

LAW OFFICE OF PAUL ZOGG

VIA OVERNIGHT FEDERAL EXPRESS DELIVERY AND VIA EMAIL  
TO BLM\_CO\_NW\_SAGE\_GROUSE@BLM.GOV

Nov. 26, 2013

Bureau of Land Management  
Northwest Colorado District  
Re: NEPA/Greater Sage Grouse EIS  
2815 H Road  
Grand Junction, CO 81506

RE: LEGAL COMMENTS ON BEHALF OF OWNERS  
OF PINTO VALLEY RANCH, GRAND COUNTY  
ON DRAFT NORTHWEST COLORADO  
GREATER SAGE GROUSE LUPA/EIS

Dear BLM:

I am writing on behalf of the owners of Pinto Valley Ranch, ("the Ranch"), in Grand County to provide official legal comments on the Draft Northwest Colorado Greater Sage Grouse Land Use Plan Amendment/Environmental Impact Statement ("LUPA/EIS").

Thank you for this opportunity to comment.

**I. THE RANCH**

By way of background, the Ranch is owned by Wingspread West LLC and related entities. BLM owns some of the mineral rights beneath the Ranch.

The Ranch was acquired because of its unspoiled scenic beauty, tranquility, tremendous wildlife, creeks, springs and other water resources. Over the past seven years, the owners have expended considerable time and resources, with the assistance of the National Resource Conservation Service, the U.S. Fish and Wildlife Service and Colorado Parks and Wildlife to revitalize the ranch.

The Ranch contains prime wetlands, groundwater springs, steep slopes, prime sage grouse habitat, key

habitat for elk, mule deer, pronghorn antelope and numerous other wildlife, and preserves an important migration route used by elk to get to lower ground each year. In addition, the Ranch contains significant paleontological resources and endangered plant species.

The Ranch has been very active in working with federal and state agencies on programs for the protection of sage grouse. These include projects with the Natural Resources Conservation Service, the U.S. Fish and Wildlife Service and Colorado Parks and Wildlife for sage grouse habitat improvement. In addition, they have conducted substantial private efforts to conserve sage grouse.

The Ranch is very concerned that these personal efforts not be nullified or undermined by inappropriate BLM management actions with respect to its mineral rights or on adjacent lands that fail to protect the sage grouse in light of the best available scientific understandings and data.

These private conservation efforts are especially significant in that sage grouse populations in Grand County, as elsewhere, have been declining.

The DEIS points out that BLM manages approximately 50 percent of sage grouse habitat, and even less than that in Grand County. DEIS at xxi, also Table 1, ES-1, p.246 (29 percent of Middle Park population). Thus, the cooperation of many private landowners in the survival and conservation of the species will likely be essential.

Accordingly, where private landowners such as those here are making efforts to preserve the species, BLM, if it is truly serious about sage grouse protection, must foster and encourage those efforts.

Sadly, however, by adopting Alternative D as the preferred alternative, BLM is proposing to actually introduce oil and gas leasing into the Pinto Valley Ranch and contiguous BLM parcels where drilling has not been historically present and undermine the efforts of the Ranch owners, along with those of three Federal and State governmental agencies, to preserve and enhance the sage grouse habitat on their property.

## II. LEGAL DEFICIENCIES IN EIS AND PREFERRED ALTERNATIVE

Thank you for your considerable efforts in preparing the Draft LUPA/EIS. However, the owners of the Ranch are extremely disappointed with BLM's selection of Alternative D as the Preferred Alternative.

In particular, they strongly object to BLM's failure to follow the recommendations of the Report on National Greater Sage-Grouse Conservation Measures produced by the Sage Grouse National Technical Team on Dec. 21, 2011 ("Tech Team") pertaining to oil and gas development which, as the DEIS concedes, is considered the greatest threat to Greater Sage Grouse in this area. The result is reasonably likely to lead to the actual listing of Greater Sage Grouse as an endangered or threatened species by the U.S. Fish and Wildlife Service.

On more considered review, it appears that BLM, should it adopt Alternative D based on the EIS as it now stands, would be in violation of both the National Environmental Policy Act ("NEPA") and the Federal Land Policy and Management Act ("FLPMA"), its implementing regulations, including the agency's "sensitive species" regulations, and BLM sage grouse directives and policies.

