August 2, 2018

Bureau of Land Management
Wyoming State Office
Attn: Greater Sage-Grouse EIS
5353 Yellowstone Road
Cheyenne, WY 82009

Re: Comments of
Industrial Minerals Association – North America, and
National Mining Association
Wyoming Draft Resource Management Plan Amendment and
Environmental Impact Statement for Greater Sage-Grouse Conservation
(Notice of Availability, 83 Fed. Reg. 19,810 (May 4, 2018))

Dear State Director:

The following are the comments of Industrial Minerals Association – North America and National Mining Association ("Commenters") pursuant to the May 4, 2018, Federal Register notice of availability of a draft environmental impact statement for the Wyoming Draft Resource Plan Amendment and Environmental Impact Statement for Greater Sage-Grouse Conservation ("Wyoming DEIS") by the Department of the Interior ("DOI") at 83 Fed. Reg. 19,810 (May 4, 2018).

The 90-day comment period is scheduled to close on August 2, 2018, and accordingly, these comments are timely presented.

I. IDENTITY AND INTEREST OF COMMENTERS

A. Identity of Commenters

The Industrial Minerals Association – North America ("IMA-NA") represents producers and processors of industrial minerals in North America and associate members providing goods and services to the industrial minerals sector. Membership is composed of companies that are leaders in the ball clay, barite, bentonite, borates, calcium carbonate, diatomite, feldspar, industrial sand, kaolin, magnesia, mica, soda ash (trona), talc, wollastonite and other industrial minerals industries. Industrial minerals are critical to the manufacturing processes of many of

the products used every day, including glass, ceramics, paper, plastics, rubber, detergents, insulation, pharmaceuticals, and cosmetics. They also are used in foundry cores and molds used for metal castings, paints, filtration, metallurgical applications, refractory products and specialty fillers. IMA-NA is the principal trade association representing the industrial minerals industry in North America.

The National Mining Association ("NMA") is a national trade association that includes the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. NMA members mine on public lands in the eleven states, including Wyoming, that are home to the Greater Sage-grouse ("GRSG") and therefore would be directly impacted by any of the alternatives appearing in the Wyoming DEIS. NMA members mine in the state areas covered by the Wyoming DEIS, and the habitat of the GRSG coincides with some of the most significant mineral resources in the West.

B. Interest of Commenters

In the United States, the mining industry directly and indirectly generated nearly 1.7 million full-time and part-time jobs in the year 2015, the latest year for which data is available. Domestic mining accounted for more than 565,000 jobs, and jobs in other industries attributable to or induced by U.S. mining totaled 1.1 million. United States labor income associated with domestic mining exceeded $100 billion in 2015, which includes wages and salaries, other employee benefits and owner-operator business income. NATIONAL MINING ASSOCIATION, THE ECONOMIC CONTRIBUTIONS OF U.S. MINING (2015 UPDATE) (2016) ("NMA REPORT") at E-1.

In Wyoming, the mining industry contribution to state gross domestic product in 2015 was $8,370,000 funded by a total of 45,556 direct, and indirect and induced jobs. NMA REPORT at 4, 6.

The Commenters strongly support conservation of the GRSG. They also strongly support efforts by Federal agencies to conserve the GRSG. The Commenters are deeply committed to ensuring that the listing status of the GRSG under the Endangered Species Act ("ESA") remains undisturbed from its current status as "not warranted" under the ESA. *See* Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List Greater Sage-Grouse (*Centrocercus urophasianus*) as an Endangered or Threatened Species, 80 Fed. Reg. 59858 (Oct. 2, 2015).

However, in order to avoid the listing of the GRSG, the previous Administration afforded the Fish and Wildlife Service ("FWS" or "Service") complete and total domination over a Federal land use planning process that should have been the sole province of the Bureau of Land

Management ("BLM") and the United States Forest Service ("USFS").[1] After what began as a laudable effort to attend to a species registering no more than a "moderate" blip on the ESA radar screen,[2] FWS effectively orchestrated a divorce between the Federal land management agencies and the State of some Western States, sacrificing what had once been a functional and productive relationship grounded in Cooperative Federalism.

The Commenters are heavily invested to ensure that a lawful process by the United States is employed to balance the needs of GRSG conservation with appropriate multiple use of Federal public lands.

II. INTRODUCTION AND SUMMARY OF COMMENTS

A. Introduction

A consistent theme that pervades the Wyoming DEIS is a renewed effort by the Federal government to ensure that the States manage fish and wildlife within their sovereign borders. Accordingly, the purpose and need of this LUPA ("Land Use Plan Amendment") is to "enhance cooperation with the states" by modifying the existing Wyoming LUP in order to "better align with individual state plans and conservation measures and with DOI and BLM policy." *See* Wyoming DEIS at ES-2. To the extent that the Administration is accounting for the local views of the regulated community such as the Commenters, this is a welcome development.

The 2015 GRSG land use planning exercise by the BLM and the USFS was exceedingly controversial. That process effectively blurred the distinction between State management of natural resources and wildlife within their borders through what evolved into a top-down policy imposed on the States from the Federal government based in Washington, D.C. As these comments are filed, there is pending litigation on each and every LUPA finalized by the previous

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1. BLM lands are managed according to "resource management plans" ("RMPs"), and USFS lands are managed according to "land and resource management plans" ("LRMPs"). For ease of reference, these comments shall collectively refer to these plans, and the amendments or revisions of those plans, simply as "land use plans" ("LUPs").

2. The GRSG was assigned a Listing Priority Number ("LPN") of an 8 during the most recent annual candidate notice of review ("CNOR") process before the Obama Administration September 2015 listing determination. The FWS has guidance for assigning an LPN for each candidate species and through this guidance, each candidate species is assigned an LPN of 1 to 12, depending on the magnitude of threats, immediacy of threats, and taxonomic status. Endangered and Threatened Species Listing and Recovery Priority Guidelines, 48 Fed. Reg. 43098-02, 43102 (Sept. 21, 1983). The lower the LPN, the higher the listing priority (a species with an LPN of 1 would have the highest listing priority). The LPN of 8 assigned by FWS to the GRSG indicates the threats to be of moderate magnitude, "because the threats are not occurring with uniform intensity or distribution across the wide range of the species at this time, and substantial habitat still remains to support the species in many areas." *See* Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions; Proposed Rule, 79 Fed. Reg. 72450, 72465 (Dec. 5, 2014).

