to have been

Summary:

The BLM must provide a supplemental EIS with notice and an opportunity for comment in compliance with its NEPA and FLPMA obligations. None of the alternatives presented in the Draft RMP included the requirements that mitigation produce a net conservation gain in regards to the lek buffer distances, the revised mitigation and monitoring plans, and the adaptive management triggers and responses. The RMPA reflects a new alternative and proposed management structure that incorporates the COT report, and that was not previously provided to the public, including state and local agencies and other cooperating agencies and stakeholders.

added to make the Proposed RMPA consistent with the GRSG provisions in other land use plans. See Fact Sheet: BLM/USFS GRSG Conservation Effort (noting that land use plans to conserve the GRSG are based on three objectives for conserving and protecting habitat). The public never had the opportunity to review and comment on these new components.

Issue Number: PP-ND-GRSG-15-03-7

Organization:Ron Ness

Protector:North Dakota Petroleum Council

Issue Excerpt Text: The net conservation gain requirement and lek distance buffers were not presented in the Draft RMPA. Although the Draft RMPA acknowledged that the Proposed RMPA/Final EIS would include more details about the monitoring and mitigation plans, see Draft RMPA at 2-13 – 2-15, app. E, app. F, these “placeholders” did not allow the public a meaningful opportunity to comment on the substance of the monitoring and mitigation plans. The inclusion of the net conservation gain requirement, revised mitigation plan, revised monitoring plan, and lek distance buffers coupled with the re-formulated alternative adopting components of the alternatives analyzed in the Draft EIS, hence constitutes “substantial changes from the previously proposed actions that are relevant to environmental concerns” and should have been presented in a Supplemental Draft EIS for public comment.

Response:NEPA Handbook 1790-1, 5.3, page 29

“Supplementation” has a particular meaning in the NEPA context. The Supreme Court has explained that supplementation of an EIS is necessary only if there remains major Federal action to occur. (See *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004)). In the case of a land use plan, implementation of the Federal action is the signing of a Record of Decision.

“You must prepare a supplement to a draft or final EIS if, after circulation of a draft or final EIS but prior to implementation of the Federal action:

- you make substantial changes to the proposed action that are relevant to environmental concerns (40 CFR 1502.9(c)(1)(i));
- you add a new alternative that is outside the spectrum of alternatives already analyzed (see Question 29b, CEQ, *Forty Most Asked Questions Concerning CEQ's NEPA Regulations*, March 23, 1981); or
- there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its effects (40 CFR 1502.9(c)(1)(ii)).”

5.3.1 When Supplementation is Appropriate, page 30

“New circumstances or information” are “significant” and trigger the need for supplementation if they are relevant to environmental concerns and bearing on the proposed action and its effects (i.e., if the new circumstances or information would result in significant effects outside the range of effects already analyzed). New circumstances or information that trigger the need for supplementation might include the listing under the Endangered Species Act of a species that was not analyzed in the EIS; development of new technology that alters significant effects; or unanticipated actions or events that result in changed circumstances, rendering the cumulative effects analysis inadequate.

5.3.2 When Supplementation is Not Appropriate, page 30

Supplementation is not necessary if you make changes in the proposed action that are not substantial (i.e., the effects of the changed proposed action are still within the range of effects analyzed in the draft or final EIS).

If a new alternative is added after the circulation of a draft EIS, supplementation is not necessary if the new alternative lies within the spectrum of alternatives analyzed in the draft EIS or is a minor variation of an alternative analyzed in the draft EIS. In such circumstances, the new alternative may be added in the final EIS.

When new circumstances or information arise prior to the implementation of the Federal action, but your evaluation concludes that they would not result in significant effects outside the range of effects already analyzed, document your conclusion and the basis for it. If the new circumstances or information arise after publication of a draft EIS, document your conclusion in the final EIS. If the new circumstances or information arise after publication of the final EIS, document your conclusion in the ROD.

40 CFR 1502.9: Draft, Final, and Supplemental Statements

(c) Agencies:

- (1) Shall prepare supplements to either draft or final environmental impact statements if:
- (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
 - (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

Land Use Planning Handbook, H1601-1, page 24.

The proposed RMP and final EIS may also contain modification to the alternatives and the accompanying impact analysis contained in the draft RMP/EIS. However, substantial changes to the proposed action, or significant new information/circumstances collected during the comment period would require supplements to either the draft or final EIS (40 CFR 1502.9(c)). The proposed RMP (amendment)/final EIS should clearly show the changes from the draft RMP (amendment)/draft EIS.

The Proposed Plan Amendment is a variation of the preferred alternative D and is within the range of alternatives analyzed in the Draft RMPA/EIS. Chapter 1, page 23.

Although the buffer report was not available at the time of the Draft RMPA/EIS release, applying these buffers was addressed in the Draft RMPA/EIS and is qualitatively within the spectrum of alternatives analyzed. Specifically, (Alternatives B and C) identified and analyzed allocation restrictions such as recommendation for withdrawal, elimination of grazing, etc. Accordingly, the management decision set forth in this Proposed RMPA/Final EIS to apply lek buffers on a project-specific basis (in accordance with Appendix J) for development within certain habitat types is within the range of alternatives analyzed. Alternatives B and C in the Draft RMPA/EIS analyzed four-mile buffers around leks when constructing roads.

Chapter 2 of the Draft RMPA/EIS identified that the BLM would further develop the adaptive management approach by identifying hard and soft triggers and responses. Due to low GRSG population numbers, the limited amount and quality of PHMA managed by the BLM, and limited decision space for management of valid existing rights, the North Dakota GRSG Proposed RMPA/Final EIS will not include an adaptive management strategy in the Proposed Plan Amendment (North Dakota GRSG PRMPA/FEIS, Chapter 2, p. 2-24)

The Draft RMPA/EIS outlined the major components of the monitoring strategy, as well as provided a table portraying a list of anthropogenic disturbances that would count against the disturbance cap. A BLM Disturbance and Monitoring Sub-team further enhanced the two Appendices (Appendix F, The GRSG Monitoring Framework, and Appendix K, GRSG Disturbance Caps) in the Proposed RMPA/Final EIS. (North Dakota GRSG PRMPA/FEIS, Chapter 2, p. 2-24)

The net conservation gain strategy is in response to the overall landscape-scale goal which is to enhance, conserve, and restore GRSG and its habitat. All of the action alternatives in the Draft RMPA/EIS provided management actions to meet the landscape-scale goal (see Table 2-3 in the Draft RMPA/EIS) (North Dakota GRSG PRMPA/FEIS, Chapter 2, p. 2-24).

A Supplemental EIS is not necessary. Changes in the proposed action are not substantial. The effects of the changed proposed action are still within the range of effects analyzed in the Draft EIS.

Best Available Science

Issue Number: PP-ND-GRSG-15-01-16

Organization: Wild Earth Guardians et al

Protestor: Erik Molvar

Issue Excerpt Text: The record establishes that met towers can result in GRSG population declines (see Cotterel Mountain data reviewed in ‘Wind Power in Wyoming,’ attached to Guardians’ DEIS comments for this plan), and siting these tall structures in the midst of prime nesting habitat is likely to result in a significant level of habitat abandonment by GRSG. The 2-mile buffer for such tall structures (FEIS at J-1) is not supported by the science to protect nesting and brood-rearing habitats, and instead a 5.3-mile buffer (after Holloran and Anderson 2005) should be applied. In addition, this restriction should not be limited to PHMAs but should also extend to General Habitats and Winter Concentration Areas as well.

Issue Number: PP-ND-GRSG-15-02-10

Organization: Beatty & Wozniak

Protestor: Bret Sumner

Issue Excerpt Text: XTO also protests the BLM’s failure to utilize sufficient, high quality, recent science in developing conservation measures for the proposed final North Dakota RMPA. The North Dakota RMPA does not meet BLM’s science and data requirements under its own Land Use Planning Handbook and Information and Data Quality Guidelines, or under the requirements of NEPA. BLM Land Use Planning Handbook H-1601-1, Appendix D, p. 13; 40 CFR § 1500.1(b); 40 CFR §

1502.8. In developing a land use plan amendment, the BLM cannot evaluate consequences to the environment, determine least restrictive lease stipulations, or assess how best to promote domestic energy development without adequate data and analysis.

Issue Number: PP-ND-GRSG-15-03-27

Organization: North Dakota Petroleum Council

Protestor: Ron Ness

Issue Excerpt Text: The stipulations, restrictions, and conservation measures in the Proposed RMPA are largely based on the U.S. Fish and Wildlife Service’s (FWS) GRSG (*Centrocercus urophasianus*) Conservation Objections: Final Report (Feb. 2013) (“COT Report”) and the BLM’s Report on National GRSG Conservation Measures Produced by the BLM GRSG National Technical Team (Dec. 2011) (“NTT Report”). Reliance on these reports is arbitrary and capricious under the Administrative Procedure Act (APA). 5 USC § 706(2)(A). The NTT Report and the COT Report failed to utilize the best available science; failed to adhere to the standards of integrity, objectivity, and transparency required by the agency guidelines implementing the Data Quality Act (“DQA”), Consolidated Appropriates Act of 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-153 – 2763A-154 (2000); and suffered from inadequate peer review.

Issue Number: PP-ND-GRSG-15-03-28

Organization: North Dakota Petroleum Council

Protestor: Ron Ness

Issue Excerpt Text: For example, at least one reviewer has noted numerous technical errors in the NTT Report, including use of citations that are not provided in the “Literature Cited” section. Megan Maxwell, BLM’s NTT Report: Is It the Best Available Science or a Tool to Support a Pre-determined Outcome?, p. 13-14 (May 20, 2013) (“NWMA Review”), Attachment 2. In addition, for two of the most frequently cited authors in the NTT Report, J.W. Connelly and B.L. Walker, 34% of the citations had no corresponding source available to review. Id. at 14. Additionally, there are articles listed in the “Literature Cited” section that are not directly referenced and do not appear to have been used within the NTT Report itself.

Issue Number: PP-ND-GRSG-15-03-29

Organization: North Dakota Petroleum Council

Protestor: Ron Ness

Issue Excerpt Text: The NTT Report also cites authority misleadingly in a number of cases. NWMA Review at 14. For example, the NTT Report stipulates that with regard to fuel management, sagebrush cover should not be reduced to less than 15 percent. NTT Report at 26. However, the source cited for this proposition, John W. Connelly, et al., Guidelines to Manage Sage-Grouse Populations & their Habitats, 28 Wildlife Society Bulletin 967 (2000) (“Connelly et al. 2000”), does not support the NTT Report’s conclusion. NWMA Review at 14. Rather, Connelly et al. 2000 states that land treatments should not be based on schedules, targets, and quotas. Connelly et al. 2000 at

977. Connelly et al. 2000 distinguished between types of habitat and provided corresponding sagebrush canopy percentages which vary from 10 percent to 30 percent depending on habitat function and quality. NWMA Review at 14 (citing Connelly et al. 2000 at 977, tbl. 3). The NTT Report failed to explain how this nuanced range of canopy cover percentages, which varies for breeding, brood-rearing, and winter habitat, as well as for mesic sites and arid sites, could translate into a range-wide 15 percent canopy cover standard.

Issue Number: PP-ND-GRSG-15-03-30

Organization: North Dakota Petroleum Council

Protestor: Ron Ness

Issue Excerpt Text: The NTT Report also fails to adequately support its propositions and conclusions. For example, the NTT Report provided no scientific justification for the three percent disturbance cap, which has been proposed in the Proposed RMP. Rather, the disturbance cap was based upon the “professional judgment” of the NTT authors and the authors of the studies they cited, which represents opinion, not fact. See Western Energy Alliance, et al., Data Quality Act Challenge to U.S. Department of the Interior Dissemination of Information Presented in the Bureau of Land Management National Technical Team Report at 30 (Mar. 18, 2015) (“NTT DQA Challenge”). Other scientific literature not considered in the NTT Report has refuted the belief that there is a widely accepted or “magic” number of habitat patch size or population that can defensibly be used to identify a “viable” population of any species, much less greater sage- grouse. Curtis H. Flather, et. al, Minimum Viable Populations: Is There a “Magic Number” for Conservation Practitioners?, 26 Trends in

Ecology & Evolution 307, 314 (June 2011), Attachment 4. Conservation measures based upon “professional judgment” and flawed studies do not constitute the best available science, and BLM should not have relied upon these studies or the NTT Report in the Proposed RMP.