Generally speaking, the Draft EIS and Preferred Alternative fail to disclose the reasonably foreseeable likelihood and actual impacts of listing of the Greater Sage Grouse as either endangered or threatened under the Endangered Species Act; fail to use and rely upon the best available science that BLM has; and fail to consider key alternatives that would protect the sage grouse while avoiding unjustified impacts on other resources.

We respectfully request that these deficiencies be corrected prior to final action based on the LUPA/EIS, and that Alternative B be adopted. In the alternative, we request that at a minimum, the Tech Team's major recommendations for oil and gas be adopted and followed, i.e., (1) no oil and gas leasing on Preliminary Priority Habitat and (2) a 3 percent surface disturbance limitation.

The owners in their individual comments also propose that in the event Alternative B based on the Tech Team Report is not adopted, a modification of the ill-advised Preferred Alternative should be adopted.

### III. VIOLATIONS OF NEPA

The National Environmental Policy Act, 42 U.S.C. §4321 et seq., "prescribes the necessary process by which federal agencies must 'take a hard look' at the environmental consequences of the proposed courses of action." *Pennaco Energy, Inc., v. U.S. Dep't. of the Interior*, 377 F.3d 1147, 1150 (10<sup>th</sup> Cir. 2004).

Under NEPA, an EIS "shall provide full and fair discussion of significant environmental impacts" to inform both agency decision-makers and the public. 40 C.F.R. §1502.2. In carrying out this mandate, the EIS shall disclose both direct effects of a proposed action and indirect effects that are still reasonably foreseeable. 40 C.F.R. 1502.16-1508.8. BLM's own regulations focus on the importance of disclosure of reasonably foreseeable future actions. 43 C.F.R. §46.30.

"It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'" *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1092 (D.C.Cir. 1973).

#### A. Failure to Disclose Listing of Sage Grouse and the Practical Consequences

Here, the Draft EIS fails significantly in failing to disclose the likelihood that Alternatives A (current management) and D (preferred alternative) will lead to the U.S. Fish and Wildlife Service listing the Greater Sage Grouse as an endangered, or at least threatened, species under the Endangered Species Act, and the practical consequences of such a listing.

The impacts are of course reasonably foreseeable. BLM's Tech Team report, itself, points out the measures that are "needed" to protect and foster the Greater Sage Grouse, but Alternative D declines to adopt them. It points

out that measures Alternative D adopts - like leasing priority habitat lands for oil and gas development and controlling impacts through stipulations -- even no surface occupancy stipulations - are likely to be ineffective. The Tech Team Report is hereby incorporated by reference into these comments.

The report states very clearly that:

"Past BLM conservation measures have focused on 0.25 mile No Surface Occupancy (NSO) buffers around leks, and timing stipulations applied to 0.6 mile buffers around leks to protect both breeding and nesting activities. Given impacts of large scale disturbances described above that occur across seasons and impact all demographic rates, applying NSO or other buffers around leks at any distance is **unlikely to be effective.**" (p.20) (emphasis supplied)

The Tech Team was clear in its recommendations:

"...we recommend excluding mineral development and other large scale disturbances from priority habits where possible... the conservation strategy most likely to meet the objective of maintaining or increasing sage-grouse distribution and abundance is to exclude energy development and other large scale disturbances from priority habitats, and where valid existing rights exist, minimize those impacts by keeping disturbances to 1 per section with direct surface disturbance impacts held to 3% of the area or less." (p.21)

In its 12-Month Findings on Listing of the Greater Sage Grouse, the Fish and Wildlife Service made the same point:

"Stipulations commonly applied by BLM to oil and gas leases and permits do not adequately address the scope of negative influences of development on sage-grouse (Holloran 2005, pp. 57-60, Walker 2007, pp. 2651; see discussion under Factor A), with the exception of the new 2010 IM issued by the BLM in Wyoming (see discussion

below). In addition, BLM's ability to waive, modify, and allow exceptions to those stipulations without regard to sage-grouse persistence further limits the adequacy of those regulatory mechanisms in alleviating the negative impacts to the species associated with energy development." 55 Fed.Reg. 13910, 13979 (March 23, 2010).

Sadly, the Draft EIS, which concedes that oil and gas development is the greatest threat to Greater Sage Grouse in this region, instead proposes to adopt the old tried and failed policies like leasing of oil and gas minerals with stipulations that the Tech Team specifically found would be "ineffective."

Alternative D also fails to adopt the 1 per section/3 percent disturbance limitation. The 5 percent caps discussed in the DEIS could allow 60 percent more surface impact than the Tech Team's proposed 3 percent limitation, as the DEIS is forced to admit. (p.638).