Administration, with two State Governors and another sovereign State (Nevada) as party plaintiffs in Federal Court.

Commenters represent mining interests in each of the States that were subject to BLM and USFS LUPAs. By a revived focus on the particular needs of each individual State sovereign, the current land use planning review will only serve to reinvigorate cooperative Federalism with respect to conservation of the GRSG and will form more genuine State-Federal partnerships to conserve the Greater Sage-grouse.

B. Summary of Comments

The Commenters support any additional flexibility through this review of the Wyoming LUP that enhances the State's flexibility to implement its Greater Sage-grouse conservation program.

With minor adjustment where indicated below, the Commenters support the "Management Alignment Alternative," otherwise nominated as the Preferred Alternative. The BLM is offering changes to the Wyoming LUP that better align with the long-stated position of the Commenters that appropriate Federal land use can serve the dual purposes of species conservation and responsible natural resource development.

Commenters make three key points related to the Wyoming DEIS:

- First, the 2015 Wyoming LUPA was developed and approved in contravention to multiple Federal laws;
- Second, the proposed withdrawal of Federal public lands that accompanied the 2015 Wyoming LUPA was unnecessary, served no underlying Greater Sage-grouse conservation purpose in the first instance, and should be formally and finally terminated in addition to removal of the Plan habitat management designation developed to accommodate the withdrawal; and
- Third, Greater Sage-grouse conservation can proceed in earnest on Federal public lands without the statutorily unauthorized "net conservation gain" compensatory mitigation standard.

III. DISCUSSION

A. General Comments

1. The 2015 Wyoming Sage-Grouse Land Use Plan Amendment Was a Product of a Legally Flawed Process

a. The History of the Greater Sage-Grouse Under the Endangered Species Act

The narrative of the 2015 Wyoming BLM Land Use planning exercise cannot be fully understood absent a review of the status of the GRSG under the ESA, 16 U.S.C. §§ 1531-1544.

During the George W. Bush Administration, the FWS determined that the ESA status of the GRSG was "not warranted." Endangered and Threatened Wildlife and Plants; 12-Month Finding for Petitions to List the Greater Sage-Grouse as Threatened or Endangered, 70 Fed. Reg. 2244 (Jan. 12, 2005). Later, in 2010, the FWS determined that listing the GRSG under the ESA was warranted but precluded by other higher priority actions pursuant to Section 4(b)(3)(B)(iii) of the ESA. *See* Endangered and Threatened Wildlife and Plants; 12-Month Findings for Petitions to List the Greater Sage-Grouse (*Centrocercus urophasianus*) as Threatened or Endangered, 75 Fed. Reg. 13910-01 (March 23, 2010). The Service's "warranted" finding was based on, among other things, the claim that under Section 4(a)(1)(D), 16 U.S.C. § 1533(a)(1)(d), existing regulatory mechanisms (both State and Federal) were not adequate.[3]

Shortly thereafter, WildEarth Guardians and other non-governmental organizations filed suit against the FWS seeking to reduce the backlog of species listing decisions by the FWS under the ESA, including a listing decision on the GRSG. *See generally In re: Endangered Species Act Section 4 Deadline Litig.,* No. 1:10-mc-00377, MDL Dkt. No. 2165 (D.D.C.). This action was consolidated with 11 other lawsuits, each seeking to compel the FWS to list different species as threatened or endangered under the ESA. *In re: Endangered Species Act Section 4 Deadline Litig.*, 716 F. Supp. 2d 1369 (U.S. Jud. Pan. Mult. Lit. 2010).

In 2011, WildEarth Guardians and the FWS jointly moved to settle the plaintiffs' claims. Joint Motion for Approval of Settlement Agreement and Order of Dismissal of Guardians' Claims, *In*

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3. Section 4(a)(1) of the Endangered Species Act, 16 U.S.C. § 1533(a)(1), sets forth the criteria by which the FWS will determine to list the GRSG:

> The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:
> (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
> (B) overutilization for commercial, recreational, scientific, or educational purposes;
> (C) disease or predation;
> (D) the inadequacy of existing regulatory mechanisms; or
> (E) other natural or manmade factors affecting its continued existence.

re: Endangered Species Act Section 4 Deadline Litigation, 1:10-mc-00377, MDL No. 2165 (D.D.C.), Dkt. No. 31 (D.D.C. May 10, 2011). The settlement agreement required the FWS to make a final ESA listing decision on the GRSG no later than September 30, 2015. *Id*.

In December of 2011, the BLM and the USFS announced their intent to commence a process, pursuant to the National Environmental Policy Act ("NEPA"), to amend their respective LUPs under the Federal Land Policy Management Act ("FLPMA") and the National Forest Management Act ("NFMA") in order to provide adequate regulatory mechanisms that would preclude an ESA listing of the GRSG by the FWS.

Concurrent with the execution by the BLM of the Wyoming Record of Decision ("ROD") on September 21, 2015, the GRSG status under the ESA was again reviewed by the Obama Administration, who also determined that listing was "not warranted." Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List Greater Sage-Grouse (*Centrocercus urophasianus*) as an Endangered or Threatened Species, 80 Fed. Reg. 59858-01 (Oct. 2, 2015). Unlike the earlier route to "not warranted," the Obama Administration afforded FWS complete and total domination over a Federal land use planning process that should have been the sole province of the BLM and the USFS. The reward: FWS proudly trumpeted its GRSG species management scheme as "unprecedented in scope and scale, and … a significant shift from management focused within administrative boundaries to managing at a landscape scale." *Id.* at 59874.

a. The Wyoming Land Use Plan is Challenged in *Wyoming Stock Growers Assn. v. United States Department of the Interior* and *Wyo. Coalition of Local Gov'ts v. U.S. Dep't of the Interior*

Litigation ensued in Wyoming and elsewhere shortly upon the execution of the ROD approving the final RMP amendments by BLM.[4] On October 14, 2015, the Wyoming Stock Growers filed a petition for review on behalf of the Wyoming Stock Growers Association ("WSGA") seeking judicial review of two of the four RODs—the BLM's and USFS's Rocky Mountain RODs and