Issue Number: PP-ND-GRSG-15-03-31

Organization: North Dakota Petroleum Council

Protestor: Ron Ness

Issue Excerpt Text: Finally, the NTT Report failed to cite or include numerous scientific papers and reports on oil and gas operations and mitigation measures that were available at the time the report was created. See NTT DQA Challenge, Exhibit C. For example, the NTT Report failed to cite a 2011 paper (which was made available to the NTT authors) that discusses the inadequacy of the research relied upon by the NTT Report in light of new technologies and mitigation measures designed to enhance efficiency and reduce environmental impacts. E.g., Rob R. Ramey, Laura M. Brown, & Fernando Blackgoat, Oil & Gas Development & Greater Sage-Grouse (*Centrocercus urophasianus*): A Review of Threats & Mitigation Measures, 35 J. of Energy & Development 49 (2011) (“Ramey, Brown, & Blackgoat”), Attachment 5. As explained by Ramey, Brown, and Blackgoat, studies prior to the NTT Report’s publication were based upon older, more invasive forms of development: “Current stipulations and regulations for oil and gas development in sage-grouse habitat are largely based on studies from the Jonah Gas Field and Pinedale anticline. These and other intensive developments were permitted decades ago, using older, more invasive technologies and methods. The density of wells is high, largely due to the previous

practice of drilling many vertical wells to tap the resource (before the use of directional and horizontal drilling of multiple wells from a single surface location became widespread), and prior to concerns over sage-grouse conservation. This type of intensive development set people’s perceptions of what future oil and gas development would look like and what its impact to GRSG would be. These fields, and their effect on GRSG, are not necessarily representative of GRSG responses to less intensive energy development. Recent environmental regulations and newer technologies have lessened the threats to GRSG”.

Ramey, Brown, & Blackgoat at 70; see also NTT DQA Challenge, Exhibit A at 5 (stating that reliance on older data is not representative of current development and thus an inappropriate basis for management prescriptions). The NTT authors’ refusal to consider this paper and to rely instead on papers that address outdated forms of oil and gas development renders most of the NTT Report’s recommendations for oil and gas development inapplicable to current practices.

Issue Number: PP-ND-GRSG-15-03-32

Organization: North Dakota Petroleum Council

Protestor: Ron Ness

Issue Excerpt Text: The effects of oil and gas development are overstated in the papers cited above and similar literature on the impacts of energy development on sage-grouse. Oil and gas development in Wyoming, home to nearly half the entire sage-grouse population, has affected no more than 25 percent of the over 2,350 leks in Wyoming. David H. Applegate & Nicholas L. Owens, Oil & Gas Impacts on

Wyoming's Sage-Grouse: Summarizing the Past & Predicting the Foreseeable Future, 8 Human-Wildlife Interactions 284, 284 (2014) (“Applegate & Owens”), Attachment 6. Yet, much of the existing literature on sage-grouse assumes oil and gas development in sage-grouse habitat is widespread and the primary ongoing threat to sage-grouse in the eastern portion of its range (Colorado, Montana, Utah and Wyoming). Not only has the existing level of impact from oil and gas impacts been severely overstated, but, more importantly, the technology associated with oil and gas development has shifted dramatically over the last decade from vertical wells with dense well pad spacing to directional and horizontal wells with significantly less disturbance and fragmentation per section of land developed. Applegate & Owens at 287 – 89. In 2012, the disturbance reduction resulting from this dramatic shift in drilling technology may have approached approximately 70 percent in Wyoming alone. Id. at 289. All pre-2014 literature that purports to characterize oil and gas impacts to sage-grouse is derived from oil and gas development from vertically drilled fields. As such, the scientific literature on foreseeable impacts to sage-grouse from oil and gas development is outdated and fails to recognize the fundamental change in drilling technology that is being deployed in oil and gas producing basins across the United States. BLM should not rely on the NTT Report when forming oil and gas stipulations and conservation measures in the Proposed RMP, because the NTT Report does not represent the best available science.

Issue Number: PP-ND-GRSG-15-03-33

Organization: North Dakota Petroleum Council

Protestor: Ron Ness

Issue Excerpt Text: The COT Report also fails to utilize the best available science, and BLM inappropriately relied upon it in the Proposed RMP. The COT Report provides no original data or quantitative analyses, and therefore its validity as a scientific document hinges on the quality of the data it employs and the literature it cites. See Western Energy Alliance, et al., Data Quality Act Challenge to U.S. Department of the Interior Dissemination of Information Presented in the U.S. Fish and Wildlife Service Conservation Objectives Team Report, Exhibit A at 1 (Mar. 18, 2015) (“COT DQA Challenge”), Attachment 7. The COT Report, like the NTT Report, fails to cite all of the relevant scientific literature and, as a result, perpetuates outdated information and assumptions. COT DQA Challenge, Exhibit A at 1. For example, the COT Report ignores numerous studies on the effects of predation on sage-grouse populations, and therefore underestimates the significance of predation as a threat. COT DQA Challenge at 56 – 63. The COT Report also relies upon a paper by Edward Garton from 2011 for its threats analysis, population definitions, current and projected numbers of males, and probability of population persistence. COT Report at iv, 12, 16, 29, 30, 32 (citing Edward O. Garton, et al., Greater Sage-Grouse Population Dynamics & Probability of Persistence, in Greater Sage-Grouse: Ecology & Conservation of a Landscape Species & Its Habitats 293 (Steven T. Knick & John W. Connelly eds., 2011) (“Garton et al. 2011”). This paper contains serious methodological biases and mathematical errors. COT DQA Challenge, Exhibit A at 2. Furthermore, the paper’s data and modeling programs are not public and thus not verifiable nor reproducible. Id. Finally, the COT Report provides a table assigning various rankings to greater sage-grouse

threats, but gives no indication that any quantitative, verifiable methodology was used in assigning these ranks. See COT Report at 16 – 29, tbl. 2. Absent a quantifiable methodology, these rankings are subjective and BLM should not rely upon any conservation measures derived from them.

Issue Number: PP-ND-GRSG-15-03-34

Organization: North Dakota Petroleum Council

Protestor: Ron Ness

Issue Excerpt Text: The COT Report also fails to even mention hunting, which is a well-documented source of GRSG mortality. See generally COT Report; Kerry P. Reese & John W. Connelly, Harvest Mgmt. for Greater Sage-Grouse: A Changing Paradigm for Game Bird Mgmt., in GRSG: Ecology & Conservation of a Landscape Species & Its Habitats 101, 106 tbl. 7.3 (Steven T. Knick & John W. Connelly eds., 2011) (showing estimated harvest of 207,433 birds from hunting from 2001 through 2007) (“Reese & Connelly”). Comparing the FWS reported harvest rates in the 2010 12-month finding on the greater sage-grouse, 75 Fed. Reg. 13,909 (Mar. 23, 2010), to the population projections developed by Garton et al. 2011 suggests that harvest rates for sage-grouse exceeded 20 percent of the overall spring population for approximately 25 years from 1970 thru 1995. Harvest rate declines after 1995 correspond to sage-grouse population increases since that time. BLM and the Department of the Interior have failed to discuss or reconcile these two data sets, both of which were relied upon in the 2010 listing. The best available scientific data suggests an ongoing decrease in the harvest rate that is deemed acceptable from 30 percent in 1981 to 20 to 25 percent in 1987 to five to 10 percent in 2000. Reese &

Connelly at 110 – 11. High harvest rates coupled with limited lek counts suggest hunting may have been a primary cause of suggested significant population declines from the 1960s through the 1980s. Further, as noted below in text taken directly from the 2010 12-month finding, FWS suggests over 2.3 million birds were harvested in the 1970s alone:

Issue Number: PP-ND-GRSG-15-03-35

Organization: North Dakota Petroleum Council

Protestor: Ron Ness

Issue Excerpt Text: The NTT and COT Reports do not satisfy these standards. Both reports rely on faulty studies with questionable methodology and assumptions, as detailed above. The NTT Report contained numerous references to studies for which it did not provide citations, and it failed to provide supporting data for many of the non-public studies it cited. NWMA Review at 14; NTT DQA Challenge at 25 – 26. The NTT Report gave no reason for this omission of key data, which is inconsistent with the guidelines implementing the DQA. See OMB Guidelines, V(3)(b)(ii)(B), 67 Fed. Reg. at 8459 (requiring that data and methodology be made sufficiently transparent that an independent reanalysis can be undertaken, absent countervailing interests in privacy, trade secrets, intellectual property, and confidentiality protections); DOI Guidelines, II(2), at 2; BLM Guidelines, 2(c), at 8. Similarly, the NTT Report did not provide any evidence that, because supporting data were not provided, an exceptionally rigorous robustness check was performed as required. OMB Guidelines, V(3)(b)(ii)(B)(ii), 67 Fed. Reg. at 8459; BLM Guidelines, 2(c), at 8. The studies upon which the NTT Report relies are therefore unverifiable and not

reproducible, which is inconsistent with the DQA guidelines. OMB Guidelines, V(3)(b)(ii)(B), 67 Fed. Reg. at 8459; BLM Guidelines, 2(c), at 8. The COT Report similarly cited frequently to a study whose data and programs are not public and, therefore, not reproducible. COT DQA Challenge, Exhibit A at 7.

Issue Number: PP-ND-GRSG-15-03-36

Organization: North Dakota Petroleum Council

Protestor: Ron Ness

Issue Excerpt Text: Both the NTT and COT Reports lacked adequate peer review. OMB Guidelines generally state that information is considered objective if the results have been subjected to formal, independent, external peer review, but that presumption is rebuttable upon a persuasive showing that the peer review was inadequate. OMB Guidelines, Part V(3)(b), 67 Fed. Reg. at 8459. Because the NTT and COT Reports suffered from inadequate peer review, their results and conclusions cannot be considered objective.

Issue Number: PP-ND-GRSG-15-03-37

Organization: North Dakota Petroleum Council

Protestor: Ron Ness

Issue Excerpt Text: The buffer restrictions are also unsupported by sound science. As an initial matter, current data from the Pinedale planning area refutes the necessity of wide buffers surrounding sage-grouse leks. A recent review of this data showed that regional climatic variations, rather than anthropogenic threats such as oil and gas, accounted for 78 percent of the variation in lek attendance in the Pinedale area from 1997 to 2012. Rob R. Ramey, Joseph Thorley, & Lex Ivey, Hierarchical Bayesian

Analyses of Greater Sage-grouse Population Dynamics in the Pinedale Planning Area & Wyoming Working Groups: 1997-2012, at 3 (Dec. 2014), Attachment 10. Because current data demonstrates that the impacts of anthropogenic disturbances on sage-grouse populations are lower than previously thought, the buffer restrictions are not supported by current science.

Moreover, many of the studies that the USGS Buffer Report relied upon use outdated information and contain other methodological weaknesses or errors. One study the report cites to describe the response by sage-grouse to industrial development contains serious flaws. D.E. Naugle, et al., Energy Development & Greater Sage-Grouse, in Greater Sage-Grouse: Ecology of a Landscape Species & its Habitats, Studies in Avian Biology No. 38 (S.T. Knick & J.W. Connelly eds., 2011) (“Naugle et al. 2011”). As one reviewer has noted, this study is not an impartial review of existing literature. The authors examined 32 studies, reports, management plans, and theses regarding sage-grouse responses to energy development, and dismissed all but seven of these studies, four of which were authored by the reviewers. Rob R. Ramey & Laura M. Brown, A Comprehensive Review of Greater Sage-Grouse: Ecology & Conservation of a Landscape Species & its Habitat at 115 (Feb. 2012), Attachment 11. Naugle et al. 2011 also misrepresented the results of another study to support their claim that sage-grouse abandon leks due to noise and human activity. Id. at 116. Further, of the seven studies reviewed, four focused on impacts to sage-grouse in the Pinedale/Jonah Field development area and two focused on coal bed natural gas (CBNG) development in the Powder River Basin. Id. Historical development in these areas is far more intensive and impactful

than current development patterns and technologies, and these studies' results cannot serve as a basis for imposing management restrictions on different forms of development. See Applegate & Owens at 287 – 88 (noting that modern forms of development cause fewer impacts than older, more intensive forms of development). Naugle et al. 2011 overall is an inappropriate basis for the lek buffers.

Another study on which the USGS Buffer Report relied for its energy buffers in particular had similar problems. See USGS Buffer Report at 5, 7 (citing A.J. Gregory & J.L. Beck, Spatial Heterogeneity in Response of Male Greater Sage-Grouse Lek Attendance to Energy Development, PLoS One, June 2014). This study, like many similar studies, was based on peak male lek count data. Id. at 2; see also D.H. Johnson, et al., Influences of Env't'l & Anthropogenic Features on Greater Sage-Grouse Populations, 1997 – 2007, in Greater Sage-Grouse: Ecology of a Landscape Species & its Habitats, Studies in Avian Biology No. 38, at 407 (S.T. Knick & J.W. Connelly eds., 2011). Peak male lek count data tends to bias lek attendance estimates and therefore leads to inaccurate population trend estimates. Rob R. Ramey, et al., Hierarchical Bayesian Analyses of Greater Sage-Grouse Population Dynamics in the Pinedale Planning Area & Wyoming Working Groups: 1997 – 2012, at 2 – 3 (Dec. 2014), Attachment 12. Mean average lek counts provide a more accurate picture of population trends. See, e.g., id.