Matt Holloran, principal and senior ecologist at Wyoming Wildlife Consultants LLC who has studied and worked with the greater sage grouse on Pinto Valley Ranch and has authored studies on the Greater Sage Grouse, has reviewed the DEIS and notes that:

"The authors of the EIS present no scientific justification for deviating from the 3% threshold, and no scientific literature exists that I am aware of justifying this deviation." (See Attachment A.)

This is especially significant in light of a recent study concluding that 99 percent of active sage grouse leks are located within a three mile radius of land with only three percent of land categorized as developed. Kruck, S.T., Hansen, S.E. and Preston, K.L., *Modeling Minimum Requirements for Distribution of Greater Sage Grouse Leks: Implications for Population Connectivity Across Their Western Range*, 3 *Ecology and Evolution*, Issue 6, pp. 1539-51 (2013).

Table 2.6 at page 188 of the DEIS makes this point very clear. The areas closed to fluid mineral leasing

remain the same from existing management Alternative A to the Preferred Alternative D. This treatment for what the Fish and Wildlife Service considers the Highest Importance Allieviated Threat (namely, oil and gas) shows the likelihood that the preferred Alternative D would only lead to listing of the species.

The net effect of adopting ineffective mitigation over the entire northwest sector of Colorado affecting 8.6 million acres of land would be significant and would likely tip this perilously threatened species to actual listing by the Fish & Wildlife Service.

BLM offers no explanation for rejecting the Tech Team's recommendation, but merely describes Alternative D as "adapting" the team's recommendations to Northwest Colorado. (DEIS at xv.) It is a triumph of misstatement to turn *rejection* of the Tech Team's recommendations into a mere "adaptation" of them. NEPA requires more honest and complete disclosure.

The consequences of such a listing would be significant, including, for example, additional restrictions on oil and gas development, recreation and ranching on both public and private land due to prohibitions on "taking" and the establishment of "critical habitat." These new limitations would be federally based and not result from the ordinary regulatory agencies such as the BLM, Colorado Oil and Gas Conservation Commission or local governments.

Even habitat alterations --- such as farming and related activities - could result in landowners facing civil or criminal charges under the Endangered Species Act since these alterations may harass or annoy and actually kill Greater Sage Grouse.

By failing to disclose these likely impacts, the BLM paints an unduly rosy picture of Alternative D as the preferred alternative. This kind of practice is a plain violation of NEPA.

B. Failure to Disclose Exceptions Create  
Unlimited Ability to Undermine Stipulations

The EIS emphasizes No Surface Occupancy stipulations as the primary justification for allowing oil and gas

leasing in important sage grouse habitat areas under the preferred Alternative D.

However, it is only in Appendix E, at pages E-2 and E-3, that BLM discloses that No Surface Occupancy stipulations are subject to exception, waivers and modification in the discretion of local officers with only limited vague standards for the protection of sage grouse.

For example, while Appendix E does establish vague and ineffective criteria for an "exception" to the No Surface Occupancy stipulation under Alternative D, no criteria are specified for waivers or modifications. (E-5). Thus, even the limited criteria for exceptions are effectively illusory since they may be avoided by a waiver or modification.

Indeed, none of the four alternatives considered in the DEIS establishes comprehensive criteria limiting waiver, exceptions and modification for the protection of sage grouse - and thus no alternative closes this critical loophole.

Indeed, such exceptions and modifications are likely to be sought in situations where sage grouse and its habitat are likely to be sacrificed or marginalized.

Without meaningful, detailed and comprehensive standards or criteria for the protection of sage grouse or its habitat, reliance on these NSO stipulations to project improved conditions for sage grouse is entirely arbitrary and capricious. For all the authors of this EIS know, in light of these open-ended vague and discretionary provisions, protection of sage grouse overall is highly likely to be undermined further. The grant of broad administrative discretion in the Appendix effectively eliminates whatever protections for the sage grouse can be found in the body of the EIS.

Wildlife consultant Holloran is concerned that the DEIS repeatedly emphasizes "broad administrative subjectivity to grant exceptions" to stipulations for the protection of sage grouse, which "undermines the scientific credibility and potential efficacy" of the stipulations." See Attachment A. He states:

"In my opinion, the administrative subjectivity to grant exceptions, waivers and modifications included in the preferred alternative negates the protections and regulatory mechanisms included in this alternative thereby making them, and the alternative, inadequate."

