American Exploration & Mining Association

10 N Post St. Ste. 305 | Spokane WA 99201-0705
P. 509.624.1158 | F. 509.623.1241
info@miningamerica.org | www.miningamerica.org

January 9, 2018

U.S. Bureau of Land Management
Greater Sage Grouse Final Environmental Impact Statement/
Proposed Resource Management Plan
Attn: Protest Coordinator
20 M Street SE, Room 2134LM
Washington, DC 20003
Via Overnight Delivery and
Via e-mail to protest@blm.gov

Re: Protest of the Nevada and Northeastern California Greater Sage-Grouse Proposed Resource Management Plan Amendments and Final Environmental Impact Statement

I. Introduction/Interest of Party

American Exploration & Mining Association (hereinafter "AEMA") hereby submit this formal protest letter (hereinafter "Protest") pursuant to the Department of the Interior/ Bureau of Land Management's (hereinafter "BLM's") protest procedures outlined in 43 C.F.R. § 1610.5-2. This Protest challenges the legal sufficiency of the BLM's *Nevada and Northeastern California Greater Sage-Grouse Proposed Resource Management Plan Amendments and Final Environmental Impact Statement* (hereinafter "PRMPA/FEIS" or "Proposed Plan") at 83Fed. Reg. 63528 (Monday, December 10 2018).

This protest is filed in accordance with 43 C.F.R. § 1610.5-2 and contains:

1) A description of the interests of the protesting party;
2) A statement of the issues being protested;
3) A statement of the parts of the PLUPA/FEIS being protested; and
4) A concise statement explaining the various ways the BLM acted unlawfully or in error.

AEMA (f/k/a *Northwest Mining* Association) is a non-profit, non-partisan, national trade organization. AEMA is the recognized national voice in support of exploration, the junior mining sector, and maintaining access to public lands.

AEMA's purpose is to advocate for and advance the mineral resource and mining related interests of its members. AEMA accomplishes its purpose by representing and informing its

members on legislative, regulatory, safety, technical, and environmental issues. AEMA is committed to principles that embody the protection of human health, the natural environment, and a prosperous economy.[1] AEMA fosters and promotes economic opportunity and environmentally responsible mining.

AEMA's members engage in all aspects of the mining life cycle, from exploration to reclamation and closure, which includes promoting the discovery, development, and extraction of mineral resources through economically and environmentally responsible methods. AEMA's members presently (and plan in the future to) engage in mining activities on U.S. Forest Service (hereinafter USFS) and Bureau of Land Management (hereinafter (BLM)-administered lands currently managed under the 2015 Amendments.

AEMA has been involved with the greater sage grouse planning process since 2012. Below is a summary of our participation in the planning process:

- Scoping comments dated March 23, 2012 to multiple state BLM offices in response to the call for public comment in conjunction with Notice of Intent to *Prepare Environmental Impact Statements and Supplemental Environmental Impact Statements to Incorporate Greater Sage-Grouse Conservation Measures into Land Use Plans and Land Management Plan*s, 76 Fed. Reg. 77008 (December 9, 2011);

- Formal comments dated October 11, 2013 in conjunction with the release of the *Supplement to the Draft Bighorn Basin RMP Revision Project* at 78 Fed. Reg. 41947 (Friday, July 12, 2013);

- Formal comments date June 4, 2013 in conjunction with the release of the *Miles City Field Office Draft Resource Management Plan and Environmental Impact Statement* at 78 Fed. Reg. 46 (Friday, March 8, 2013);

- Formal comments dated June 20, 2013 in conjunction with the release of the *Hiline Field Office Draft Resource Management Plan and Environmental Impact Statement* at 78 Fed. Reg. 56 (Friday, March 22, 2013);

[1] AEMA and its members have significant interests in the U.S. Forest Service's (hereinafter USFS) compliance with the necessary processes outlined in the National Environmental Policy Act (hereinafter NEPA), 42 U.S.C.§ 4321 *et seq*., so as to accomplish Congress' goal of protecting the human environment. See 42 U.S.C. §432, Comm. To Save the Rio Hondo v. Lucero, ,102 F 3d 445, 448 (10th Cir. 1996) ("To ensure the protection, [NEPA] establishes 'action forcing' procedures the agencies must follow." (alteration in original)).