Further, the Gregory and Beck study results are based on data that do not reflect current development realities. The study's conclusions are based on well density data and lek counts from 1991 through 2011. Gregory & Beck at 4. The period in which

sage-grouse reacted most strongly to increasing well densities, according to the authors, was from 2007 – 2011. Id. However, the authors note that the trend in male lek attendance from 2007 – 2011 was a response to well-pad densities in 2004. Id. at 7. Despite significant changes in oil and gas development patterns and technologies since 2004, the authors extrapolate from these results a prediction that oil and gas development will lead to even greater decreases in lek attendance in the coming years. Id. This prediction assumes that oil and gas development in the future will mirror oil and gas development in the past, an unlikely outcome. In 2004, intensive development was the norm in the Powder River Basin, the Pinedale/Jonah Field, and in most oil and gas developments across the country. See, e.g., Applegate & Owens at 287. As noted earlier in this protest, horizontal and directional drilling permits increased 40-fold in the ten years following 2004, and more intensive, conventional development permits decreased by about half over the same time period. Applegate & Owens at 287. As Applegate and Owens note, “[a] single horizontal well now takes the place of 8 to 16 vertical wells,” leading to reductions in well pad disturbances, linear disturbances, and disturbances due to human activity. Id. at 288. Gregory and Beck's study does not account for these changes in oil and gas technology and is an inappropriate basis for imposing buffers on all oil and gas development across greater sage-grouse range.

Issue Number: PP-ND-GRSG-15-06-1

Organization: Defenders of Wildlife

Protestor: Mark Salvo

Issue Excerpt Text: Setting lek buffer-distances at the minimum (lower) end of the range recommended by the best available

scientific information and other sources limits options for future management in sage-grouse habitat. Allowing land uses and development to within minimum distances of sage-grouse breeding areas would have a greater negative impact on sage-grouse than if the agency required larger lek buffers. Managing to the minimum not only increases the risk of harming sage-grouse, but also maximizes the potential for land uses and development

activities to inadvertently breach buffer boundaries. Offering exceptions to minimum buffers would almost certainly affect sage-grouse populations that depend on those leks and associated nesting and brood-rearing habitat. Requiring larger lek buffers would both conserve sage-grouse and preserve agency options for managing for sage-grouse and other values in breeding, nesting and brood-rearing habitat.

Summary:

The North Dakota PRMPA/FEIS does not comply with the National Environmental Policy Act, the Data Quality Act, and the Land Use Planning Handbook's guidance to use the best available science because it relies on reports (e.g., COT Report, NTT Report, and Baseline Environmental Report), which do not comply with standards of integrity, objectivity, and transparency.

In addition, the North Dakota PRMP/FEIS does not comply with the National Environmental Policy Act, the Data Quality Act, and the Land Use Planning Handbook's guidance to use the best available science in determining lek buffer distances.

Response:

Before beginning the North Dakota PRMP/FEIS, data from all sources, adequacy of existing data, data gaps, and the type of data necessary to support informed management decisions at the land-use plan level.

In March 2012, the FWS initiated a collaborative approach to develop range-wide conservation objectives for the greater sage-grouse to inform the 2015 decision about the need to list the species and to inform the collective conservation efforts of the many partners working to conserve the species. In March 2013, this team of State and FWS representatives, released the Conservation Objectives Team (COT) report based upon the best scientific and commercial data available at the time that identifies key areas for greater sage-grouse conservation, key threats in those areas, and the extent to which they need to be reduced for the species to be conserved. The report serves as guidance to Federal land management agencies, State greater sage-grouse teams, and others in focusing efforts to achieve effective conservation for this species. The COT Report qualitatively identifies threats/issues that are important for individual populations across the range of greater sage-grouse, regardless of land ownership.

A National Technical Team (NTT) was formed as an independent, science-based team to ensure that the best information about how to manage the greater sage-grouse is reviewed, evaluated, and provided to the BLM in the planning process. The group produced a report in December 2011 that identified science-based management considerations to promote sustainable greater sage-grouse populations. The NTT is staying involved as the BLM work through the Strategy to

make sure that relevant science is considered, reasonably interpreted, and accurately presented; and that uncertainties and risks are acknowledged and documented.

Both the NTT report and the COT report tier from the WAFWA Greater Sage-grouse Comprehensive Conservation Strategy (Stiver et al. 2006).

The Summary of Science, Activities, Programs and Policies that Influence the Rangeland Conservation of Greater Sage-Grouse (also referred to as the Baseline Environmental Report [BER]; Manier et al. 2013) then provides complimentary quantitative information to support and supplement the conclusions in the COT. The BER assisted the BLM in summarizing the effect of their planning efforts at a range-wide scale, particularly in the affected environment and cumulative impacts sections. The BER looked at each of the threats to greater sage-grouse identified in the Fish and Wildlife Service's "warranted but precluded" finding for the species. For these threats, the report summarized the current scientific understanding, as of report publication date (June 2013), of various impacts to greater sage-grouse populations and habitats. The report also quantitatively measured the location, magnitude, and extent of each threat. These data were used in the planning process to describe threats at other levels, such as the sub-regional boundary and WAFWA Management Zone scale, to facilitate comparison between sub-regions. The BER provided data and information to show how management under different alternatives may meet specific plans, goals, and objectives.

Additionally, the BLM consulted with, collected, and incorporated data from other agencies and sources, including but not limited to the U.S. Fish and Wildlife Service and the North Dakota Game and Fish Department and relied on numerous data sources and scientific literature to support its description of baseline conditions (PRMP/FEIS, Chapter 3) and impact analysis (PRMP/FEIS, Chapters 4 and 5). A list of information and literature used is contained in Chapter 7.

As a result of these actions, the BLM gathered the necessary data essential to make a reasoned choice among the alternatives analyzed in detail in the PRMP/FEIS, and provided an adequate analysis that led to an adequate disclosure of the potential environmental consequences of the alternatives (PRMP/FEIS, Chapters 4 and 5). As a result, the BLM has taken a "hard look," as required by the NEPA, at the environmental consequences of the alternatives in the PRMP/FEIS to enable the decision maker to make an informed decision. Finally, the BLM has made a reasonable effort to collect and analyze all available data.

On November 21, 2014 the US Geological Survey (USGS) published "Conservation Buffer Distance Estimates for Greater Sage-Grouse—A Review" (Manier et. al. 2014). The USGS review provided a compilation and summary of published scientific studies that evaluate the influence of anthropogenic activities and infrastructure on GRSG populations. The North Dakota PRMP/FEIS included a management action to incorporate the lek buffer-distances identified in the report during NEPA analysis at the implementation stage (PRMP/FEIS, Appendix J). As stated in this appendix,

Justifiable departures to decrease or increase from these distances, based on local data, best available science, landscape features, and other existing protections (e.g., land use

allocations, state regulations) may be appropriate for determining activity impacts. The USGS report recognized “that because of variation in populations, habitats, development patterns, social context, and other factors, for a particular disturbance type, there is no single distance that is an appropriate buffer for all populations and habitats across the sage-grouse range”. The USGS report also states that “various protection measures have been developed and implemented... [which have] the ability (alone or in concert with others) to protect important habitats, sustain populations, and support multiple-use demands for public lands”. All variations in lek bufferdistances would require appropriate analysis and disclosure as part of activity authorization. (p. J-2).

As such, the BLM has considered the best available science when determining lek buffers and has incorporated a mechanism to consider additional science as it becomes available.

Public Participation

Issue Number: PP-ND-GRSG-15-03-5

Organization:North Dakota Petroleum Council

Protestor:Ron Ness

Issue Excerpt Text: The Trades protest substantial changes made between the Draft RMPA and Proposed RMPA without notice and an opportunity for public comment. In particular, the Trades protest the unexpected adoption of the wholly new Proposed RMPA rather than one of the alternatives analyzed in the Draft EIS. Although BLM maintains that components of the Proposed RMPA were analyzed in other alternatives, the combination of these components in the

Proposed RMPA creates a dramatically different alternative that requires notice and public comment. Furthermore, the Proposed RMPA contains a number of significant elements that were not included in any of the alternatives analyzed in the Draft RMPA, including the requirement that mitigation produce a net conservation gain, and the lek distance buffers, as well as the extensively revised monitoring plan and mitigation strategy. These proposed changes violate NEPA because they were not included in the Draft RMPA or have been so significantly changed as to render them unrecognizable, and because BLM did not allow the public an opportunity to meaningfully comment on these provisions

Summary:

The BLM did not allow the public an opportunity to comment on new provisions found in the Proposed RMPA or analyzed in the Draft EIS, including the requirement that mitigation produce a net conservation gain, lek distance buffers, as well as the mitigation plan and monitoring plans.

The BLM did not sufficiently provide public participation opportunities after the Draft EIS was issued considering new provisions in the Proposed RMPA.

Response:

The CEQ regulations explicitly discuss agency responsibility towards interested and affected parties at 40 CFR 1506.6. The CEQ regulations require that agencies shall: (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures (b) Provide

public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies that may be interested or affected.

Public involvement entails “The opportunity for participation by affected citizens in rule making, decision making, and planning with respect to the public lands, including public meetings or hearings . . . or advisory mechanisms, or other such procedures as may be necessary to provide public comment in a particular instance” (FLPMA, Section 103(d)). Several laws and Executive orders set forth public involvement requirements, including maintaining public participation records. The BLM planning regulations (43 CFR 1601- 1610) and the CEQ regulations (40 CFR 1500-1508) both provide for specific points of public involvement in the environmental analysis, land use planning, and implementation decision-making processes to address local, regional, and national interests. The NEPA requirements associated with planning have been incorporated into the planning regulations.

NEPA Handbook H-1790-1, page 101

If you make major changes to the draft EIS, the final EIS should be a complete full text document. The content of a full text document is substantially the same as the corresponding draft EIS except that it includes copies of substantive comments on the draft EIS, responses to those comments and changes in or additions to the text of the EIS in response to comments (40 CFR 1503.4). A full text final EIS may incorporate by reference some of the text or appendices of the draft EIS.

43 CFR 1610.2 Public participation.

(a) The public shall be provided opportunities to meaningfully participate in and comment on the preparation of plans, amendments and related guidance and be given early notice of planning activities. Public involvement in the resource management planning process shall conform to the requirements of the National Environmental Policy Act and associated implementing regulations.

(f) Public notice and opportunity for participation in resource management plan preparation shall be appropriate to the areas and people involved and shall be provided at the following specific points in the planning process:

- (1) General notice at the outset of the process inviting participation in the identification of issues (See 1610.2(c) and 1610.4-1);
- (2) Review of the proposed planning criteria (See 1610.4-2);
- (3) Publication of the draft resource management plan and draft environmental impact statement (See §1610.4-7);
- (4) Publication of the proposed resource management plan and final environmental impact statement which triggers the opportunity for protest (See 1610.4-8 and 1610.5-1(b)); and
- (5) Public notice and comment on any significant change made to the plan as a result of action on a protest (See 1610.5-1(b)).

A description of the public comment process and the development of the North Dakota GRSG PRMPA/FEIS is found in section 1.9, page 1-22. As a result of public comments, best science, cooperating agency coordination, and internal review of the Draft RMPA/EIS, the BLM has developed the Proposed Plan Amendment for managing BLM-administered land within the North Dakota sub-region planning area. In developing the Proposed Plan Amendment, the BLM made modifications to the Preferred Alternative identified in the Draft RMPA/EIS. The Proposed

Plan Amendment focuses on addressing public comments, while continuing to meet the BLM's legal and regulatory mandates. Changes made to the Proposed Plan Amendment from the preferred alternative D in Draft RMPA/EIS are summarized and thoroughly discussed in section 1.10, starting on page 1-22. This summary explains where new provisions found in the Proposed RMPA were built from provisions previously considered and analyzed in the Draft EIS, including the requirement that mitigation produce a net conservation gain, lek distance buffers, as well as the mitigation plan and monitoring plans.