The disclosure here is not adequate or fair as required under NEPA and CEQ guidelines. Burying an all important limitation on the mitigation prescribed in Appendix E outside the text of the EIS is intolerable and unreasonable. These significant qualifications and limitations on the most important mitigation planned for sage grouse with respect to oil and gas should be loudly emphasized and underlined in the Executive Summary, not buried in small print in an appendix.

The EIS is inadequate on this score.

#### C. Failure to Consider Reasonable Alternatives

Under NEPA, an agency must "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action. 40 C.F.R. §1502.14.

"The obligation to consider alternatives to the proposed action is at the heart of the NEPA process, and is 'operative even if the agency finds no significant environmental impact.' ... In formulating an EA, an agency must 'study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.' 42 U.S.C. §4332(2)(E); 40 C.F.R. §1508.9(b)." *Dine Citizens Against Ruining Our Environment v. Klein*, 2010 WL 4284602 \*13 (D.Colo. 2010). An agency may not "define the project so narrowly that it foreclose[s] a reasonable consideration of alternatives." *Id.*

Under BLM's NEPA regulations, the agency must consider a range of alternatives that cover "the full spectrum of reasonable alternatives, each of which must be rigorously explored and objectively evaluated." 43 C.F.R. §420(2)(c).

Here, the Draft LUPA/EIS does not contain sufficient variation and alternatives to permit reasoned understanding and evaluation of potential future courses of action.

1. Failure to Consider an Alternative with Specific Protections for Sage Grouse Linkage Corridors

The Draft EIS classifies Sage Grouse habitat in three categories, as explained at page xxiii and at §1.1.1. pp.1-2. These include Preliminary Priority Habitat ("PPH"), Preliminary General Habitat ("PGH"), Linkage/Connectivity Habitat and All Designated Habitat ("ADH"), which consists of all of the three previous categories.

Alternative A, the existing management, does not address these designations. But B, C, and D do. DEIS at xxxii-xxxiv. However, throughout the latter alternatives Linkage/Connectivity Habitat is treated only generally in a vague manner and as a minimal alternative.

Indeed, Alternatives B and D appear not to consider any conservation measures for linkage habitat at all. DEIS at xxxiii-xxxiv.

There is no scientific basis for excluding Linkage/Connectivity Habitat from protection or according it separate treatment. The Greater Sage Grouse's habitat must be considered as an ecological and scientific unit. See Knick, Hanser & Preston, "Modeling ecological minimum requirements for distribution of greater sage-grouse leks; implications for population connectivity across there Western range, U.S.A." (funded by U.S. Fish and Wildlife Service 2013, hereafter "USFWS Survey") (See Attachment B).

Given that linkage habitat is comparatively small at 295,800 acres compared to 2.4 million acres of PPH, this omission is not justified. DEIS at xxiii.

After reviewing the DEIS, wildlife consultant Holloran states that a problem is "[t]he minimal attention and consideration of the importance of population connectivity." See Attachment A.

The USFWS Survey emphasized the critical role of sage grouse population connectivity and concluded that "models developed from a general set of broad-scale, rangewide

variables often fail to capture critical environmental factors specific to local areas (Scott, et al 2002).” (Attachment B).

The Survey clearly and unequivocally emphasized the importance of sage grouse population connectivity -

“Land and wildlife agencies currently are developing conservation actions for sage-grouse based on core or priority areas containing highest densities of breeding birds (Doherty et al. 2011). Less clear are land-use plans for regions outside of core areas that might be important for dispersal and gene flow. Species that have multiple interconnected populations are more likely to persist because risk of extirpation caused by regional events is confined to local populations; connectivity among populations ensures that recolonization can occur following local extirpation assuming that sufficient habitat remains (Thomas 1994; Hanski 1998). Populations within the interior portion of the sage-grouse range were highly interconnected. However, peripheral populations often were connected by habitat corridors only to one adjacent population. Human development or habitat loss that eliminates habitat in these corridors would further isolate those populations.” Id at 1549

“Our mapped corridors of habitat among populations provide an important step in designing conservation actions that facilitate dispersal and gene flow and reduce isolation and risk of extirpation.” Id. (Attachment B).

BLM’s own Tech Team Report also emphasized the importance of linkage/connectivity habitat, stating that:

“It will be necessary to achieve the following sub-objectives for general habitat:

“□ Quantify and delineate general habitat for capability to provide connectivity among priority areas (Knick and Hanser 2011).