- Formal comments date June 28, 2013 in conjunction with the release of the *Draft Billings and Pompeys Pillar National Monument Resource Management Plan and Environmental Impact Statement at* 78 Fed. Reg. 61 (Friday, March 29, 2013);

- Formal comments dated October 9, 2014 in conjunction with the release of the *Greater Sage-Grouse Bi-State Distinct Population Segment Forest Plan Amendment and Revised Draft Environmental Impact Statement* (DLUPA/DEIS) at 79 Fed. Reg. 40100 (Friday, July 11, 2014);

- Formal comments dated January 29, 2014 in conjunction with the release of the *Nevada and Northeastern California Greater Sage-Grouse Draft Land Use Plan Amendments and Draft Environmental Impact Statement* at 78 Fed. Reg. 65701 (Friday, November 1, 2013). In addition, AEMA submitted supplemental comments on June 24, 2014 at 78 Fed. Reg. 65701 (November 1, 2013);

- Formal comments dated January 29, 2014 in conjunction with the release of the *Utah Greater Sage-Grouse Draft Land Use Plan Amendment and Environmental Impact Statement* at 78 Fed. Reg. 65700 (November 1, 2013);
- Formal comments dated March 24, 2014 in conjunction with the release of the *Wyoming Greater Sage-Grouse Draft Land Use Plan Amendments and Draft Environmental Impact Statement* at 78 Fed. Reg. 79004 (Friday, December 27, 2013);
- Formal supplemental comments dated July 7, 2014 in conjunction with the release of the *Miles City Field Office Draft Resource Management Plan and Environmental Impact Statement* at 78 Fed. Reg. 46 (Friday, March 8, 2013);

- Formal supplemental comments dated July 7, 2014 in conjunction with the release of the *Hiline Field Office Draft Resource Management Plan and Environmental Impact Statement* at 78 Fed. Reg. 56 (Friday, March 22, 2013);

- Formal supplemental comments date June 28, 2013 in conjunction with the release of the *Draft Billings and Pompeys Pillar National Monument Resource Management Plan and Environmental Impact Statement at* 78 Fed. Reg. 61 (Friday, March 29, 2013);

- Formal comments dated January 29, 2014 in conjunction with the release of the *Idaho and Southwestern Montana Draft Land Use Plan Amendment and Environmental Impact Statement* at 78 FR 65703 (November 1, 2013);

- Formal protest dated June 29, 2015 in conjunction with the release of the *Nevada and Northeastern California Greater Sage-Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement* at 80 FR 3071(May 29, 2015);

- Formal protest dated June 29, 2015 in conjunction with the release of the *Idaho and Southwestern Montana Greater Sage-Grouse Proposed Land Use Plan Amendments and Final Environmental Impact Statement* at 80 FR 30676 (May 29, 2015);

- Formal protest dated June 29, 2015 in conjunction with the release of *the Oregon Sub-regional Greater Sage-Grouse Proposed Resource Management Plan Amendment and Final Environmental Impact Statement* at 80 FR 30676 (May 29, 2015);

- Scoping comments dated January 14, 2016 in conjunction with the release of *Notice of Proposed Withdrawal; Sagebrush Focal Areas; Idaho, Montana, Nevada, Oregon, Utah, and Wyoming and Notice of Intent to Prepare an Environmental Impact Statement* at 80 FR 57635 (Sept. 24, 2015);

- Formal comments dated March 28, 2017 in conjunction with the release of the *Notice of Amended Proposed Withdrawal, Release of Draft Environmental Impact Statement, and Notice of Public Meetings; Idaho, Montana, Nevada, Oregon, Utah, and Wyoming*, 81 Fed. Reg. 96478 (Dec. 30, 2016); *see also* 81 Fed. Reg. 96451 (Dec. 30, 2016);

- Scoping comments dated November 29, 2017 in response to the call for public comment in conjunction with the *Notice of Intent to Amend Land Use Plans Regarding Greater Sage-Grouse Conservation and Prepare Associated Environmental Impact Statements or Environmental Assessments,* 82 FR 47248 (Oct. 11, 2017);