The BLM updated the North Dakota GRSG PRMPA/FEIS based on public comment received on the Draft RMPA/EIS (see Appendix L, Response to Comments on the Draft Resource Management Plan Amendment/Environmental Impact Statement). NEPA requires agencies to prepare a supplement to the draft EIS: 1) if the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or 2) if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

A supplement is not necessary if a newly formulated alternative is a minor variation of one of the alternatives is qualitatively within the spectrum of alternatives analyzed in the draft EIS. The Proposed Plan Amendment includes components of the alternatives analyzed in the Draft RMPA/EIS. Taken together, these components present a suite of management decisions that present a minor variation of alternatives identified in the Draft RMPA/EIS and are qualitatively within the spectrum of alternatives analyzed. For example, changes to the allocations of oil and gas and lands and realty were within the range of alternatives analyzed (see above description for Chapter 2 changes). As such, the BLM has determined that the Proposed Plan Amendment is a minor variation and that the impacts of the Proposed Plan Amendment would not affect the human environment in a substantial manner or to a significant extent not already considered in the EIS. The impacts disclosed in the North Dakota GRSG PRMPA/FEIS are similar or identical to those described Draft RMP/EIS. Therefore, a supplemental EIS is not required for this RMPA/EIS.

The agencies have fulfilled the requirements of providing opportunity for public involvement during the planning and NEPA process.

Impacts-Greater Sage-Grouse

Issue Number: PP-ND-GRSG-15-01-19

Organization: WildEarth Guardians

Protestor: Erik Molvar

Issue Excerpt Text: For no alternative does BLM provide any analysis of whether the proposed management is likely to result in an increase, maintenance, or further decrease of sage grouse populations, or describe the relative magnitude of projected increases or decreases, or what effect

management alternatives will have on population persistence projections (Garton et al. 2015). This type of analysis has been performed for some or all of Wyoming under various scenarios in the scientific literature (e.g., Holloran 2005, Copeland et al. 2013, Taylor et al. 2012).

Issue Number: PP-ND-GRSG-15-04-12

Organization: Western Watersheds Project

Protestor: Travis Bruner

Issue Excerpt Text: We protest the failure to analyze whether the sage-grouse populations in the planning area will be conserved, enhanced, or recovered by the management actions within the plan. While the stated purpose of the PRMP is to identify and incorporate appropriate conservation measures into RMPs to conserve, enhance, and/or restore GRSG habitat by reducing, eliminating, or minimizing threats to that habitat, PRMPA/FEIS at 1-4, the plan provides no analysis of whether sage-grouse populations in the planning area will be conserved, enhanced, or recovered by the management actions within the plan.

Issue Number: PP-ND-GRSG-15-04-13
Organization: Western Watersheds Project
Protestor: Travis Bruner

Issue Excerpt Text: NEPA requires that agencies take a ‘hard look’ at the direct impacts of activities approved under projects and plans, the efficacy of mitigation measures, and cumulative impacts considering other reasonably foreseeable impacts that will occur to the resource in question. BLM Resource Management Plans historically have had lifespans exceeding 20 to 30 years, and thus it is critical that the Sage-grouse Plan Amendments strike the proper level of protection for this species. For no alternative does BLM provide any analysis of whether the proposed management is likely to result in an increase, maintenance, or further decrease of sage grouse populations, or describe the relative magnitude of projected increases or decreases, or what effect management alternatives will have on population persistence projections (Garton et al. 2015).

Summary:

The North Dakota GRSG PRMPA/FEIS fails to adequately analyze the impacts to GRSG because the analysis of the alternatives do not address whether the proposed management is likely to result in an increase, maintenance, or further decrease of Sage-Grouse populations. The PRMPA also fails to address how the plan will address direction on mitigation.

Response:

A land use planning-level decision is broad in scope. For this reason, analysis of land use plan alternatives is typically broad and qualitative rather than quantitative or focused on site-specific actions. The baseline data provides the necessary basis to make informed and land use plan-level decisions. The effectiveness of these decisions on changes Sage-Grouse populations will be evaluated based on criteria in the monitoring plan see Appendix F of the Greater North Dakota GRSG PRMPA/FEIS.

Chapter 4 of the North Dakota GRSG PRMPA/FEIS provides analysis of different conservation measures to reduce or eliminate threats, including habitat disturbance, lek buffers, disturbance, and habitat degradations. Mitigation is addressed for all threats (See Chapter 2 page 2-2). Additional criteria for addressing mitigation is found in Appendix E Regarding Regional Mitigation Strategy.

Instructional Memorandum 2012-044 provided direction for the National Greater Sage-grouse Conservation Measures (NTT report). Conservation measures included in the NTT based alternative focus primarily on greater sage-grouse PPH and includes percent disturbance caps as a conservation measure to maintain or increase sage-grouse populations. The data for this report

were gathered from BLM, Forest Service, and other sources and were the "best available" at the range-wide scale at the time collected. The report provides a framework for considering potential implications and management options, and demonstrates a regional context and perspective needed for local planning and decision-making.

Impacts-Air Quality, Climate Change, and Noise

Issue Number: PP-ND-GRSG-15-01-13

Organization: WildEarth Guardians

Protestor: Erik Molvar

Issue Excerpt Text:

This failing has been incorporated by the BLM in its plan revision by specifying that noise limits will be measured within 0.6 mile of the lek instead of at the periphery of occupied seasonal habitat. In the Wyoming Basins Ecoregional Assessment, the authors pointed out, "Any drilling <6.5 km

[approximately 4 miles] from a GRSG lek could have indirect (noise disturbance) or direct (mortality) negative effects on sage-grouse populations." WBEA at 131... The ambient level needs to be set at 15 dBA and maximum noise allowed should not exceed 25 dBA to prevent lek declines due to noise. In addition, by setting the noise level at the lek, BLM fails to adequately protect nesting habitats, wintering habitats, and brood-rearing habitats from significant noise impacts.

Summary:

The North Dakota GRSG PRMPA/FEIS violated NEPA by failing to take a hard look at the high quality information when setting noise level limits near lek perimeters to adequately protect nesting habitats, wintering habitats, and brood-rearing habitats from significant noise impacts. Specifically, the FEIS failed to consider the need to measure noise limits at greater distances and at non-lekking sites, and to define the ambient noise measure.

Response:

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

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

NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)). The BLM is required to take a "hard look" at potential environmental impacts of adopting the North Dakota GRSG PRMPA/FEIS.

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

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

As the decisions under consideration by the BLM are programmatic in nature and would not result in on-the-ground planning decision or actions (e.g., the BLM is not approving an Application for Permit to Drill to start drilling), the scope of the analysis was conducted at a regional, programmatic level. The analysis focuses on the direct, indirect, and cumulative impacts that could potentially result from on-the-ground changes. This analysis identifies impacts that may result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

The North Dakota GRSG PRMPA/FEIS used the best available research information for setting the noise level at the edge of the lek perimeter instead of the perimeter of the occupied seasonal habitat and setting the limit at 10dB instead of 15dB. The FEIS discusses impacts from noise throughout Chapter 4 for each resource that could be impacted. Chapter 4, Section, 5.3 Special Status Species—Greater Sage-Grouse describes the environmental consequences associated with the impacts on GRSG and their habitat from activities carried out in conformance with the FEIS, coupled with the mitigation of those activities and the goal of a net conservation gain (FEIS Chapter 4).

The BLM has reviewed the suggested Wyoming Basin Rapid Ecoregional Assessment to determine if the information is substantially different than the information considered and cited in the North Dakota GRSG PRMPA/FEIS planning effort regarding noise limits to leks. The Wyoming Basin Rapid Ecoregional Assessment does not provide additional information that would result in effects outside the range of effects already discussed in the North Dakota GRSG PRMPA/FEIS planning effort.

The North Dakota GRSG PRMPA/FEIS includes a bibliography and reference section located in Volume II, Chapter 7, page 7-1 of the FEIS, which lists information considered by the BLM in preparation of the North Dakota GRSG PRMPA/FEIS planning effort.

The BLM complied with NEPA's requirement to analyze the environmental consequences/impacts to noise limits to leks in the North Dakota GRSG PRMPA/FEIS.

Impacts-Oil and Gas

Issue Number: PP-ND-GRSG-15-03-10
Organization:North Dakota Petroleum

Council

Protestor:Ron Ness

Issue Excerpt Text: The Final EIS also does not adequately analyze the aggregated impacts of the Proposed RMPA’s leasing and development restrictions on oil and gas development. The Proposed RMPA discourages issuance of rights-of-way across 32,900 acres of lands, imposes new RDFs and conservation measures on existing leases, and makes development on existing leases subject to a requirement that project proponents obtain compensatory mitigation resulting in a net conservation gain. The measures, when combined with the extensive limitations on new leases, including NSO stipulations in PHMA and CSU stipulations in GHMA, will cumulatively stymie oil and gas development on federal lands within the planning area. The Final EIS does not adequately recognize the cumulative impacts of leasing and development restrictions on federal lands.

Issue Number: PP-ND-GRSG-15-03-11

Organization:North Dakota Petroleum Council

Protestor:Ron Ness

Issue Excerpt Text: Additionally, the Final EIS does not adequately analyze the effects of the requirement that land users provide compensatory mitigation to obtain a “net conservation gain.” Most significantly, the Final EIS does not analyze whether sufficient compensatory mitigation is available to satisfy the requirements of the mitigation framework. The BLM must examine whether adequate mitigation

Summary:

The North Dakota GRSG PRMPA/FEIS does not adequately analyze the impacts of the Proposed RMPA on oil and gas development. Additionally, the North Dakota GRSG PRMPA/FEIS does not analyze the availability of compensatory mitigation within the planning

opportunities exist in the planning area, such as through conservation easements or restoration activities. This analysis is particularly important because FWS has not endorsed any mitigation banks or exchanges in Colorado, Utah, Montana, North Dakota, and California; accordingly, land users may have a difficult time securing mitigation opportunities. BLM cannot condition permits on a requirement that land users cannot fulfill due to lack of mitigation. Accordingly, BLM must analyze the availability of compensatory mitigation in the Final EIS.

Issue Number: PP-ND-GRSG-15-03-12

Organization:North Dakota Petroleum Council

Protestor:Ron Ness

Issue Excerpt Text: Finally, the BLM did not adequately analyze the impacts right-of-way avoidance areas will have upon existing oil and gas leases. The Proposed RMPA would designate 32,900 acres as right-of-way avoidance areas. At the same time, the Proposed RMPA states that 94,834 acres of public lands in the planning area are currently under lease for oil and gas. Proposed RMPA at 3-39. To the extent individual leases, or even groups of leases or potential development areas, are isolated from roads or transportation infrastructure, lessees will be unable to develop the resources present. BLM must ensure that access is allowed to both existing and newly issued oil and gas leases in the planning area. Accordingly, BLM must analyze the impacts of the right-of- way avoidance and exclusion areas in the Proposed RMPA.

area.

Response

Impacts Analysis

The CEQ regulations require an environmental impact statement to "succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The description shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues" (40 CFR 1502.15). The BLM complied with these regulations in writing its environmental consequences section. The requisite level of information necessary to make a reasoned choice among the alternatives in an EIS is based on the scope and nature of the proposed decision. The analysis of impacts provided in Chapter 4 of the North Dakota GRSG PRMPA/FEIS is sufficient to support, at the general land use planning-level of analysis, the environmental impact analysis resulting from management actions presented in the Proposed RMPA/FEIS.

For example, section 4.7.1 of the North Dakota GRSG PRMPA/FEIS provides the assumption that existing fluid mineral leases will not be affected by closures proposed under the RMPA (p. 4-89). The BLM provides further analysis of impacts to fluid mineral development, specifically from proposed lands and realty decisions, in section 4.7.8 of the document. For example, impacts from lands and realty actions are anticipated to be the same under the proposed plan as they would be under Alternative D, which states, "because all fluid mineral development in PHMA would be subject to NSO stipulations under Alternative D, managing ROW avoidance areas in PHMA would have no impact on fluid minerals. All GHMA would be open to ROW location for oil and gas-related activities under Alternative D. However, identification of conservation measures to minimize surface disturbance and disrupting activities could increase the expense of developing facilities for oil and gas operations by limiting routing options and requiring the use of more expensive technology," (p. 4-103).

As specific actions come under consideration, the BLM will conduct subsequent NEPA analyses that include site-specific project and implementation-level actions, such as the issuance of ROWs. The site-specific analyses will tier to the plan-level analysis and expand the environmental analysis when more specific information is known. In addition, as required by NEPA, the public will be offered the opportunity to participate in the NEPA process for implementation actions.