"□ Conserve, enhance or restore sage-grouse habitat and connectivity (Knick and Hanser 2011) to promote movement and genetic diversity, with emphasis on those habitats occupied by sage grouse..." (p.9)

BLM's Instruction Memorandum 2010-071 specifies that sage grouse "priority habitat" includes habitat "necessary to maintain range-wide connectivity." At page 1-2. See Attachment C.

Legally, the EIS fails to present an effective alternative that addresses Linkage/Connectivity Habitat with the kind of specific, protective measures necessary to ensure that the BLM Tech Team's recommendations for preservation of the species are implemented and achieved.

## 2. Failure to Consider an Alternative with Additional Protections in Areas of Low Oil and Gas Production, Such as Grand County, CO

The Draft EIS is also legally inadequate in that it treats all potential oil and gas lands as equivalent over 8.6 million acres of land in 10 counties, 5 BLM resource areas and one national forest and fails to distinguish between high production areas and low production areas like Grand County, CO.

To be more specific, Alternatives B and C apply "no leasing" designations to certain sage grouse habitat lands, whereas Alternative D would lease almost all sage grouse habitat lands and rely on stipulations for the protection of the grouse.

This kind of "all or nothing" approach, without regard to the likely oil and gas productivity of the lands involved, is not sanctioned by NEPA or BLM's regulations requiring a look at a "full spectrum" of alternatives.

The omission is significant. For example, in low oil and gas productivity areas, like Grand County for instance, the tradeoffs with oil and gas are less significant and may appropriately be dealt with by a "no leasing" designation at less cost to potential mineral development.

The DEIS recognizes that there are three major oil and gas basins in the region, none of them in Grand County. DEIS at 296.

If the only alternative considered for Grand County is to lump the county in with high productivity areas like Garfield County, for instance, BLM is not considering a "full spectrum" of alternatives, and is ignoring reasonable steps to mitigate the impacts of potential oil and gas development in a cost-efficient and sensible way.

This omission should be addressed in the Final EIS.

3. Failure to Consider an Alternative That  
Comprehensively Restricts and Limits Exceptions,  
Modifications or Waivers of Oil and Gas  
Stipulations

As the Tech Team pointed out, BLM's reliance on stipulations to protect the Greater Sage Grouse from oil and gas development is likely to be ineffective. Also, even the most restrictive stipulation is subject under BLM policy to "exceptions," "modifications" or "waivers" that undermine the imposition of a protective uniform policy.

As explained in Appendix E at E-2 and E-3, exceptions and modifications to stipulations may be authorized in the discretion of BLM's local officer with only limited specific standards for the protection of sage grouse or sage grouse habitat.

The Fish and Wildlife Service, in its 12-Month Findings, also pointed out specifically that: "...BLM's ability to waive, modify, and allow exceptions to those stipulations without regard to sage-grouse persistence further limits the adequacy of those regulatory mechanisms in alleviating the negative impacts to the species associated with energy development." 55 Fed.Reg. 13910, 13979 (March 23, 2010).

However, in the DEIS, the exceptions, modifications or waivers (Appx. E at E-2) vary somewhat between the alternatives and establish some criteria for waivers, exceptions and modifications. But none of the four alternatives comprehensively limits the use of waivers,

exceptions and modifications in specific ways that ensure that the greater sage grouse is protected.

For example, while Appendix E does establish vague criteria for an "exception" to the No Surface Occupancy stipulation under Alternative D, no such criteria are specified for waivers or modifications. (E-5). Thus, the criteria for exceptions are effectively illusory since they may be avoided by a waiver or modification.

Indeed, wildlife consultant Holloran describes the "administrative subjectivity" built into the preferred alternative as effectively "negating" the protections for sage grouse included in that alternative. Attachment A.

Moreover, none of the four alternatives considered in the DEIS establishes comprehensive criteria limiting waiver, exceptions and modification for the protection of sage grouse - and thus no alternative closes this critical loophole.

BLM's failure to consider variation and a "full spectrum" of alternatives with respect to exceptions, modifications and waivers violates NEPA and BLM's NEPA regulations.

This omission is especially significant in that the Preferred Alternative D relies on the old, failed policy of leasing almost every square inch of land, with mitigation left to be controlled by stipulations on the leases.

Ominously, the DEIS speaks of "flexibility" with Alternative D that would lead to a "minimal" impact on oil and gas development. (DEIS p.638). As consultant Holloran notes, "This repeated use of the flexibility language establishes a broad subjective administrative discretion, modification and limitation to the preferred alternative." Attachment A.