- Scoping comments dated January 5, 2018 on the *USFS Notice of Intent to prepare an Environmental Impact Statement regarding greater sage-grouse land management issues that could warrant land management plan amendments* at 82 Fed. Reg. 55,346 (Nov. 21, 2017);

- Formal comments, dated July 31, 2018 in conjunction with the release of the *Idaho Greater Sage Grouse Draft Management Plan Amendment and Draft Environmental Impact Statement* at 83 FR 19801 (May 4, 2018);

- Formal comments, dated July 31, 2018 in conjunction with the release of the *Nevada and Northeastern California Draft Management Plan Amendment (RMPA) and Draft Environmental Impact Statemen*), 83 FR 19800 (May 4, 2018);

- Formal comments dated July 31, 2018 in conjunction with the release of *the Draft Management Plan Amendment (RMPA) and Draft Environmental Impact Statement* [Oregon] at 83 FR 19804 (May 4, 2018);

- Formal comments dated July 18, 2018 in conjunction with the release of the *Colorado, Utah, and Wyoming Greater Sage Grouse Draft Management Plan Amendment (RMPA)*

and Draft Environmental Impact Statements (DEIS'), 83 FR 19808, 19803, 19810 (May 4, 2018), respectively and the failure to amend Montana's 2015 Plans;

- Scoping comments dated August 10, 2018 on the *USFS Supplemental Notice of Intent to Prepare an Environmental Impact Statement: Notice of Updated Information Concerning the Forest Service Greater Sage-Grouse Land and Resource Management Plan Amendments*, 83 Fed. Reg. 28608 (June 20, 2018).

During the scoping period and the comment periods for the 2015 Amendments, AEMA specifically criticized the use of "*A Report on National Greater Sage-Grouse Conservation Measures"* (BLM, December 21, 2011 hereinafter, "NTT Report"), and the "*Greater Sage-grouse Conservation Objectives: Final Report,* (United States Fish and Wildlife Service, February 2013, hereinafter "COT Report"), and identified several procedural, legal and scientific shortcomings including those associated with:

- Mining Law of 1872 (30 U.S.C. 21a *et seq*., hereinafter "Mining Law");
- Mining and Minerals Policy Act (30 U.S.C. §21a);
- Federal Land Policy and Management Act of 1976 (43 U.S.C 1701 *et seq*., hereinafter "FLPMA");
- National Environmental Policy Act (42 U.S.C. § 4321 *et seq*., hereinafter "NEPA"); and
- Data Quality Act (Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2764a-153-154 (2000), hereinafter "DQA").

As previously stated, AEMA submitted formal comments, dated July 31, 2018 in conjunction with the release of the *Nevada and Northeastern California Draft Management Plan Amendment (RMPA) and Draft Environmental Impact Statemen*), 83 FR 19800 (May 4, 2018). In those comments, AEMA raised the following issues:

- The No Action Alternative is not a viable option;
- The cancellation of the proposed Sagebrush Focal Area (hereinafter "SFA") withdrawal necessitates Removal of the SFA designation;
- BLM must ensure compliance with the Mining Laws and FLPMA;
- BLM must clarify that certain restrictions in the 2015 Amendments do not apply to locatable minerals;
- Compensatory mitigation/net gain standard is not lawful;
- The definition of "valid existing rights" (hereinafter "VER") should be modified to clarify that all rights pursuant the Mining Law, including access and occupancy rights at 30 U.S.C. § 22 and reiterated at 43 U.S.C. § 1732(b) are included in the definition of VER.

AEMA appreciates the BLM's effort to update the 2015 Amendments with current data, provide opportunity for ground-truthing through the proposed Allocation Exception Process described in Table 2-2 and the development of a causal factor analysis as it relates to adaptive management described in Appendix D of the FEIS. We also support BLM's decision to cancel the proposed SFA mineral withdrawals in light of the overwhelming data in the 2016 SFA Withdrawal DEIS that the withdrawal was not warranted to protect GSG habitat and would cause substantial socioeconomic harm in the six SFA states.