Net Conservation Gain – Compensatory Mitigation

Post-ROD procedures and time frames for establishing a Regional Mitigation Strategy are described in Chapter 2 and Appendix E of the North Dakota GRSG PRMPA/FEIS. As stated in the North Dakota GRSG PRMPA/FEIS, a Regional Mitigation Strategy will be developed "to inform the mitigation components of NEPA analyses for BLM management actions and third-party actions that result in habitat loss and degradation. The Regional Mitigation Strategy will be developed within one year of the issuance of the Record of Decision on this EIS. The BLM's Regional Mitigation Manual MS-1794 will serve as a framework for developing the Regional

Mitigation Strategy,” (p. 2-32). The Regional Mitigation Strategy should provide further mitigation guidance on avoidance, minimization, and compensation, and include, as part of compensation, “discussion of impact/project valuation, compensatory mitigation options, siting, compensatory project types and costs, monitoring, reporting, and funds administration,” (Appendix E, p. E-3).

With regard to the impact of avoidance areas existing oil and gas leases, the BLM does not require a ROW authorization in circumstances where actions are tied to leases that are part of a unit. For example, a fluid mineral leaseholder wanting to install a pipeline within a unitized area would be exempt from acquiring a ROW authorization as long as the pipeline is contained in the unit. There are 24,842 acres of unitized areas in the decision area (North Dakota GRSG PRMPA/FEIS, p. 3-17).

The net impact of the ROW avoidance area is less because a portion of the PHMA is a unitized oil and gas field (this means facilities such as roads and pipelines needed for the development of the field are covered under a separate agreement between the operator and the BLM as opposed to the the realty program). All other utilities would be subject to the ROW avoidance area in PHMA (North Dakota GRSG PRMPA/FEIS, p. 4-33).

Impacts-Other

Issue Number: PP-ND-GRSG-15-01-18

Organization: WildEarth Guardians

Protestor: Erik Molvar

‘hard look’ at effectiveness of proposed mitigation measures because its impact analysis ignores the primacy of cheatgrass invasion in determining patterns of rangeland fire.

Issue Excerpt Text:

BLM has failed to take the legally required

Summary:

The North Dakota GRSG PRMPA/FEIS violated NEPA by failing to take a “hard look” at effectiveness of proposed mitigation measures and failed to adequately analyze the impacts of cheatgrass invasion in determining patterns of rangeland fire.

Response:

NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)). The BLM is required to take a “hard look” at potential environmental impacts of adopting the North Dakota GRSG PRMPA.

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

Cheatgrass impacts ecosystems in North Dakota in a different manner from the way it impacts ecosystems in the Great Basin (North Dakota GRSG PRMPA/FEIS, p. 3-29 and 3-38). Chapter Four of the North Dakota GRSG PRMPA/FEIS (P. 4-14 and 4-77 thru 4-78) discusses the effects of vegetation and wildland fire management on Cheatgrass (invasive annuals):

“The chance of a large wildfire in sagebrush is less in the NDFO planning area than in GRSG habitats to the west and south, due to the planning area’s vegetation (less cheatgrass) and cooler wetter climate. However, climate change may increase the risk of wildfire throughout Montana and the Dakotas (NRC 2010). Fire suppression may be used to maintain habitat for GRSG (NTT 2011, pg. 25-27). Fire suppression may preserve the condition of some vegetation communities, as well as habitat connectivity. This is particularly important in areas where fire frequency has increased as a result of weed invasion, or where landscapes are highly fragmented. Fire also increases opportunities for invasive species, such as cheatgrass (*Bromus tectorum*), to expand (Balch et al. 2012), and fire suppression may limit this expansion.

“Vegetation and weed treatments that decrease standing vegetation could decrease the intensity of wildland fires and allow fires to be more easily controlled. For example, efforts to reduce incursion of nonnative annual grasses (primarily cheatgrass) and proliferation of other noxious and invasive weeds would promote healthy plant communities and lower risk of high-intensity wildfire” (USGS 2006).

The BLM complied with NEPA’s requirement to analyze the environmental consequences/impacts to vegetation and wildland fire management in the North Dakota GRSG PRMPA/FEIS.

GRSG-General

Issue Number: PP-ND-GRSG-15-01-20

Organization: WildEarth Guardians

Protestor: Erik Molvar

Issue Excerpt Text:

The BLM has not made a showing through its collective NEPA analyses that sage grouse respond differently to the impacts of permitted activities in different ecological regions or Management Zones based on what is known based on the science, with the exception that post-grazing stubble height recommendations are 26 cm in the mixed-grass prairies of the Dakotas and eastern Montana and 18 cm across the remaining range of the GRSG based on scientific studies. Indeed, the science shows that responses of GRSG to human-induced habitat alternations are remarkably similar

across the species’ range. Given that the science does not differ significantly across the species’ range regarding the impacts of human activities on GRSG, does not find different thresholds at which human impacts become significant, and is highlighted by similar (or indeed, identical) conservation measures recommended by expert bodies reviewing the literature or in the peer-reviewed scientific literature itself, different approaches to GRSG conservation in different geographies are indicative of a failure to address the conservation needs of the species in one planning area or another. This geographic inconsistency reveals an arbitrary and capricious approach by federal agencies to the conservation of this Sensitive Species, and the resulting plan amendment decisions are properly classified as

demonstrating an abuse of agency discretion. North Dakota shares and Management Zone with South Dakota and parts of Montana and Wyoming (FEIS at 1-17), and GRSG protections need to be strengthened and made consistent across this geography across the High Plains.

Issue Number: PP-ND-GRSG-15-04-10
Organization: Western Watersheds Project
Protestor: Travis Bruner

Issue Excerpt Text: We protest the lack of consistent management parameters across the range of the species, or adequate explanations for variation where that exists.

The management specified in the PRMPA/FEIS also differs from the management proposed on other BLM and FS lands throughout GRSG habitat. A crosscheck of range-wide plans reveals that habitat objectives are far from uniform. For example, in regard to grass height, utilization/cover requirements, and canopy cover, the plans have significant variation. GRSG habitat needs, especially hiding cover, do not vary widely across its range, thus it is a failure on the part of the agencies not to provide consistent parameters or at minimum an explanation for the variation between plans.

Issue Number: PP-ND-GRSG-15-06-3
Organization: Defenders of Wildlife
Protestor: Mark Salvo

Issue Excerpt Text: Other proposed final federal GRSG plan would adopt minimum standards for average grass height in GRSG nesting and brood-rearing habitat. For example, desired habitat conditions in GRSG habitat in the Oregon FEIS includes perennial grasses >7 inches high on arid sites and >9 inches on mesic sites in GRSG breeding habitat, including lekking, pre-

nesting, nesting, and early brood-rearing habitats (citing Gregg et al. 1994; Hanfet et al. 1994; Crawford and Carver 2000; Hagen et al. 2007; Jon Bates, USDA ARS, pers. comm. 2/10/2015) (Oregon FEIS: 2-41, Table 2-4). Desired habitat condition in the HiLine plan includes perennial grasses at > 7 inches high in GRSG breeding habitat (HiLine FEIS: 42, Table 2.4; 195, Table 2.27). The Proposed Plan in the Idaho FEIS includes desired conditions for GRSG habitat that include perennial grasses and forbs >7 inches high during nesting and early brood-rearing season (Idaho FEIS: 2-20, Table 2-3).

While these plans also provide that desired conditions may not be met on every acre of GRSG habitat and that a specific site's ecological ability to meet desired conditions would be considered in determining whether objectives have been achieved (similar to the North Dakota FEIS) (and recognizing that these additional disclaimers, by themselves, further complicate grazing management in GRSG range), the plans at least adopt science-based minimum standards for evaluating grazing effects and informing adaptive management of GRSG nesting and brood-rearing habitat

Issue Number: PP-ND-GRSG-15-06-4
Organization: Defenders of Wildlife
Protestor: Mark Salvo

Issue Excerpt Text: The Nevada/Northeastern California plan has adopted this desired condition for managing GRSG habitat (2-18, Table 2-2). This provision sets a science-based (Lockyear et al in press) threshold that, when surpassed, indicates when grazing management adjustments should be applied.

Issue Number: PP-ND-GRSG-15-06-5
Organization: Defenders of Wildlife

Protestor:Mark Salvo

Issue Excerpt Text: The North Dakota Proposed RMPA should follow the example set by the Nevada and Oregon plans. Although the Nevada plan also has its deficiencies concerning climate change management, it better addresses the BLM's responsibility to consider climate change impacts in the current planning process. It identifies climate change as a planning issue and "fragmentation of [GRSG] habitat due to climate stress" as a threat to GRSG; it recognizes (at least some) existing direction on planning for climate change and acknowledges that climate adaptation can be addressed under existing resource programs; it describes the impacts of climate change on GRSG and sagebrush habitat, and the Proposed RMPA adopts objectives and associated actions to adaptively manage for

Summary:

Protests identified inconsistencies among the various sub-regional GRSG land use plan amendments and revisions. These differences include how the LUPA addresses grazing management, surface disturbance caps, and GRSG habitat in general and may lead to arbitrary decisions in each sub-region.

Response:

The BLM State Director determines the planning area for Land Use Planning (43 CFR 1610.1(b)). This planning area may cross administrative boundaries as appropriate to provide for meaningful management. While the BLM has used a consistent method and framework for developing alternatives (based on the recommendations in the NTT Report) and planning areas, the specifics of each sub-region necessitated tailoring the range of alternatives to specifically address the threats within the sub-region, including locality and population differences (see also Section 2.4 of the FEIS). Therefore, the differences between sub-regional plans are appropriate to address threats to GRSG at a regional level. There are some inconsistencies among the sub-regional plans as a means to address specific threats at a local and sub-regional level.

GRSG - Density and Disturbance Cap

Issue Number: PP-ND-GRSG-15-04-9
Organization:Western Watersheds Project
Protestor:Travis Bruner

Issue Excerpt Text: We protest the failure

climate change impacts on the species.

The Proposed RMPA in the Oregon FEIS would designate a network of "climate change consideration areas", generally high elevation areas (typically above 5,000 feet) with limited habitat disturbance that the BLM has identified as likely to provide the best habitat for GRSG over the long term, according to climate change modeling. The climate change consideration areas total 2,222,588 acres and include priority habitat, general habitat, and even areas outside current GRSG range. The purpose of these areas is to benefit GRSG over the long term by identifying locations and options for management and restoration activities, including compensatory mitigation associated with local land use and development.

to prescribe consistent management among types of disturbance. The plan does not include grazing as a surface disturbance subject to the disturbance cap. But this disregards the surface-disturbing impacts of livestock concentration areas such as water

developments, roads, and structural range improvements that disrupts vegetation communities, disturb and compact soils, and make reestablishment of native vegetation difficult in the surrounding area. By failing to include these concentration areas in the definition of surface disturbance, the

agencies have also failed to prescribe management of grazing in accordance with avoidance and mitigation practices it assigns to other uses. The PRMP says nothing about limiting the disturbance caused by the mere presence of livestock, e.g. that which is known to increase stress levels in the species

Summary:

Protesters dispute the application of density and disturbance caps of being insufficient to protect GRSG as the calculation does not include disturbance associated with livestock grazing.

Response:

The density and disturbance caps were established per the NTT Report and science incorporated therein. Management actions were suggested in the NTT report to reduce disturbance associated with threats to GRSG habitat. In the NTT report, Livestock grazing is identified as a diffuse disturbance, rather than a discrete disturbance. According to the NTT Report (BLM, 2011,p. 8):

“GRSG are extremely sensitive to discrete disturbance (Johnson et al. 2011, Naugle et al. 2011a,b) although diffuse disturbance over broad spatial and temporal scales can have similar, but less visible effects.”

Though grazing is not identified as a discrete threat, there are provisions and management actions proposed in the NTT Report and incorporated in the Proposed RMPA that address these impacts (see Section 2.10, pages 2-48 through 2-53).

The density and disturbance caps address other more discrete disturbances. Additionally, there are other management actions that more appropriately address the effects of livestock grazing to GRSG habitat proposed in the North Dakota GRSG PRMPA/FEIS.

GRSG - Livestock Grazing

Issue Number: PP-ND-GRSG-15-04-6

Organization:Western Watersheds Project

Protestor:Travis Bruner

Issue Excerpt Text: We protest the failure of the plan to mandate specific terms and conditions to grazing permits, including limits on season-of-use and forage utilization levels by livestock, or any consequence if those terms and conditions are violated. In order to conserve, protect, and enhance GRSG populations, the plan must include restrictions on spring grazing in all GRSG breeding habitat. In addition to

the needs for hiding cover and concealment of nests and young broods, GRSG eggs and chicks need to be protected from the threats of nest disturbance, trampling, flushing, egg predation, or egg crushing that livestock pose to nesting GRSG. See Beck and Mitchell, 2000, as cited in Manier et al. 2013; Coates et al., 2008. This nesting season is crucial for the species’ survival because its reproductive rates are so low; failing to institute season-of-use restrictions for permitted grazing, and the failure to even consider it, are shortcomings of the plan.