It also suggests, by turns, widespread undermining on a local basis of standards and stipulations adopted after this comprehensive EIS - namely a widespread local use of modifications, waivers and exceptions.

By contrast, the Tech Team stated that because oil and gas development disturbance is so large: "...applying NSO or other buffers around leks at any distance is unlikely to be

effective" and "timing" restrictions are simply not comprehensive enough to prevent impacts to sage grouse. (Report pp.20-21).

At the very least, one alternative, if not more, should have featured stipulations that cannot be waived, excluded or modified with respect to sage grouse priority habitat.

Accordingly, the range of alternatives - without a single alternative that comprehensively restricts waiver, exclusion and modification of protective stipulations - is wholly inadequate in the DEIS.

D. THE EIS IS INADEQUATE AS TO OIL AND GAS, TIERED TO AN OUTDATED RMP THAT DID NOT CONSIDER NEW OIL AND GAS TECHNOLOGIES SUCH AS FRACKING, HORIZONTAL DRILLING AND THE RECENT 'NIOBRARA PLAY'

The Draft EIS is also, in itself, inadequate to support oil and gas development in Grand County, inasmuch as it does not consider new oil and gas technologies and developments that did not exist at the time the old Kremmling Resource Area Resource Management Plan ("RMP") was adopted in 1984 or amended in 1999, or when Colorado BLM did a purported "statewide" oil and gas environmental impact statement in 1991.

While "tiering" to an older, broader EIS may be appropriate in some circumstance, 43 C.F.R. §46.140, 40 C.F.R. §1508.28, this is only true in situations where there are no "new circumstances," "new information," or "changes in the action" that "may result in significantly different environmental effects." 43 C.F.R. §46.120; 40 C.F.R. 1502.9(c).

This is certainly not the case here. Nor does the Council on Environmental Quality's "rule of thumb" that an EIS "more than 5 years old" should be "carefully reexamined" for supplementation support reliance on the 14-year old RMP/EIS. Item 32, 46 Fed.Reg. 18026, March 23, 1981.

In a report dated March 10, 2011, Weston Wilson expounded about the inadequacies of the existing and still in effect Kremmling RMP/EIS on an occasion in which BLM was

considering auctioning Grand County oil and gas leases. Please see the Wilson report at Attachment D.

For example, Mr. Wilson stated:

"[Neither the] RMP/EIS nor the Statewide Oil and Gas EIS of 1991 evaluated modern shale oil or shale gas technology. Not till this decade did the industry master the techniques needed to release oil from shale. This is an unstudied and untested new technology not previously analyzed by BLM in its prior NEPA documents."  
(p.2) (Attachment D).

As a part of this new technology, as Mr. Wilson discusses, industry is using improved horizontal drilling and large-scale hydraulic fracturing and seeking oil rather than gas, from the Niobrara shale. (p.7)

To demonstrate how outdated BLM's documents are, the 1991 EIS projected with a 95 percent probability level that only negligible oil and gas deposits existed in the Middle Park Basin. (p.7) And yet, as recently as two years ago, industry had nominated parcels there, including some on the Pinto Valley Ranch, for development.

The content of Mr. Wilson's criticisms remain valid today in that the new, final Kremmling RMP has not been issued and developed, and the extent to which it might address these issues is unknown.

The Draft Sage Grouse EIS does not address these new oil and gas technologies and developments, and so cannot serve to support future oil and gas development in accordance with NEPA and BLM regulations.

#### E. FAILURE TO DISCLOSE IRREVERSIBLE OR IRRETRIEVABLE LOSS OF GREATER SAGE GROUSE

Under BLM's regulations, an EIS "shall disclose ... (a)ny irreversible or irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 43 C.F.R. §46.415(a)(8). An administrative agency such as BLM is "bound by its own regulations." *Mead Data Central, Inc., v. U.S. Department of the Air Force*, 566 F.2d 242, 258 (D.C.Cir. 1977).

Here, the EIS contains a section 4.25 addressing such impacts at pp. 916-17, but it fails to address loss of the Greater Sage Grouse population in Northwest Colorado.

Such a loss is reasonably foreseeable in light of the fact that Alternative D adopts a mitigation strategy for oil and gas that its own Tech Team has found to be ineffective in protecting sage grouse and the USFWS considers the greatest threat. (DEIS at 951) (energy development considered "greatest threat" to Greater Sage Grouse in these management zones).