4. As these comments are filed, the litigation docket challenging the BLM an USFS GRSG land use plans is enormous and is spread through most of the Western state jurisdictions and the District of Columbia. *See, e.g.*, *W. Exploration LLC v. U.S. Dep't of the Interior*, 250 F. Supp. 3d 718 (D. Nev. 2017), *appeal docketed*, No. 17-16220 (9th Cir. June 13, 2017); *W. Watersheds Project v. Schneider*, No. 1:16-cv-83 (D. Idaho); *Herbert v. Jewell*, No. 2:16-cv-101 (D. Utah); *W. Energy All. v. U.S. Dep't of the Interior*, No. 2:16-cv-1267 (D. Utah); *W. Energy All. v. U.S. Dep't of the Interior*, No. 1:16-cv-112 (D.N.D.); *Am. Exploration & Mining Ass'n v. U.S. Dep't of the Interior*, No. 1:16-cv-737 (D.D.C.); *W. Energy All. v. U.S. Dep't of the Interior*, No. 1:16-cv-2482 (D.D.C.); *Harney Soil & Water Conservation Dist. v. U.S. Dep't of the Interior*, No. 1:16-cv-2400 (D.D.C.); *Cahill Ranches, Inc. v. Bureau of Land Mgmt.*, No. 1:17-cv-960 (D. Or.); *Bd. of Cnty. Comm'rs of the Cnty. of Garfield v. U.S. Dep't of the Interior*, No. 1:17-cv-1199 (D. Colo.). In *Otter v. Jewell*, 227 F. Supp. 3d 117 (D.D.C. 2017), *appeal docketed*, No. 17-5050 (D.C. Cir. Mar. 28, 2017), the U.S. District Court for the District of Columbia granted summary judgment in favor of the United States on justiciability grounds and did not reach the merits in this case, now stayed on appeal.

GRSG LUPA in Wyoming. The petition requested that the court set aside the challenged final agency actions. The plaintiffs alleged that the LUPA unlawfully and arbitrarily restrict many resource uses, including livestock grazing and mining. They further allege that the RODs and the approved LUPA impose arbitrary vegetation objectives, such as a 7-inch grass height.

The Wyoming Coalition of Local Governments ("CLG") filed its petition for review of the BLM's decision approving the ROD and the Approved Resource Management Plan Amendments ("ARMPAs") for the Rocky Mountain Region and the USFS's decision approving the GRSG ROD for Northwest Colorado and Wyoming, Land Management Plan Amendments for the Routt National Forest, Thunder Basin National Grassland, Bridger-Teton National Forest, and Medicine Bow National Forest, and Wyoming Plan Amendment for portions of the Ashley and Uinta-Wasatch-Cache National Forests on March 1, 2016. The CLG claims that the BLM Wyoming RMP Amendments violate the Administrative Procedures Act, FLPMA, the General Mining Act of 1872 ("1872 Mining Law"), as amended, the Mineral Leasing Act and the respective implementing regulations, and that the USFS ROD and LMPA also violate NEPA, and the NFMA. CLG's case was consolidated with the *Wyoming Stock Growers Association* case on April 5, 2016.

2. Congress and the Trump Administration Have Repudiated or Abandoned Several Key Policy Benchmarks of the Previous Administration GRSG Land Use Plans

As of this date, the Trump Administration has abandoned several key cornerstone policies of the BLM land use plan challenged in Wyoming and proposed to be revised here.

a. "Landscape" Level Land Use Planning, the Philosophical Lynchpin of the 2015 BLM Land Use Plans, Has Been Rejected by Congress

In December 2016, President Trump signed a resolution of disapproval under the Congressional Review Act (House Joint Resolution 44) that rescinded the BLM's "Resource Management Planning" Rule ("Planning 2.0"). Resource Management Planning, 81 Fed. Reg. 89580-01 (Dec. 12, 2016). Similar to the GRSG land use plans, Planning 2.0 heavily relied on "landscape-scale" principles and net conservation gain mitigation that were embodied in the Wyoming LUPA and others, and was praised by the FWS as a "significant shift." Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List Greater Sage-Grouse (*Centrocercus urophasianus*) as an Endangered or Threatened Species, 80 Fed. Reg. 59858-01, 59874 (Oct. 2, 2015). Accordingly, this approach to land use planning has been expressly rejected by Congress.

b. March 28, 2017 White House Executive Order 13783 Entitled "Promoting Energy Independence and Economic Growth"

President Trump executed Executive Order 13783 (March 28, 2017), directing a reexamination of the mitigation policies and practices across the DOI in order to better balance conservation strategies and policies with the equally legitimate need of creating jobs for hard-working American families. The objective of the review is to identify agency actions that unnecessarily burden the development or utilization of the Nation's energy resources and support action to appropriately and lawfully suspend, revise, or rescind such agency actions as soon as practicable.

c. Secretary's Order 3349

In response to President Trump's Executive Order 13783, Secretary Zinke issued Secretarial Order No. 3349 entitled, "American Energy Independence" ("SO 3349"), implementing the review of agency actions directed by the White House. Specifically, SO 3349 directs a reexamination of the mitigation policies and practices across the DOI in order to better balance conservation strategies and policies with the equally legitimate need of creating jobs for hard-working American families.

Importantly, Section 4 of SO 3349 rescinded Secretarial Order 3330 ("SO 3330"), "Improving Mitigation Policies and Practices of the Department of the Interior," dated October 31, 2013. Through SO 3330, the Obama Administration directed the BLM to develop and implement a landscape-scale mitigation policy that supported the GRSG LUPA's imposition of a "net conservation gain" standard across the entire planning area. By operation of SO 3349 and EO 13783, the BLM and USFS are required to reassess the "landscape-scale" mitigation approach in the GRSG LUPAs during this process.

d. Secretary's Order 3353

On June 7, 2017, the Secretary of the Interior issued Secretarial Order No. 3353 which, *inter alia*, directed the BLM to:

1) Review plans and programs that States have in place to ensure that the Federal Sage-Grouse Plans adequately complement State efforts to conserve the species;

2) Examine "issues associated with preventing and fighting the proliferation of invasive grasses and wildland fire, which are leading threats to Sage-Grouse habitat";

3) Examine the "impact on States disproportionately affected by the large percentage of Federal lands within their borders, recognizing that those lands are important to resource use and development, and to the conservation of the Sage-Grouse"; and

4) Review "the 2015 Sage-Grouse Plans and associated policies, including seven BLM Instruction Memoranda (IM) issued in September 2016" to identify "provisions" that "may require modification or rescission, as appropriate, in order to give appropriate weight to the value of energy and other development of public lands within BLM's overall multiple-use mission…, and opportunities to conserve the Sage-Grouse and its habitat without inhibiting job creation and local economic growth."