Issue Number: PP-ND-GRSG-15-04-8
Organization: Western Watersheds Project
Protestor: Travis Bruner

Issue Excerpt Text: The agencies also fail to define grazing as a surface disturbing or disruptive activity that should be avoided during breeding and nesting (March 1- June 15). And yet, the best science recommends that grazing be restricted during this same period. This failure is arbitrary and capricious, and the PRMPA/FEIS should be revised to limit spring season harms to leks. The PRMPA/FEIS doesn't analyze seasonal restrictions nor does it set utilization limits that conform to the scientific recommendations. Where experts have articulated minimum criteria for excluding

livestock (on rangeland with less than 200 lbs/ac of herbaceous vegetation per year) and questioning the appropriateness of grazing on lands producing 400 lbs/ac/year, the PRMPA/FEIS has not considered limiting grazing in this way within the planning area. The PRMPA/FEIS also doesn't specify a utilization limit on grazing, but Dr. Braun recommends a 25-30 percent utilization cap and recalculating stocking rates to ensure that livestock forage use falls within those limits. Despite this clear articulation of how to best conserve, enhance, and recover GRSG, the PRMPA/FEIS does not reconsider the stocking rates within the planning area or set utilization criteria, a serious oversight.

Summary:

- The BLM fails to define livestock grazing, and its associated infrastructure, as a surface disturbing or disruptive activity contrary to the best available science.
- Best available science requires protection during nesting season from effects of livestock grazing; this was not considered in the analysis.
- The North Dakota GRSG PRMPA/FEIS violates NEPA by failing to analyze seasonal restrictions, set utilization limits or stocking rates, and mandate specific terms and conditions to grazing permits.

Response:

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

The BLM NEPA Handbook also directs the BLM to "use the best available science to support NEPA analyses, and give greater consideration to peer-reviewed science and methodology over that which is not peer-reviewed" (BLM Handbook H-1790-1, p. 55).

Under the BLM's guidelines for implementing the Information Quality Act, the BLM applies the principle of using the "best available" data in making its decisions (BLM Information Quality Act Guidelines, February 9, 2012).

- The density and disturbance caps were established per the NTT Report and science incorporated therein. Management actions were suggested in the NTT report to reduce disturbance associated with threats to GRSG habitat. In the NTT report, Livestock

grazing is identified as a diffuse disturbance, rather than a discrete disturbance.

According to the NTT Report (BLM, 2011, p. 8):

“GRSG are extremely sensitive to discrete disturbance (Johnson et al. 2011, Naugle et al. 2011a, b) although diffuse disturbance over broad spatial and temporal scales can have similar, but less visible effects.”

Though grazing is not identified as a discrete threat, there are provisions and management actions proposed in the NTT Report and incorporated in the North Dakota GRSG PRMPA/FEIS that address these impacts. For example, Action RM-1.3 “Within PHMA, incorporate GRSG habitat objectives and management considerations into all BLM grazing allotments through allotment management plans (AMP) or permit renewals. Develop standards with State of North Dakota and USFWS” (p. 2-19); and Action RM-1.5 “The BLM would prioritize (1) the review of grazing permits/leases, in particular to determine if modification is necessary prior to renewal, and (2) the processing of grazing permits/leases in PHMA. In setting workload priorities, precedence would be given to existing permits/leases in these areas not meeting Land Health Standards, with focus on those containing riparian areas, including wet meadows. The BLM may use other criteria for prioritization to respond to urgent natural resource concerns (such as fire) and legal obligations. The NEPA analysis for renewals and modifications of livestock grazing permits/leases that include lands within PHMA would include specific management thresholds, based on GRSG Habitat Objectives (Table 2-2), Land Health Standards (43 CFR, Part 4180.2) and ecological site potential, and one or more defined responses that would allow the authorizing officer to make adjustments to livestock grazing that have already been subjected to NEPA analysis. Allotments within PHMA, focusing on those containing riparian areas, including wet meadows, would be prioritized for field checks to help ensure compliance with the terms and conditions of the grazing permits. Field checks could include monitoring for actual use, utilization, and use supervision” (p. 2-19); and others. The BLM used the best available science to identify and address the threat of livestock grazing in the North Dakota GRSG PRMPA/FEIS.

- When preparing an EIS, NEPA requires an agency to rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, to briefly discuss the reasons for their having been eliminated (40 CFR 1502.14(a)). When there are potentially a very large number of alternatives, the BLM may only analyze a reasonable number to cover the full spectrum of alternatives (BLM Handbook H-1790-1, Section 6.6.1 quoting Question 1b, CEQ, Forty Most Asked Questions Concerning CEQ's NEPA Regulations, March 23, 1981).

In accordance with BLM's Land Use Planning Handbook and BLM IM No. 2012-169, BLM considered a range of alternatives with respect to both areas that are available or unavailable for livestock grazing and the amount of forage allocated to livestock on an area-wide basis. The analysis considers a range of alternatives necessary to address unresolved conflicts among available resources and includes a meaningful reduction in livestock grazing across the alternatives, both through reduction in areas available to livestock grazing and forage allocation.

The BLM developed a reasonable range of alternatives that meet the purpose and need of the North Dakota GRSG PRMPA/FEIS and that address resource issues identified during the scoping period. The North Dakota GRSG PRMPA/FEIS analyzed five alternatives, which are described in Chapter 2, Proposed Action and Alternatives (p. 2-1 through 2-94). A number of alternatives were also considered but not carried forward for detailed analysis (p. 2-63 through 2-64).

Section 2.11.2, Eliminate Livestock Grazing from BLM Public Lands, details an alternative that proposed to make the entire North Dakota Field Office unavailable for livestock grazing. The NEPA requires that agencies study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources. No issues or conflicts were identified during this land use planning effort that requires the complete elimination of grazing within the planning area for their resolution and, in the absence of such conflicts, such an alternative would be inconsistent with the multiple-use policy objectives of the planning area. Where appropriate, removal of livestock and adjustments to livestock use has been incorporated in this planning effort.

The BLM has considerable discretion through its grazing regulations to determine and adjust stocking levels, seasons-of-use, and grazing management activities, and to allocate forage to uses of the public lands in an RMP. Suitable measures, which could include reduction or elimination of livestock grazing, are provided for in the North Dakota GRSG PRMPA/FEIS, which could become necessary in specific situations where livestock grazing causes or contributes to conflicts with the protection and/or management of other resource values or uses. Such determinations would be made during site-specific activity planning and associated environmental reviews. These determinations would be based on several factors, including monitoring studies, current range management science, input from livestock operators and the interested public, and the ability of particular allotments to meet the Standards for Rangeland Health.

All alternatives would allow the reduction or elimination of livestock grazing, or changes in season-of-use) in specific situations where livestock grazing causes or contributes to conflicts with the protection or management of other resource values or uses. Livestock grazing permit modification would be in accordance with the Rangeland Management Grazing Administration Regulations found in 43 CFR Part 4100. Future changes to livestock grazing permits, including seasonal restrictions, would happen at the project-specific (allotment) level after the appropriate monitoring, Rangeland Health Assessments, site-specific NEPA, and compliance with 43 CFR SubPart 4160, occurs. At that time, permits would be developed to ensure the allotment(s) meets all applicable Standards and would strive to meet all applicable GRSG habitat objectives.

The BLM considered a reasonable range of alternatives and considered grazing restrictions in the North Dakota GRSG PRMPA/FEIS in full compliance with NEPA; changes to individual permits is not appropriate at the land management planning scale and would occur at the implementation stage.

- NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)). The BLM is required to take a “hard look” at potential environmental impacts of adopting the North Dakota GRSG PRMPA/FEIS.

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

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

As the decisions under consideration by the BLM are programmatic in nature and would not result in on-the-ground planning decision or actions (e.g., the BLM is not approving an Application for Permit to Drill to start drilling, or an application to graze livestock), the scope of the analysis was conducted at a regional, programmatic level. The analysis focuses on the direct, indirect, and cumulative impacts that could potentially result from on-the-ground changes. This analysis identifies impacts that may result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

All alternatives would allow for seasonal restrictions and/or the reduction or elimination of livestock grazing in specific situations where livestock grazing causes or contributes to conflicts with the protection or management of other resource values or uses. Such modifications would be made during site-specific activity planning and associated environmental review. These modifications would be based on several factors, including monitoring studies, review of current range management science, input from livestock operators and interested publics, and the ability to meet the standards.

The BLM has considerable discretion through grazing regulations to determine and adjust stocking levels, and grazing management activities, and to allocate forage to uses of the public lands in an RMP. Suitable measures, which could include reduction or elimination of livestock grazing, are provided for in this PRMP/FEIS, which could become necessary in specific situations where livestock grazing causes or contributes to conflicts with the protection and/or management of other resource values or uses. Such determinations would be made during site-specific activity planning and associated environmental analyses. These determinations would be based on several factors, including monitoring studies, current range management science, input from livestock operators and the interested public, and the ability of particular allotments to meet the RMP objectives.

Livestock grazing permit modification will be in accordance with the Rangeland Management Grazing Administration Regulations found in 43 CFR 4100. Future changes to livestock grazing

permits would happen at the project-specific (allotment) level after the appropriate monitoring, Rangeland Health Assessments, and site-specific NEPA, occurs. At that time, permits would be developed to ensure the allotment(s) meets all applicable Standards and would strive to meet all applicable GRSG habitat objectives. Impacts from range management decisions for the preferred alternative are addressed on p 4-73 thru 4-74. The BLM complied with NEPA's requirement to analyze the environmental consequences/impacts from grazing in the North Dakota GRSG PRMPA/FEIS.

Administrative Procedures Act

Issue Number: PP-ND-GRSG-15-03-2

Organization: North Dakota Petroleum Council

Protestor: Ron Ness

Issue Excerpt Text: The Trades protest the BLM's adoption of several elements of the Proposed RMPA, specifically, the compensatory mitigation requirement; the "net conservation gain" standard; lek buffer distances; density and disturbance caps; and RDFs, because each constitutes a substantive rule that the BLM cannot apply before they complete the formal rulemaking procedures required by the APA. See 5 USC § 553. Additionally, the Trades protest the limitations on modifications and waivers of NSO stipulations in PHMA because they improperly amend a BLM regulation without completing the formal rulemaking procedures. Because the land use planning process is not equivalent to a formal rulemaking, these provisions of the Proposed RMPA are void until the BLM adopts these rules in accordance with APA rulemaking procedures.

Issue Number: PP-ND-GRSG-15-03-3

Organization: North Dakota Petroleum Council

Protestor: Ron Ness

Issue Excerpt Text:

The Proposed RMPA's waiver and modification provisions are inconsistent with 43 CFR § 3101.1-4. First, the Proposed

RMPA prohibits waivers and modifications despite the regulation's language that stipulations "shall be subject to modification or waiver." Second, the Proposed RMPA expands decision-making authority on whether to grant an exception to parties beyond BLM to FWS and the North Dakota Game and Fish Department. These direct contradictions reflect that BLM is attempting to alter its regulations through the RMPA. The BLM cannot finalize the provisions of the Proposed RMPA prohibiting exceptions, modifications, and waivers in PHMAs until it amends its regulation at 43 CFR § 3101.1-4 through formal rulemaking procedures, as required by the APA. See 5 USC § 553. When agencies seek to establish procedures other than those set forth in their regulations, they must amend those regulations through a formal rulemaking process. *City of Idaho Falls v. Fed. Energy Reg. Comm'n*, 629 F.3d 222, 231 (Fed. Cir. 2011). If an agency action "adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy," the action is a legislative rule requiring compliance with the notice and comment procedures at 5 USC § 553. *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014). Because the provisions of the Proposed RMPA related to exceptions, modifications, and waivers of stipulations attempt to amend BLM's regulation at 43 CFR § 3101.1-4 without following the formal rulemaking procedures required by 5 USC § 553, the BLM must revise the

Proposed RMPA to remove the limitations on waivers, modifications, and exceptions.

Issue Number: PP-ND-GRSG-15-03-4

Organization:North Dakota Petroleum Council

Protestor:Ron Ness

Issue Excerpt Text: The BLM cannot finalize the provisions of the Proposed RMPA requiring compensatory mitigation, requiring that mitigation achieve a “net conservation gain,” imposing conservation measures, and prohibiting exceptions, modifications, and waivers in PHMAs until it follows formal rulemaking procedures, as required by the APA. See 5 USC § 553. The Proposed RMPA does not constitute a formal rulemaking process. First, FLPMA specifically requires BLM to promulgate rules through the APA rulemaking process at 5 USC § 553(a)(2) but does not require land use plans to follow APA rulemaking procedures. Compare 43 USC § 1740 with

id. § 1712.