Past efforts at trying to restore Greater Sage Grouse to habitats that the grouse no longer use have not been particularly successful. *E.g.*, *Fish and Wildlife Service 12 Month Findings*, 75 Fed.Reg. 13910, 14006 ("recovery and repopulation of extirpated areas will be slow and infrequent... Translocation of this species is difficult and to date has not been successful..."); *Tech Team Report p.35* lek not used for 10 years deemed abandoned; *DEIS* at 515 (loss of shrubland would not be expected to regain its shrubland character for 20 to 30 years).

Thus, in adopting Alternative D, BLM is heading on a course that its own best experts have predicted will be ineffective in protecting the grouse, whose populations are already in decline and are likely heading for species listing with the Fish and Wildlife Service.

The Draft EIS fails to adequately disclose this potential irretrievable impact.

#### F. DRAFT EIS INADEQUATE IN SUPPORTING SITE SPECIFIC OIL AND GAS DECISIONS

The DEIS also fails to support oil and gas development decisions in that it does not fulfill the mandates that BLM set forth in Instruction Memorandum 2010-117, dated May 17, 2010, and incorporated herein by reference, namely that site-specific NEPA compliance must be completed in all cases prior to leasing for oil and gas and site visits should be conducted to specific sites in the "majority" of cases.

For the record, BLM has not prepared any NEPA document that analyzed the site-specific impacts on the Pinto Valley Ranch, and that includes this EIS.

Thus, the DEIS fails to clear the agency's own legal standards for oil and gas leasing with respect to the Pinto Valley Ranch, and most likely, many other parcels of land.

#### **IV. VIOLATIONS OF FLPMA**

A. Failure to Use Best Available Data Violates BLM Consistency Regulations, BLM's sage grouse plan and NEPA and is arbitrary and capricious.

BLM's selection of Alternative D as the Preferred Alternative is a violation of agency "consistency" regulations developed under FLPMA because it rejects the recommendations of the Tech Team, its chosen top team of sage grouse experts. It also shows that in selecting the alternative, BLM would be acting in an arbitrary and capricious fashion under the Administrative Procedure Act.

The Tech Team's report speaks for itself, stating that: "Conservation measures described in this report are derived from interpretation of the best available scientific studies using our best professional judgment." (p.58).

Similarly, BLM has disregarded its best available data in the form of the U.S. Fish and Wildlife Survey indicating the importance of linkage habitat for peripheral populations of sage grouse.

Under the Endangered Species Act, 16 U.S.C. §1533(b)(1)(A), the U.S. Fish and Wildlife Service is required to "make determinations" on the endangered status of the sage grouse "on the basis of the best scientific and commercial data available..."

Under BLM's consistency regulations, 43 C.F.R. §1610.3-2, agency regulations require that BLM planning decisions "shall be consistent with officially approved or adopted resource related plans, and the policies and programs contained therein, of other Federal agencies." BLM is bound to comply with its own regulations. *Mead Data Central, Inc., v. U.S. Department of the Air Force*, 566 F.2d 242, 258 (D.C.Cir. 1977).

Here, there is no consistency with the Fish and Wildlife Service's programs, policies and research.

This omission is particularly unfortunate, and unlawful, for BLM because in its 2004 National Sage Grouse Habitat Conservation Strategy Plan, see Attachment E, BLM specifically stated:

"The BLM will use the best available science and other relevant information to develop conservation efforts for sage grouse and sagebrush habitats." At V, p.7

In adopting its plan, BLM declared that "cooperation" with other federal agencies, among others, is "essential" for successful conservation of the sage grouse. At V, p.8.

The selection of Alternative D violates BLM's own national sage grouse plan in these respects.

Council on Environmental Quality Regulations under NEPA also require environmental impact statements to be coordinated "to the fullest extent possible" with the requirements of statutes including the Endangered Species Act. 40 C.F.R. §1502.25. These regulations are binding on BLM in preparing this EIS. 40 C.F.R. §1507.1.

The selection of Alternative D, ignoring and rejecting the best available data and science as stated in the Tech Team Report, violates these regulations.

As courts have noted, although a court must defer to an agency's expertise, "it must do so only to the extent the agency utilizes, rather than ignores, the analysis of its own experts." *Defenders of Wildlife v. Babbitt*, 958 F.Supp. 670, 685 (D.D.C. 1997).