On August 4, 2017, a report addressing the issues set forth above, which was developed with input from Western Governors and the State of Utah, was delivered by the BLM to the Secretary. That report recommends land use plan revisions where appropriate to lawfully comply with Federal law and conserve the GRSG.

e. Notice of Intent to Amend GRSG Land Use Plans and Termination of Sagebrush Focal Areas, 82 Fed. Reg. 47248-02 (Oct. 11, 2017)

On October 11, 2017, the BLM made two significant decisions. First, it announced its intention to amend the GRSG land use plans and take public comment regarding the scope of that effort:

> [T]he BLM seeks comment on the [sagebrush focal areas] designation, mitigation standards, lek buffers in all habitat management area types, disturbance and density caps, habitat boundaries to reflect new information, and reversing adaptive management responses when the BLM determines that resource conditions no longer warrant those responses. The BLM also seeks comment on State specific issues, ….

Notice of Intent to Amend Land Use Plans Regarding Greater Sage-Grouse Conservation and Prepare Associated Environmental Impact Statements or Environmental Assessments, 82 Fed. Reg. 47248-02, 47249 (Oct. 11, 2017). Concurrent with that announcement, the BLM canceled the withdrawal application for the sagebrush focal areas ("SFA") and terminated the NEPA process. "The BLM has determined that the lands are no longer needed in connection with the proposed withdrawal." Notice of Cancellation of Withdrawal Application and Withdrawal Proposal and Notice of Termination of Environmental Impact Statement for the Sagebrush Focal Area Withdrawal in Idaho, Montana, Nevada, Oregon, Utah and Wyoming, 82 Fed. Reg 47248-01, 47248 (Oct. 11, 2017).

Accordingly, several of the critical Obama Administration policy cornerstones of the land use planning by the BLM and the USFS challenged in Wyoming have been repudiated, abandoned or are presently under review by the Trump Administration. Accordingly, this review of the 2015 Wyoming BLM GRSG RMP is in order.

f. Instruction Memorandum 2018-093 (July 24, 2018) (Compensatory Mitigation)

On July 24, 2018, the BLM provided specific policy direction on the issue of compensatory mitigation through issuance of Instruction Memorandum ("IM") No. 2018-093. Specifically, the BLM is now directing that compensatory mitigation cannot be required as a condition for the use of public lands. Included within that policy directive is that the BLM shall also not accept any monetary payment to mitigate the impacts of any proposed action and, in all instances, the BLM must refrain from authorizing any activity that causes unnecessary or undue degradation ("UUD"), pursuant to Section 302 of FLPMA.

So stated, IM No. 2018-093 authorizes acceptance of compensatory mitigation as voluntary by a project proponent. To ensure that compensatory mitigation is voluntary, the BLM must not explicitly or implicitly suggest that a project approval is contingent upon proposing a "voluntary" compensatory mitigation component, or that doing so would reverse or avoid an adverse finding. Importantly, the IM notes that "[e]ven if FLPMA *authorizes* the use of compensatory mitigation, it does not require project proponents to implement compensatory mitigation." IM No. 2018-093 (July 24, 2018), *available at* https://www.blm.gov/policy/im-2018-093 (emphasis in original).

Further, "these concerns are particularly acute when coupled with the 'net conservation gain' standard, which necessarily goes beyond mitigating actual or anticipated impacts to forcing participants to pay to address impacts they did not cause. To minimize the risk of misuse and ensure compliance with applicable legal authorities, BLM will not mandate compensatory mitigation as a condition of project authorizations, unless required by law." *Id*. Accordingly, compensatory mitigation, the foundation for the "net conservation gain" standard applied across the 2015 ARMPAs adopted across the range of the BLM GRSG planning area, has been renounced.

f. Fish & Wildlife Service ESA Mitigation Policy and General Programmatic Mitigation, 83 Fed. Reg. 36,469 and 36,472 (July 30, 2018)

On July 30, 2018, the FWS formally withdrew two significant mitigation policies of the previous Administration. The first policy, issued on November 6, 2017, related to ESA compensatory mitigation policy, was withdrawn by Endangered and Threatened Wildlife and Plants; Endangered Species Act Compensatory Mitigation Policy, 83 Fed. Reg. 36469-01 (July 30, 2018). The second, a policy of November 21, 2016, guided the Service on recommendations to mitigate impacts of activity of land and water developments on fish, wildlife, plants, and their habitats, was withdrawn at U.S. Fish and Wildlife Service Mitigation Policy, 83 Fed. Reg. 36472-01 (July 30, 2018). Each withdrawn policy was an eleventh-hour pronouncement by the

previous Administration that imposed a "net conservation gain" standard as applied to matters particularly focused under the ESA, in addition to throughout FWS-related activities.

As justification for the policy revocation, the FWS recognized that the previous policies raised serious concerns related to requiring mitigation to impacts unrelated to a project proponent's actions as potentially implicating federal constitutional concerns related to the Fifth Amendment prohibition on takings. *See generally Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013). Additionally, according to the FWS, "[t]he ESA requires neither 'net conservation benefit' nor 'no net loss,' and the [FWS] has not previously required a 'net benefit' nor 'no net loss' while implementing the ESA." Endangered and Threatened Wildlife and Plants; Endangered Species Act Compensatory Mitigation Policy, 83 Fed. Reg. 36469-01, 36470 (July 30, 2018).

Similar to the BLM's recognition of the UUD standard under FLPMA, the FWS recognized that, threaded between Sections 7 and 10 of the ESA, "the applicant may do something less than fully minimize and mitigate the impacts of the take where to do more would not be practicable," while still advancing the Section 7(a)(2) obligation to insure that any Federal activity is not likely to jeopardize the continued existence of any endangered or threatened species or result in destruction or adverse modification of habitat. *See National Wildlife Federation v. Norton*, 306 F. Supp. 2d 920, 928 (E.D. Cal. 2004).

Accordingly, as these comments are filed, the legal and policy basis for applying the "net conservation gain" standard, both as a matter of land management practices under FLPMA and NFMA, as well as a foundation for conservation of listed species and designated habitat under the ESA, have no lawful grounding in the LUP under review.