Second, the public has not been afforded an adequate opportunity to comment on certain portions of the Proposed RMPA that constitute legislative rules as required by 5 USC § 553(d). The APA allows for a comment period of “not less than” 30 days. See 5 USC § 553(d). In this case, because BLM introduced many rules in the Proposed RMPA (rather than the Draft LUPA), including the lek buffer distances, density limitations and disturbance caps, and the limitations on modification and waiver of, and exception to, lease stipulations, the public only has the opportunity to protest these components during a fixed 30-day window. See 43 CFR § 1610.5-2(a)(1). Finally, the provisions of the Proposed RMPA constituting legislative rules have not been subject to notice required by 5 USC § 553(b).

Summary:

The BLM acted arbitrarily and capriciously, and in violation of the Administrative Procedures Act, when it:

- implemented a number of changes to management practices - including a “net conservation standard,” required design features, lek buffer distances, and density and disturbance caps – without first completing a formal rulemaking process; and
- made changes to existing regulations – in this case, the process for applying waivers, exemptions, and modifications, without first completing a formal rulemaking process.

Response:

The Federal Land Policy and Management Act (FLPMA) details the BLM’s broad responsibility to manage public lands and engage in land use planning to guide that management. The BLM Land Use Planning Handbook, H-1610, directs that land use plans and plan amendment decisions are broad-scale decisions that guide future land management actions and subsequent site-specific implementation decisions. A primary objective of the BLM Special Status Species policy is to initiate proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of the species under the ESA (BLM Manual Section 6840.02.B).

The North Dakota GRSG PRMPA/FEIS is a targeted amendment specifically addressing goals, objectives, and conservation measures to conserve GRSG and to respond to the potential of its

being listed (See Section 1.2, Purpose and Need). The BLM’s planning process allows for analysis and consideration of a range of alternatives to conserve, enhance, and restore GRSG habitat and to eliminate, reduce, or minimize threats to this habitat to ensure a balanced management approach.

The regulations concerning land use planning, 43 CFR 1610, states that “guidance for preparation and amendment of resource management plans may be provided by the Director and State Director, as needed... [including] national level policy which has been established through ... Director approved documents” (Section 1610.1(a)(1)).

As noted in Section 1.8.1, this RMP Amendment details how Director-approved guidance, BLM Instructional Memorandum 2012-044, forms the basis of the national GRSG strategy, including the landscape-scale net-conservation gain approach and its requisite parts.

Finally, the protestors are incorrect that the Proposed RMPA’s waiver and modification provisions are inconsistent with 43 CFR § 3101.1-4. That regulation does not require BLM to provide for waivers or modifications but instead provides regulatory limits on the BLM’s ability to allow waivers or modifications if BLM determines (e.g., consistent with the plan and its regulatory authority) that it wishes to grant one. Therefore, the elements of the North Dakota GRSG PRMPA/FEIS do not represent an exercise of rule-making authority, but a valid exercise of the land use planning process authorized by FLPMA, federal regulations, and the BLM Director-approved planning guidance. Moreover, the planning process generally, and the process followed for this planning effort specifically, provided significant opportunities for public input akin to the opportunities provided by notice-and-comment rulemaking under the APA.

Energy Policy Act of 2005

Issue Number: PP-ND-GRSG-15-03-22

Organization:North Dakota Petroleum Council

Protestor:Ron Ness

Issue Excerpt Text: The requirement that lessees mitigate impacts to GRSG to provide a “net conservation gain” is more restrictive than necessary. The BLM could have required lessees to mitigate impacts to avoid unnecessary or undue degradation. See 43 USC § 1732(b). Though inconsistent with FLPMA, the BLM did not even consider requiring that mitigation achieve “no net loss” of GRSG habitat. Because the requirement that mitigation achieve a “net

conservation gain” is inconsistent with EPAct, the BLM must revise the Proposed RMPA to remove the “net conservation gain” requirement. Likewise, the lek distance buffers are more restrictive than necessary. The 3.1 mile buffers are not scientifically defensible, as explained in Section IX.B, infra. Furthermore, in the Final EIS, the BLM did not analyze whether alternative buffer distances would offer substantially similar protection to the GRSG. See Proposed RMPA at 4-104, 4-107. Because the lek buffer distances are unnecessarily restrictive, the BLM must revise the Proposed RMPA to identify measures that comply with the directives of EPAct.”

Summary:

The North Dakota PRMP/FEIS violates the Energy Policy Act of 2005 by failing to apply the least restrictive stipulations for oil and gas leasing by:

- implementing lek buffer distances; and
- providing for a “net conservation gain” of GRSG habitat

Response:

Section 363 of the Energy Policy Act of 2005 and its implementing memorandum of understanding requires that the Secretaries of the Interior and Agriculture ensure that oil and gas lease stipulations be “only as restrictive as necessary to protect the resource for which the stipulations are applied” (42 USC section 15801 et. seq.; BLM MOU WO300-2006-07).

In order to mitigate impacts to other resources, the BLM appropriately proposes and analyzes restrictions on potential oil and gas leasing through oil and gas lease stipulations, conditions of approval, and best management practices. BLM policy requires RMPs to identify specific lease stipulations and resource condition objectives and general/typical conditions of approval and best management practices that will be employed to accomplish these objectives in areas open to leasing. (BLM Handbook H-1601-1, p. C-23 and C-24). Accordingly, each alternative analyzed in the North Dakota GRSG PRMPA/FEIS presents a set of oil and gas conditions of approval and best management practices necessary to meet the goals and objectives for each resource and resource use in the planning area.

The North Dakota GRSG PRMPA/FEIS fully analyzed impacts of the stipulations, conditions of approval, and best management practices for each alternative (North Dakota GRSG PRMPA/FEIS, Chapters 4 and 5). By comparing impacts across the alternatives, the BLM determined which management actions in the Proposed Alternative were necessary, without being overly restrictive, to meet the goals and objectives of the North Dakota GRSG PRMPA/FEIS.

The Proposed Action in the North Dakota GRSG PRMPA/FEIS includes a management action to incorporate the lek buffer-distances identified in the USGS report titled “Conservation Buffer Distance Estimates for GRSG—A Review” (Manier et. al. 2014) during NEPA analysis at the implementation stage. Applying these buffers was addressed in the Draft RMPA/EIS and is qualitatively within the spectrum of alternatives analyzed. Accordingly, the management decision set forth in this Proposed RMPA/Final EIS to require lek buffers for development within certain habitat types is within the range of alternatives analyzed. The impacts of the lek buffers is disclosed in Sections 4.3 and 5.3 of the North Dakota GRSG PRMPA/FEIS. Based on the impacts analysis performed, the BLM determined that the stipulations considered are not overly restrictive, are necessary to meet the goals and objectives of the PRMPA/FEIS, and do not violate the Energy Policy Act.

The guidance in the North Dakota GRSG PRMPA/FEIS to provide for a net conservation gain is not a stipulation, condition of approval, or best management practice that will be applied to leases or Applications for Permit to Drill. Instead, it is part of the mitigation strategy in response to the overall landscape-scale goal, which is to enhance, conserve, and restore GRSG and its habitat. As it relates to mitigation, page 2-30 of the North Dakota GRSG PRMPA/FEIS states:

Consistent with the Proposed Plan Amendment’s goal outlined in Section 2.6.2, the intent of the North Dakota RMPA is to provide a net conservation gain to the species. In all GRSG habitat, in undertaking the BLM management actions, and, consistent with valid existing rights and applicable law, in authorizing third party actions that result in habitat loss and degradation, the BLM would require and ensure mitigation that provides a net conservation gain to the species including accounting for any uncertainty associated with the effectiveness of such mitigation. Actions which result in habitat loss and degradation include those identified as threats which contribute to GRSG disturbance as identified by the USFWS in its 2010 listing decision (75 FR 13910) and shown in Table F-2 in Appendix F. This would be achieved by avoiding, minimizing, and compensating for impacts by applying beneficial mitigation actions. This is also consistent with BLM Manual 6840 – Special Status Species Management, Section .02B, which states “to initiate proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of the need for listing of these species under the ESA.”

Because it is not a stipulation, condition of approval, or best management action applied to a lease or application for permit to drill, this mitigation guidance does not violate the Energy Policy Act of 2005.

Air Quality, Climate Change, and Noise

Issue Number: PP-ND-GRSG-15-06-6

Organization: Defenders of Wildlife

Protestor: Mark Salvo

Issue Excerpt Text: Properly addressing climate change in GRSG planning would require the BLM to analyze the effectiveness of their proposed conservation actions in light of climate change impacts and make appropriate modifications to ensure they are effective over the long-term. Proper analysis

of climate change would also require the agency to examine the cumulative environmental consequences of their proposed actions in a changed climate as their baseline for analysis. For example, the impacts of habitat disturbance may be more pronounced when combined with the effects of climate change, which could lead agencies to different management decisions about whether, where, how much, and in what manner development activities should occur.

Summary:

In order to properly address impacts of climate change in GRSG planning, the BLM needs to do the following:

- Evaluate effectiveness of conservation actions in light of climate change and make appropriate modifications over time;
- Examine cumulative environmental consequences in a changed climate as the baseline; and
- Examine impacts such as habitat disturbance in concert with climate change.

Response:

DOI Secretarial Order 3289 and DOI Secretarial Order 3226 require that the BLM “consider[s] and analyze[s] potential climate change impacts when undertaking long-range planning exercises...developing multi-year management plans, and making major decisions regarding potential use of resources”. The BLM applies this requirement to the preparation of RMP revisions and amendments, as indicated in Table 1-2 (Drought/Climate Change) as a Range-Wide Planning Issue for the North Dakota Field Office. Climate is discussed in Sections 3.17 and 4.16 of the North Dakota GRSG PRMPA/FEIS, as well as within sections of Chapter 5.

As indicated in Chapter 5 in the discussion of cumulative impacts, climate change is considered with regard to the potential effect it could have on various resources. For example on page 5-76, “Climate change would also pose a long-term threat of cumulative impacts on soil resources. Cumulative impacts on soil resources from climate change could include vegetation regime changes (e.g., from sagebrush to grasslands), increased wildfire potential due to drought, and increased sedimentation and erosion (Connelly et al. 2004).” It would be highly speculative to analyze a future climate change scenario as a baseline for the cumulative impacts assessment, on anything but a qualitative basis, as has been done in the North Dakota GRSG PRMPA/FEIS. In the future, as tools for predicting climate change in a management area improve and changes in climate affect resources and necessitate changes in how resources are managed, the BLM may be required to reevaluate decisions made as part of this planning process and to adjust management accordingly.

The BLM complied with Secretarial Order 3289 in developing the North Dakota GRSG PRMPA/FEIS.

ACECs

Issue Number: PP-ND-GRSG-15-01-21

Organization: WildEarth Guardians

Protestor: Erik Molvar

Issue Excerpt Text: The BLM has not complied with FLPMA’s mandate that it give priority to designating ACECs here. Although BLM considered designating certain areas as ACECs, found some of them eligible, and acknowledged that ACEC designation would best protect their relevant and important values, the BLM determined not to designate them. Instead, the BLM created a completely new, less-restrictive

designation called Sagebrush Focal Areas. The BLM failed to provide an adequate explanation of its decision not to designate these areas as ACECs, including an explanation of how their relevant and important values will be protected absent such designation. Where the BLM has acknowledged areas meet the criteria for ACEC designation and would be best protected as ACECs, yet has instead developed a new, less-restrictive designation for them, the BLM has failed to put designation of ACECs first, in violation of FLPMA.

Summary:

The North Dakota GRSG PRMPA/FEIS fails to comply with the FLPMA mandate give priority to designating eligible ACECs to protect relevant and importance values. BLM created Sagebrush Focal Areas, which are less restrictive than an ACEC designation and failed to

provide an explanation as to how such a designation would protect the identified resource values.

Response:

The BLM has acted consistent with FLPMA, which provides that the BLM in its land use plans give priority to the designation and protection of areas of critical environmental concern. The BLM policy does not require that a potential ACEC's relevant and important values be protected to the same level or degree of protection in all plan alternatives: "[t]he management prescription for a potential ACEC may vary across alternatives from no special management attention to intensive special management attention" (BLM Manual Section 1613.22.B).

Elaborating further, the Manual states that "[s]ituations in which no special management attention would be prescribed (and therefore no designation) include...those in which the alternative would necessitate the sacrifice of the potential ACEC values to achieve other purposes" (BLM Manual Section 1613.22.B.1). Thus, BLM policy allows for one or more RMP alternatives to be analyzed that would potentially impact relevant and important values in order to allow management for other prescribed purposes.