Here, by acting in violation of its own regulations and policies, failing to coordinate with the Fish and Wildlife Service's research and statutory mandate and failing to follow the conclusions and recommendations of its own experts on the Tech Team, the BLM in selecting Alternative D has acted in a very arbitrary, capricious and unlawful manner. It is the most compelling example of arbitrary and capricious conduct to refuse to follow the findings, conclusions and recommendations of its own chosen experts on the Tech Team. The EIS presents no data, theories or arguments which disagree with the Tech Team and the USFWS study.

B. Failure to use Best Available Data and to Coordinate with Fish and Wildlife Service also Violates BLM's sensitive species regulations.

Under BLM policy and regulations developed under FLPMA, the Greater Sage Grouse is an official "sensitive species."

In selecting Alternative D as the Preferred Alternative, BLM has violated these regulations requiring cooperation with other agencies and use of the best available data. BLM also violates these regulations in failing to include site-specific information in the EIS.

These regulations specify that: "BLM should work cooperatively with other agencies ... '[t]o help ensure that the best information is available in the BLM decision-making process.'" Sensitive Species, 6840.2A1D. This was not done here.

The regulations require that "[a]ctions authorized by BLM shall further the conservation and/or recovery of ... Bureau sensitive species" and "BLM shall cooperate with other governmental ... agencies" to achieve these results. Sensitive Species, 6840.06, .2E. In rejecting the Tech Team's and USFWS Study's findings, and adopting an alternative that will likely be "ineffective," BLM simply has not complied with these provisions.

Sensitive species regulations also provide that: "When appropriate, land use plans shall be sufficiently detailed to identify and resolve significant land use conflicts with Bureau sensitive species without deferring conflict resolution to implementation-level planning." SS 6840.2A1B.

By covering a large swath of Northwest Colorado and attempting uniform decisions, BLM has not complied with this regulation.

Similarly, the provisions of E-1 and E-2 that allow for exceptions and modifications to sage grouse protective stipulations violate these regulations by providing an opportunity and incentive for "deferring conflict resolution to implementation-level planning."

As with the other regulations cited above, these regulations are binding on BLM." *Mead Data Central, Inc., v. U.S. Department of the Air Force*, 566 F.2d 242, 258 (D.C.Cir. 1977).

#### C. Alternative D is Also Not Consistent with Grand County Land Use Policies.

Under FLPMA, the BLM is required "coordinate" its land use planning and management "with the land use planning and management programs ... of the State and local governments within which the lands are located" "to the extent consistent with the laws governing administration of the public lands." 43 U.S.C. §1712(c)(9).

Here, BLM's Preferred Alternative D fails on this score as it pertains to Grand County, Colorado, as shown by the attached letter of Grand County dated Feb. 1, 2011, pertaining to then proposed oil and gas leasing in the county and the attached Grand County Zoning Regulations applicable to oil and gas exploration and production. See Attachments F and G.

The County there makes plain that "the local ecosystem is very fragile" and oil and gas leasing "could have drastic negative consequences on our local environment."

As the County points out:

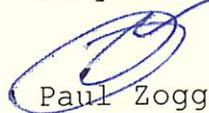
"With respect to sage grouse, as well as other wildlife, such as mule deer, moose and elk, strong consideration should be given to the current condition of habitat and the impacts of oil and gas drilling on the habitat...."

"...The NEPA analysis in the current RMPs cannot support leasing parcels under conservation easements or parcels with wilderness characteristics or habitat for sage grouse, mule deer, moose, elk."

The Ranch owners concur. Alternative D is not consistent with the county's land use policies, and therefore violates FLPMA.

Please give these comments your serious attention and concern. We look forward to significant changes that will remove the illegalities in BLM's process prior to a final decision.

Very truly yours,



Paul Zogg

cc: Wingspread West

#### ATTACHMENTS

A - Letter of Wildlife Consultant Matt Holloran Dated Nov. 26, 2013.

B-Knick, Hanser & Preston, Modeling ecological minimum requirements for distribution of greater sage-grouse leks: implications for population connectivity across their western range, U.S.A., *Ecology and Evolution* pp.1539-1551, 2013.

C - BLM Instruction Memorandum 2010-071, March 5, 2010.

D-Review of the Draft Environmental Assessment August 2011 Competitive Oil and Gas Lease Sale, Weston W. Wilson, March 10, 2011.

E-Bureau of Land Management National Sage-Grouse Habitat Conservation Strategy, November 2004.

F-Grand County Board of Commissioners Letter dated February 1, 2011.

G - Grand County Oil and Gas Regulations.