B. Specific Comments

1. Issues and Related Resource Topics

a. Modifying Habitat Management Area Designations

The Wyoming DEIS is requesting comment on the "[in]tegration of flexibility into the plans to be able to adjust habitat management area boundaries without the need for plan amendment." Wyoming DEIS at ES-3.

Under FLPMA, 43 U.S.C. §§ 1701-1785, requirements for land use planning on public land include that the BLM, under the Secretary of the Department of the Interior, "develop, maintain, and when appropriate, revise land use plans" to ensure that land management be conducted "on the basis of multiple use and sustained yield." 43 U.S.C. §§ 1701(a)(7), 1712(a); *see also Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 555 (9th Cir. 2006).

As between plan maintenance and plan revisions, "these provisions were created as complements, and taken together they ensure that whatever resource management plans are changed in any meaningful way, the changes must be made by amendment (i.e., supported by scientific environmental analysis and public disclosure)." This is consistent with FLPMA's requirement that the BLM ensure the "views of the general public" and "third-party participation" are adequately incorporated into the land planning process. [Citation omitted.] This interpretation is also supported by provisions of FLPMA that require the BLM to manage public lands in accordance with resource management plans once they have been established." *Klamath Siskiyou Wildlands Center* at 557. In the Ninth Circuit, the test is that the dividing line between plan maintenance and plan revisions if a "dramatic change in policy" effectuates a change in a "term or condition" in the existing RMP. *Id*. at 559-60.

Under 43 CFR § 1610.5-4, plan maintenance actions are limited to further refining or documenting a previously-approved decision incorporated in the plan." Further, "maintenance shall not result in expansion in the scope of resource uses or restrictions, or change the terms, conditions and decisions of the approved plan." By contrast, 43 CFR § 1610.5-5 requires more extensive plan amendment triggered by "the need to consider monitoring an evaluation findings, new data, new or revised policy, a change in circumstances or a proposed action that may result in a change in the scope of resource uses or a change in the terms, conditions and decisions of the approved plan."

The BLM Land Use Planning Handbook, H-1601-1, Part VI, Chapter (H) further directs that land use plan maintenance is limited to "clarifying a previously approved decision incorporated into the plan" including such examples as refining the boundary of an archeological district based on new inventory data and refining the known habitat of a special status species addressed in the plan based on new information, and, upon new discovery of a sage-grouse lek, and applying an existing oil and gas lease stipulation to a new area. *Id*. at 44.

The Commenters support the laudable purposes of flexibility for adjustment of HMAs without the need for a plan amendment. The issue is how to define the outer reaches of "plan maintenance" from material changes that would warrant the formality of land use plan amendments under FLPMA. The DEIS Management Alignment Alternative proposes to update and make adjustment to HMAs and include language that would allow the BLM to update the HMAs through plan maintenance "when appropriate, based on the most updated best available science." Such efforts to reflect the accurate habitat on the ground would serve the laudable purpose of allowing infrastructure and economic development to occur in areas that would not impact the species. *See* Wyoming DEIS at ES-3.

b. Sagebrush Focal Areas

The Wyoming DEIS at ES-3 seeks information on whether the SFA designated areas contribute to achieving conservation outcomes, in addition to the relevance of the SFA habitat designation

in the absence of a mineral withdrawal and if there are further constraints on mineral development within SFAs.

As a part of the range-wide approach to the BLM and USFS land use plans in the previous Administration, approximately 10 million acres of available public lands were withdrawn and made inaccessible under the 1872 Mining Law, including 252,162 acres in Fremont, Lincoln, Sublette, Sweetwater, and Uinta Counties. The preview to the formality of the actual withdrawals became evident in the ROD and the ARMPAs. *See* Notice of Proposed Withdrawal; Sagebrush Focal Areas; Idaho, Montana, Nevada, Oregon, Utah, and Wyoming and Notice of Intent to Prepare an Environmental Impact Statement, 80 Fed. Reg. 57635-01 (Sept. 24, 2015) (notifying the public of the proposed withdrawal of BLM and USFS lands identified as SFAs in Idaho, Montana, Nevada, Oregon, Utah and Wyoming). The notice also began a two-year segregation period which prohibited location and entry from those lands identified as SFAs.

However, when the NEPA process began to facilitate the withdrawals, the purported threat to the GRSG as dictated by the FWS was infinitesimal compared to the overall acreage proposed to be withdrawn. The BLM DEIS noted: "The total amount of mining related disturbance in Sagebrush habitat under the No Action Alternative [no withdrawal] would be *9,554* acres . . ., or *approximately one-tenth of 1 percent of the total withdrawn area*." (Emphasis added). Sagebrush Focal Areas Withdrawal Environmental Draft Impact Statement Idaho, Montana, Nevada, Oregon, Utah, and Wyoming (Dec. 2016) at 4-71. Indeed, the difference in acres that could be disturbed over 20 years between no withdrawal and a withdrawal of approximately 10 million acres was a mere 6,934 acres.

Based on the erroneously calibrated threat to GRSG from mining and other resource development, on October 11, 2017, BLM allowed the two-year segregation period to expire by operation of law and cancelled the proposed SFA withdrawal. *See* Notice of Cancellation of Withdrawal Application and Withdrawal Proposal and Notice of Termination of Environmental Impact Statement for the Sagebrush Focal Area Withdrawal in Idaho, Montana, Nevada, Oregon, Utah and Wyoming, 82 Fed. Reg. 47248-01 (Oct. 11, 2017). The obsolescence and imprecision by which the SFA allocations remain in the current ARMPAs, including Wyoming, remains apparent. Other restrictions tied to the designation of the SFAs, if legitimate to advance GRSG conservation, can be developed with a scalpel, as opposed to the overbroad and miscalculated scope of proposed withdrawals advocated by the previous Administration. Accordingly, the LUP should be amended to eliminate the SFA allocations.

c. Mineral Withdrawal

The Wyoming DEIS seeks comment on what would occur as a result of not moving forward with the previously recommended withdrawals. See Wyoming DEIS at ES-3.