The North Dakota GRSG PRMPA/FEIS analyzed a range of alternatives for the management of potential ACECs. The North Dakota GRSG PRMPA/FEIS analyzed special management attention that would fully protect relevant and important values of the potential ACEC in at least one alternative. As detailed in Section 2.8 and Table 2-4, Alternative C would designate all PHMA as an ACEC. More detail regarding ACEC relevance and importance criteria can be found in Appendix D. Additionally, Section 2.6, Development of the Proposed Land RMPA, describes how the BLM has refined the Proposed Plan to provide a layered management approach that offers the highest level of protection for greater sage-grouse in the most valuable habitat. So, although the proposed plan does not designate any new ACECs, land use allocations in the Proposed Plan Amendment would limit or eliminate new surface disturbance in PHMA, while minimizing disturbance in GHMA. In addition to establishing protective land use allocations, the Proposed Plan Amendment would implement a suite of management tools such as disturbance limits, GRSG habitat objectives and monitoring, mitigation approaches, and lek buffer-distances throughout the range. These overlapping and reinforcing conservation measures would work in concert to improve GRSG habitat conditions and provide clarity and consistency on how the BLM would manage activities in GRSG habitat.

The BLM adequately considered the protection of relevant and important values in the North Dakota GRSG PRMPA/FEIS.

Fluid Minerals

Issue Number: PP-ND-GRSG-15-02-9

Organization:Beatty & Wozniak, PC

Protestor:Bret Sumner

Issue Excerpt Text: By creating a management mechanism whereby any authorization of an exception to allow oil

and gas development within identified priority habitat requires the unanimous approval of the BLM, North Dakota Game and Fish Department (NDGF) and FWS, BLM is ceding its authority over oil and gas development to the FWS; in other words, providing FWS a de facto veto authority over the BLM. The BLM has sole authority

to determine whether an exception to a lease stipulation is warranted and cannot delegate

that authority to another agency. See 43 CFR § 3101.1-4.

Summary:

The North Dakota GRSG PRMPA/FEIS violates FLPMA by providing the FWS with decision-making authority in the approval of exceptions, modifications and waivers to oil and gas lease stipulations.

Response:

As stated in 43 CFR 3101.1-4, "a stipulation included in an oil and gas lease shall be subject to modification or waiver only if the Authorized Officer determines that the factors leading to its inclusion in the lease have changed sufficiently to make the protection provided by the stipulation no longer justified or if proposed operations would not cause unacceptable impacts." While the proper delegation of authority for approving exceptions, waivers, and modifications is described in this regulation, it does not prescribe any particular methodology used in the Authorized Officer's determination.

Attachment 1 of Washington Office Instruction Memorandum 2008-032 supplements BLM Handbook H-1624-1, Planning for Fluid Mineral Resources and the 2007 Onshore Oil and Gas Order No. 1, providing further guidance on including exceptions, waivers, and modifications in land use plans. Pertaining to the process for reviewing and approving an exception to, waiver of, or modification to a stipulation on a lease that has been issued, "BLM coordination with other state or Federal agencies should be undertaken, as appropriate, and documented," (Washington Office Instruction Memorandum 2008-032, Attachment 1-6).

Management Action FM-1.1 of the North Dakota GRSG PRMPA/FEIS describes the proposed process for granting exceptions to lease stipulations. Under this action, authorization of an exception would require the BLM, state wildlife agency, and the USFWS to concur that the proposed action would not have direct, indirect, or cumulative effects on GRSG or its habitat, or is proposed to be undertaken as an alternative to a similar action occurring on a nearby parcel and would provide a clear conservation gain to GRSG (p. 2-22). The North Dakota GRSG PRMPA/FEIS provides specificity to the BLM's process for granting exceptions, and therefore does not violate FLPMA, the MLA, or BLM guidance for the aforementioned reasons.

Special Status Species

Issue Number: PP-ND-GRSG-15-01-11

Organization: WildEarth Guardians

Protestor: Erik Molvar

Issue Excerpt Text: For the foregoing reasons, protections applied to existing oil and gas leases both inside Priority Habitats and in General Habitats are scientifically unsound, biologically inadequate, and legally deficient in light of the Purpose and

Need for this EIS as well as the BLM's responsibility to prevent undue degradation to GRSG habitats under FLPMA and the agency's duty to uphold the responsibilities outlined in its Sensitive Species policy. The BLM's failure to apply adequate lek buffers to conserve GRSG, both inside and outside of Priority Habitats, in the face of scientific evidence, its own expert opinion, and its own NEPA analysis to the contrary, is

arbitrary and capricious and an abuse of discretion.

Issue Number: PP-ND-GRSG-15-01-7

Organization: WildEarth Guardians

Protestor: Erik Molvar

Issue Excerpt Text: Continued application of stipulations known to be ineffective in the face of strong evidence that they do not

work, and continuing to drive the GRSG toward ESA listing in violation of BLM Sensitive Species policy, is arbitrary and capricious and an abuse of discretion under the Administrative Procedures Act. The agency, through the North Dakota RMP Amendment, needs to provide management that will prevent this decline of GRSG across the planning area.

Summary:

The BLM is tasked with ensuring that land use and implementation plans fully address conservation of BLM Special Status species.

Application of ineffective stipulations and continuing to drive the GRSG toward ESA listing is a violation of BLM Sensitive Species Policy. The agency must provide management that will prevent decline of GRSG.

Response:

Contrary to the protest issues raised, the proposed land use plan for North Dakota GRSG PRMPA/FEIS does satisfy the BLM's Special Status Species policies and the management requirements under FLPMA. A primary objective of the BLM's Special Status Species policy is to initiate proactive conservation measures that reduce or eliminates threats to Bureau sensitive species to minimize the likelihood of and the need for listing of the species under the ESA (Manual Section 6840.02. B). Manual 6840 directs the BLM to "address Bureau sensitive species and their habitats in land use plans and associated NEPA documents" when engaged in land use planning with the purpose of managing for the conservation. (Manual 6840.2.B). This policy, however, acknowledges that the implementation of such management must be accomplished in compliance with existing laws, including the BLM's multiple use mission as specific in the FLPMA. (Manual 6840.2). The BLM's Land Use Planning Handbook (Handbook 1601-1) also provides guidance for developing the management decisions for sensitive species that "result in a reasonable conservation strategy for these species," and "should be clear and sufficiently detailed to enhance habitat or prevent avoidable loss of habitat pending the development and implementation of implementation-level plans." (Handbook 1601-1, Appendix C at 4). The Handbook indicates that management decisions "may include identifying stipulations or criteria that would be applied to implementation actions." (Handbook 1601-1, Appendix C at 4). The BLM did consider measures that conserve the GRSG as contemplated in the policies (See Chapter 2, Section 2.4.1 on page 2-5).

As described and analyzed in the North Dakota GRSG PRMPA/FEIS, the BLM considered relevant baseline information and studies about GRSG, including the NTT report and proposed conservation measures to address GRSG and its habitat for all alternatives, and focused on a proposed plan that would reduce or eliminate the threat to the species and minimize the likelihood for listing. In Chapter 2, the BLM describes in detail its effort in analyzing the management for the conservation of GRSG and the information it relied on in such analysis.

(See FEIS at 2-5). Specifically, the BLM incorporated conservation measures identified in the NTT Report, and COT Report beginning at page 2-10 Section 2.6.2.

The BLM discussed for the proposed plan and the alternatives the management decisions and the impacts to the GRSG and provided for conservation measures in the FEIS. For example, on page 4-25 “Alternative B also meets the Conservation Measures 2 and 5 to: eliminate intentional fires in sagebrush habitats and immediately suppressing fire in all sagebrush habitat. Since, land planning-level decision is broad in scope. Analysis of land use plan alternatives are typically broad and qualitative rather than quantitative or focused on site-specific actions. The baseline data provides the necessary basis to make informed land use plan-level decisions. Again, the the North Dakota GRSG PRMPA/FEIS provides analysis of different conservation measures to reduce or eliminate threats, including habitat disturbance, lek buffers, disturbance, and habitat degradations. In short, based on the science considered and impact analysis in the North Dakota GRSG PRMPA/FEIS, the management proposed in the North Dakota GRSG PRMPA/FEIS satisfies BLM’s intent to manage public lands in a manner that avoids the need for listing on Bureau sensitive species under the ESA.

Travel Management

Issue Number: PP-ND-GRSG-15-01-14

Organization: WildEarth Guardians

Protestor: Erik Molvar

Issue Excerpt Text: Road densities are also an issue, because GRSG avoid habitats adjacent to roads. Holloran (2005) found that road densities greater than 0.7 linear miles per square mile within 2 miles of leks resulted in significant negative impacts to GRSG populations. This road density should be applied as a maximum density in Priority and General Habitats, and in areas that already exceed this threshold, existing roads should be decommissioned and revegetated to meet this standard on a per-square-mile-section basis. The BLM’s proposed plan revision fails to provide adequate (indeed, any) limits on road density.

Issue Number: PP-ND-GRSG-15-01-15

Organization: WildEarth Guardians

Protestor: Erik Molvar

Issue Excerpt Text: We find the BLM direction to designate routes in subsequent travel planning with route designation

within 5 years of adoption of the plan amendments and revisions during subsequent travel management planning per NTT (2011) to be sufficient, but only if vehicles are subsequently limited to those designated routes. See FEIS at 2-17. At present, direction requires clarification that vehicles will be limited to designated routes once routes are designated. We are satisfied with the BLM’s proposal to use existing alignments to access valid existing rights where possible and to prevent upgrading of routes unless a minimal impact would occur to GRSG. BLM proposes that new roads be located more than 3.1 miles from leks in PHMA (FEIS at J-1); this would be adequate if it was not undermined by the possibility for modification to a different buffer distance at the whim of the authorizing officer. See FEIS at J-2 regarding “[j]ustifiable departures.” In order to bring the North Dakota RMP amendment up to scientific standards for road location and development, BLM must apply NTT (2011) recommendations as well as road density limits in accord with the best available science. We appreciate the agency’s decision to consider and apply

seasonal closures to any type of vehicle found to be causing disturbance. FEIS at 2- 18.

Summary:

The North Dakota GRSG PRMPA/FEIS violated NEPA by failing to utilize best available science to identify limits on road location and density.

Response:

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

The BLM NEPA Handbook also directs the BLM to “use the best available science to support NEPA analyses, and give greater consideration to peer-reviewed science and methodology over that which is not peer-reviewed” (BLM Handbook H-1790-1, p. 55).

The North Dakota GRSG PRMPA/FEIS considered alternative B, which was based on “A Report on National GRSG Conservation Measures” (NTT, 2011). Consistent with the NTT report (p. 11) this alternative would limit OHV travel to existing roads, primitive roads, and trails at a minimum in PHMA and GHMA (North Dakota FEIS, p. 2-17). Additionally alternatives C, D, and the proposed alternative also utilize the same NTT Recommended direction for OHVs.

The BLM utilized Holloran’s 2005 findings, the NTT report, and the USGS Report on Conservation Buffer Distance Estimates for GRSG to define allowable maximum landscape anthropogenic disturbance, required distance from leks for new actions, and density of mining or energy facilities.

As discussed previously under the NEPA—Range of Alternatives Section, of this report, the BLM complied with NEPA regulations in developing the range of alternatives; the spectrum of actions considered all meet BLM regulations, policy, and guidance. The management actions in the Proposed RMPA/Final EIS fall within the range of alternatives for protecting GRSG related to travel management, including travel limitations, road maintenance, and road construction.

For example, Alternative C has a 4-mile buffer around leks to determine road route; Alternatives B and D and the Proposed Plan Amendment would limit route construction to realignments of existing designated routes if that realignment were to have a minimal impact on GRSG habitat, were to eliminate the need to construct a new road, or would be necessary for motorist safety; Alternative D and the Proposed Plan Amendment would allow new routes and realignments in PHMA and GHMA during site-specific travel planning if it would improve GRSG habitat and resource conditions. Additionally, Appendix J of the FEIS explains that justifiable departures from established buffer distances may be necessary “because of variation in populations, habitats, development patterns, social context, and other factors, for a particular disturbance type, there is no single distance that is an appropriate buffer for all populations and habitats across the GRSG range. The USGS report also states that “various protection measures have been developed and implemented... [which have] the ability (alone or in concert with others) to

protect important habitats, sustain populations, and support multiple-use demands for public lands”. All variations in lek buffer distances would require appropriate analysis and disclosure as part of activity authorization” (FEIS, p. J -2). The North Dakota GRSG PRMPA/FEIS includes a list of references (Chapter 7), which lists information considered by the BLM in preparation of the FEIS.

The BLM relied on high quality information in the preparation of the North Dakota GRSG PRMPA/FEIS.