If the BLM is to achieve a lawful outcome in this present administrative process, it must critically analyze and carefully balance its obligations under four key bedrock substantive

Federal laws: 1) General Mining Act of 1872, Ch. 152, 17 Stat. 91 (codified as amended at 30 U.S.C. §§ 22-24, 26-30, 33-35, 37, 39-43, 47 ("1872 Mining Law"); 2) the Federal Land and Policy Management Act, 43 U.S.C. §§ 1701-1784 ("FLPMA"); 3) the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a; and 4) the Endangered Species Act, 16 U.S.C. §§ 1531-1544.

In Wyoming, the Minerals Leasing Act of 1920, Pub. L. No. 66-146, 41 Stat. 437 (1920) (current version at 30 U.S.C. §§ 181-226) ("MLA"), plays an important role in the business models of Commenters' member companies. The MLA governs the legal relationship between the Federal government and mining entities represented by Commenters for the extraction of non-energy leasable minerals such as trona, phosphate, sodium, potassium, and sulphur.[5]

Any further attention by BLM to advancing the withdrawal of public lands from mining is primarily governed by the Mining Law and FLPMA, the organic Federal statutes that would normally provide the legal baseline for land use planning. The inner workings of each are further discussed below.

i. The General Mining Act of 1872

The 1872 Mining Law, has, for more than a century and half, recognized claims based on individual actions appropriating hard rock minerals from Federal lands.

The 1872 Mining Law invites citizens to locate mining claims on public lands open to location by declaring that "all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase . . . ." 30 U.S.C. § 22. This statutory command grants a valid existing right to all United States citizens to use lands open to mineral entry, with or without a mining claim, for all uses and purposes reasonably incidental to prospecting, mining and processing, including rights of ingress and egress.

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5. The MLA has been described as "[t]he law that changed Wyoming's economic destiny," *see* Samuel Western, *The Mineral Leasing Act of 1920: The law that changed Wyoming's economic destiny*, https://www.wyohistory.org/encyclopedia/mineral-leasing-act-1920-law-changed-wyomings-economic-destiny (last visited August 1, 2018). The MLA also provides a guidepost the NEPA analysis for leasables such as coal and trona on Federal lands. Linear disturbances for utilities and pipelines are rights of way issued under FLPMA, but for leasable minerals within the mineral lease areas, rights of way within mineral lease areas, even when linear such as injection or extraction pipelines, roads, power lines and other infrastructure, are issued by BLM under authority granted through MLA.

   In the Wyoming DEIS, Table 4.3 describes GRSG range wide impacts from leasable minerals, including non-energy leasable minerals. Between the years 2015 and 2017, the BLM has leased approximately 25,000 acres in HMAs, of which a mere 25 acres were located in PHMA. The BLM has determined that the act of leasing itself would have no direct effect, as no specific disturbance is taken as a result of purchasing a lease. *See* Wyoming DEIS at 4-29. This conclusion is correct.

Stated generally, the 1872 Mining Law authorizes and governs prospecting, exploration, development, and mining for economic minerals on Federal public lands. It was designed to encourage individuals to prospect, explore and develop the mineral resources of the public domain through an assurance of exclusive possession of the developed minerals. *United States v. Shumway*, 199 F.3d 1093, 1098-99 (9th Cir. 1999) ("The miners' custom, that the finder of valuable minerals on government land is entitled to exclusive possession of the land for purposes of mining and to all the minerals he extracts, has been a powerful engine driving exploration and extraction of valuable minerals . . . .") The 1872 Mining Law has also encouraged the private development of the minerals and metals America needed and would need without risking the public treasury.

Mining claim location is a self-initiated act that does not require approval of the United States to establish property rights. When a mining claimant properly locates a mining claim, the claimant requires a "unique form of property." *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963). This unique property interest includes the right to use so much of the surface as is reasonably necessary to develop the discovered valuable mineral deposit and the right to extract all valuable locatable minerals without payment to the United States. Accordingly, the 1872 Mining Law provides mining claimants with considerable rights to conduct operations to extract minerals from public lands.

Under the 1872 Mining Law, all citizens have the right to enter public lands open to mineral entry and locate mining claims or mill site claims. *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 506 (9th Cir. 1997). Once a claim is staked, the holder "has the exclusive right to possession and enjoyment of all the surface included within the lines of the locations, but the United States retains title to the land." *Id*. Moreover, "[i]f a discovery of a 'valuable mineral deposit' is made, the claim can be held indefinitely so long as the annual assessment work is performed, the necessary filings are made, fees are paid, and a valuable mineral deposit continues to exist." *Id.* at 507.

It is well established that "[t]he owner of a mining claim owns property, and is not a mere social guest of the Department of the Interior to be shooed out the door when the Department chooses." *United States v. Shumway*, 199 F.3d 1093, 1103 (9th Cir. 1999); *accord United States v. Locke*, 471 U.S. 84, 86 (1985) ("[A]n unpatented mining claim remains a fully recognized possessory interest."). In other words, a mining claim, even without more, implicates significant rights.

ii. The Federal Land Policy Management Act of 1976

The FLPMA is the organic framework for the BLM. The FLPMA sets forth the principles governing the management of lands owned by the United States and administered by the Secretary of the Interior through the BLM.

Under FLPMA, the BLM is required to manage the public lands on the basis of multiple use and sustained yield. 43 U.S.C. § 1701(a)(7) (2006) " 'Multiple use management' is a concept that

describes the complicated task of achieving a balance among the many competing uses on public lands, 'including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.' " *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004) (quoting 43 U.S.C. § 1702(c)).

In enacting FLPMA, Congress explicitly acknowledged the continued vitality of the 1872 Mining Law. Section 302(b) of FLPMA states:

> Except as provided in Section 1744, Section 1782, and Subsection (f) of Section 1781 of this title and in the last sentence of this paragraph, no provision of this section or any other section of this act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under the act, including, but not limited to, rights of ingress and egress.

43 U.S.C. § 1732(b). The House Committee on Interior and Insular Affairs described this provision more particularly when it stated:

> This section specifies that no provision of the Mining Law of 1872 will be amended or altered by this legislation except as provided in Section 207 (recordation of mining claims), Subsection 401(f) (regulation of mining in the California desert), Section 311 (wilderness review areas and wilderness areas), and except for the fact that the Secretary of the Interior is given specific authority, by regulation or otherwise, to provide that prospecting and mining under the mining law will not result in unnecessary or undue degradation of the public lands. The secretary is granted general authority to prevent such degradation.

H.R. Rep. No. 94-1163 at 6 (1976). Under this regulatory framework, the BLM is required to strike an appropriate balance between potentially competing interests and land management objectives. A LUP cannot lawfully close an area to the operation of the Mining Laws. Withdrawals of the magnitude proposed in the 2015 Wyoming ARMPA can only be achieved through a Congressional act, and the current Wyoming RMP conflicts with the FLPMA's multiple use mandate and the Property Clause of the United States Constitution, which gives Congress sole power to regulate the public lands. *See* U.S. CONST., ART. IV, § 3, CL. 2.

iii. The Fatal Imbalance of the Current Wyoming Land Use Plan Afford Ample Justification to Formally and Finally Terminate the SFA Withdrawals

The previous land use plans were not crafted under a premise that balanced the Congressional directives under the 1872 Mining Law and FLPMA. The Wyoming 2015 ARMPA was driven by an effort by the previous Administration to achieve an outcome under the ESA, and, out of necessity, the balance required between 1872 Mining Law and FLPMA was minimized.

As observed by a senior Administration official at the time, the 2015 GRSG LUPAs were "not a planning exercise, but an effort to develop a landscape level plan to conserve the GRSG."[6] In other words, the BLM and USFS endorsed a policy decision by the previous Administration that an ESA outcome, a Washington, D.C. directed outcome under the ESA, was to prevail over local values and considerations that the 1872 Mining Law and FLPMA accommodate.[7] The litigation administrative record reveals that FWS Director Dan Ashe assumed command of determining when the cosmetic "good-faith" negotiations with the States advancing their land use management plans needed to be directed differently, or in some cases, terminated in favor of national ESA uniformity.[8] Stated differently, the interested constituencies found themselves negotiating with the FWS over Federal activity wholly within the province of the BLM.

On October 11, 2017, the BLM published a Notice of Cancellation of Withdrawal Application and Withdrawal Proposal and Notice of Termination of [EIS] for [SFAs] Withdrawal in Idaho, Montana, Nevada, Oregon, Utah and Wyoming ("Cancellation Notice"), 82 Fed. Reg. 47248-01 (Oct. 11, 2017). The BLM determined that "the lands are no longer needed in connection with the withdrawal. The BLM has also terminated the preparation of an [EIS] evaluating this application. *Id*. at 47248. It also provided notice that the two-year segregation expired by operation of law on September 24, 2017. *Id*. Accordingly, for the reasons stated above, the unlawful SFA withdrawals should not be revived.

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6. July 6, 2014 email from James Lyons, Assistant Deputy Secretary of the Interior, to Edwin Roberson, Assistant BLM Director. James Lyons goes on to declare that "[w]ords matter and I am concerned that too many people on the ground simply see this as a plan revision/amendment effort."

7. In subsequent litigation, the Department of Justice justified the Obama Administration's rejection of State-based plans as necessary for national uniformity over State-specific precision.

> Shortly thereafter, the National Policy Team released further guidance for the planning effort, emphasizing certainty and uniformity. In early 2015, agencies received guidance regarding SFAs. These developments warranted further refinement to the [Administrative Draft of the Proposed Plan] and ultimately resulted in the Proposed Plan analyzed in the FEIS. In short, [the Governor's Plan] was considered by the agencies, *but was superseded in light of the Federal policies for regulatory certainty and uniformity,* which [the Governor's Plan] did not satisfy.

See Reply Brief of Federal Defendants' in Support of Cross-Motion for Summary Judgment at 20, n.12, *Otter v. Jewell*, No. 1:15-CV-01566-EGS (D.D.C. May 6, 2016) (emphasis added).

8. *See, e.g.*, WO_0001994; WO_0000766 (FWS Director Ashe stating "[h]owever, I hope this is not intended to be a negotiation with WY, because it is *essential* that the Service be satisfied that the strongholds are secure") (emphasis added); WO_0029242 (Director Ashe regarding the plan for secretarial mineral withdrawal process: "ANYTHING OTHER THAN A VERY STRONG STATEMENT ON WITHDRAWALS WITHIN FSAs [SFAs] WOULD BE VERY DAMAGING." (emphasis in original); WO_0023710 (March, 2015 email from Director Ashe declining to meet with a Western State (Idaho), declaring that: "I'm not really interested in further hashing of the [SFA] stronghold boundaries at a policy level.").

d. Managing Noise Standards Outside PHMA

The Commenters support any additional flexibility through this review of the Wyoming LUP that enhances the State's flexibility to implement their Greater Sage-grouse conservation program.

The preferred Management Alignment Alternative features an element addressing noise standards, and the Wyoming DEIS is seeking comment on managing noise standards outside of designated PHMA/Core Areas. *See* Wyoming DEIS at ES-3. The issue arises in the context of Wyoming Executive Order 2015-4, which directs that within PHMA/Core Areas, new project noise levels, either individually or cumulatively, should not exceed 10 dB above baseline noise at the perimeter of elect from 6 p.m. to 8 a.m. during the breeding season (March 1 to May 15). *See* State of Wyoming Executive Department, Executive Order 2015-1 at Attachment B, p. 8.

Because priority habitat management areas ("PHMA") and core areas are the most efficient geographical confines by which the GRSG may be conserved, Commenters support that new project noise levels pursuant to the Wyoming Executive Order to remain in place in PHMA/Core Areas pursuant to the directive of EO-2015-4. If future science confirms that noise standards within PHMA/Core Areas is an effective conservation tool near leks during breeding season, then project flexibility *outside* of PHMA/Core Areas should be considered, but only if it remains consistent with the overarching goal of maintaining State-based flexibility in implementation of the Wyoming State Plan. Stated simply, Commenters support the continued integrity of GRSG conservation within PHMA/Core Areas and non-Core/general habitat management area ("GHMA") as a means to insure GRSG conservation efficiency while harmonizing appropriate land uses and future development under the Mining Law and FLPMA.

e. Compensatory Mitigation

i. The BLM Has Conceded that Net Conservation Gain Was Unlawfully Inserted into the Wyoming ARMPA Under NEPA

For purposes of the proposed RMP changes: "At the request of the State, the Management Alignment Alternative in this Draft RMPA/EIS proposes a change to the compensatory mitigation by modifying the net conservation gain standard for compensatory mitigation that the BLM incorporated into its plans in 2015." Wyoming DEIS at ES-6. But as correctly stated in the Wyoming DEIS, the public was *not* afforded the opportunity to comment on this mitigation standard to be applied for GRSG conservation because it came well after the DEIS was published and comment period closed. *Id*. Accordingly, the United States concedes this key feature of the 2015 RMP as fatally defective as a matter of NEPA process review.

ii. Net Conservation Gain, as a Mitigation Requirement, Is Not Authorized under FLPMA

There is no lawful authority by the BLM to impose "net conservation gain" in an RMP, even if it is a desired environmental mitigation baseline by some constituencies to this BLM LUP review.

FLPMA represents a "balance of two vital – but often competing – interests": the "'need for domestic sources of minerals, food, timber, and fiber from the public lands,'" and the protection of "'the quality of scientific, scenic, historical, ecological, environmental, air, and atmospheric, water resource, and archeological values.'" *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30, 33 (D.D.C. 2003) (quoting 43 U.S.C. §§ 1701(a)(12) and (a)(8)).

FLPMA contemplates and accepts that authorized land uses can have impacts on Federal lands. The statute requires the Secretary to "take any action necessary to prevent unnecessary or undue degradation of the [public] lands," 43 U.S.C. § 1732(b), a provision referred to as the "UUD" standard. BLM's regulations define UUD, for mining purposes, as prohibiting "conditions, activities, or practices" that are "not reasonably incident to prospecting, mining, or processing operations." 43 C.F.R. § 3809.5 (quotation marks omitted). Even if desired, the UUD standard does authorize the BLM to limit the degradation of public land resources resulting from authorized uses. The agency may prohibit not only *un*necessary impacts but also those impacts that, despite being necessary to an authorized land use, are *un*due or excessive.

As directed by Congress, FLPMA accommodates reasonable public land development in order to fulfill the vision of the multiple use mission of Western public lands. Accordingly, flexibility within designated habitat management areas is accommodated through the UUD degradation standard as a direct expression of Congress. GRSG conservation–range wide–can comfortably be implemented to compensate for reasonable land use within important GRSG habitat without confronting FLPMA's delicate balancing of land use and land stewardship.

iii. Truly Voluntary Conservation Should Be Accounted for in the Wyoming Plan Amendment

In IM 2018-093, the BLM recently had cause to define the parameters of *voluntary* compensatory mitigation. According to IM 2018-093, compensatory mitigation as a condition of permitting is not authorized under any organic direction under FLPMA as a required condition to use public lands.

However, compensatory mitigation that a project proponent proposes continues to be a tool, but, importantly, must be voluntary. According to the BLM, compensatory mitigation is "voluntary" when a project proponent's activities, payments, or in-kind contributions to conduct offsite actions to minimize the impacts of a proposed action are free of coercion or duress, including the agency's withholding of authorization for otherwise lawful activity, or the suggestion that a favorable outcome is contingent upon adopting the compensatory mitigation program. Indicia of

voluntary compensatory mitigation are that the BLM not explicitly or implicitly suggest that project approval is contingent upon proposing compensatory mitigation or that doing so would reverse or avoid an adverse finding. If voluntary, a project proponent may proffer such mitigation and the BLM may consider such voluntary compensation as a means to reach a finding of no significant impact ("FONSI") or as a part of a proposed designed feature of a project. *See* IM 2018-093.

Commenters' members have engaged in voluntary ESA conservation activity, including candidate conservation agreement with assurances ("CCAAs") on private surface and candidate conservation agreement (CCA, without assurances) on Federal surface. The construct, operation, and funding of these agreements have been, and will continue to be, a fundamental part of the business model of companies whose activities may affect species with special status designations or their habitat. Accordingly, to the extent such voluntary conservation is reaffirmed and voluntarily implemented, they must be accounted for appropriately in this LUPA as an asset to GRSG conservation.

2. Clarification Issues

a. Lek Buffers

In general, the imposition of uniform lek buffer distances without regard for site specific project impacts ignores the unique circumstances and habitat impacted by most project operations. Notwithstanding an enthusiasm exhibited in the 2015 range wide GRSG LUPA planning exercise for lek buffer uniformity, and even with accommodation to modify lek buffer requirements based on local data, best available science, landscape features, and other existing protections (e.g. land use allocation state regulations), there is little scientific basis for any default standard of lek buffers to be applied by the BLM in project specific context.

Instead, lek buffers must be developed in conjunction with local knowledge of GRSG seasonal movements and population responses to management actions. For the Wyoming LUPA, lek buffers must be analyzed to provide greater flexibility and adaptability to make changes to buffers as new information and science becomes available and if the site will allow for a more flexible approach.

But more importantly, Commenters pause to offer how the imposition of potentially inflexible lek buffer requirements potentially collide with the full range of applicable laws that authorize and encourage mining on public lands, including the General Mining Law of 1872, the Surface Use Act, the Mining and Materials Policy Act, FLPMA, and the implementing regulations of those statutes. Commenters are concerned by how the Wyoming DES refers to the rights under the mining laws and the disjointed methodology in which the Wyoming DEIS uses short hand descriptions to characterize the scope and sources of rights under the 1872 Mining Law.

Consideration should be given to include LUP revisions that allow for reconciliation of potential conflicts and implementation of existing surface management regulations (43 CFR Subpart 3809) in order to appropriately complement baseline land use planning with appropriate analysis of project impacts at the project specific level.

b. Clarification on the Use of Required Design Features (RDFs)

The imposition of required design features ("RDFs") was an effort by the previous Administration to seek to seek illogical and misguided uniformity across most, if not all, of the 2015 GRSG land use plans in the West.

As noted above in the discussion on the need to revisit uniform lek buffers, the preexisting regulations at 43 Code of Federal Regulations Subpart 3809 cannot be ignored as a regulatory framework to guide project management on Federal lands that play a role in GRSG conservation. In the Wyoming LUPA, BLM must acknowledge that in proscribing RDFs, such design features are applicable to BLM decisions under 43 C.F.R. Subpart 3809 only to the extent practicable and may not be imposed to deny approval of a notice or plan of operations under those regulations.

IV. CONCLUSION

For the reasons stated above, the Wyoming LUP should be amended accordingly.

Sincerely,

Mark G. Ellis
President
Industrial Minerals Association - North America

Adam Eckman
Associate General Counsel
National Mining Association