However, AEMA's members' patented and unpatented mining claims, future plans to enter, explore, and locate mining claims, and current and future mining operations on these federal lands remain adversely affected by the 2015 Amendments. This is because the 2015 Amendments contain provisions including several restrictions on mineral exploration and development, that violate, *inter alia*, the Mining Law, Mining and Minerals Policy Act, the Materials and Minerals Policy, Research and Development Act of 1980 (30 U.S.C. §§ 1601 – 1605), FLPMA, NEPA, and DQA. Many of these unlawful provisions and restrictions were also promulgated in violation of the notice and comment requirements of NEPA and the Administrative Procedure Act (hereinafter "APA"). These unlawful and unnecessary provisions include but are not limited to the requirement of compensatory mitigation, imposition of a net conservation gain or benefit mitigation standard, uniform lek buffer distances, disturbance caps, seasonal timing restrictions, and travel restrictions.

These unlawful and unnecessary provisions must be removed from the Proposed Plan Amendment regardless of whether or not a state requested amendments or changes to the 2015 Plans. We incorporate by reference as though fully set out herein our formal protest dated June 29, 2015 in conjunction with the release of the *Nevada and Northeastern California Greater Sage-Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement* at 80 FR 3071(May 29, 2015).

AEMA's current protest against BLM's Proposed Plan is based upon the same issues we raised in our scoping comments dated January 5, 2018 and our formal comments dated July 31, 2018. As discussed in detail below, BLM has failed to adequately address many of our concerns or issues raised during the regional call for public comment (82 FR 47248, Oct. 11, 2017 and 83 FR 19800, May 4, 2018). Consequently, the Proposed Plan suffers from the same legal shortcomings.

The Proposed Plan is based upon invalid and incomplete information and does not comply with applicable laws, regulations, policies, and planning procedures. In response to our Protest, BLM must eliminate all elements of the Proposed Plan that do not comply with applicable laws, regulations, policies, and planning procedures and prepare a Revised PRMPA and Supplemental EIS, then allow the public an opportunity to provide comments on the Supplemental EIS and to protest the Revised PRMPA. BLM must uphold our protest because it satisfies the criteria outlined in BLM Handbook H-1601-1, Land Use Planning Handbook, for the circumstances in which the State Director must uphold a protest as listed in Section C.2., BLM Handbook H-1601-1 at 7:

"b) significant aspects of the proposed plan or amendment are based upon invalid or incomplete information;" or

"c) the proposed plan or amendment does not comply with applicable laws, regulations, policies and planning procedures."

A. Contact Information

Name: American Exploration & Mining Association
Mailing Address: ATTN: Laura Skaer
10 Post Street, Suite 305
Spokane, WA 99201
lskaer@miningamerica.org
Phone Number: (509) 624-1158 x 16

Interest: As described in this protest letter, AEMA's interest to the PRMPA/FEIS relates to the substantial harm the Proposed Plan will have on AEMA members, and compliance by BLM with meeting the legal standards established under the following authorities:

- General Mining Law (30 U.S.C. 21a *et seq*.);
- Mining and Minerals Policy Act (30 U.S.C. §21a);
- National Materials and Minerals Policy, Research, and Development Act of 1980 (30 U.S.C. 1601 *et seq*.);
- FLPMA (43 U.S.C 1701 *et seq*.);
- NEPA (42 U.S.C. § 4321 *et seq*.); and
- DQA (Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2764a-153-154 (2000).

II. Table of Contents

III. Issues and Parts of the Plan Being Protested

1. **Executive Summary**
   - ES.3 Issues and Related Resource Topics Identified Through Scoping
     - ES.3.1 Issues and Related Resource Topics Retained for Further Consideration in this RMPA/EIS
     - ES.3.2 Clarification of Planning Decisions in the 2015 ARMPA/ROD
     - ES.3.3 Issues and Resource Topics Not Carried Forward for Additional Analysis (Scoping Issues Outside the Scope and Scoping Issues Previously Analyzed)
   - ES.4 Alternatives Considered
     - ES.4.1 No-Action Alternative
     - ES.4.2 Management Alignment Alternative
   - ES.5 Development of the Proposed Plan Amendment
2. **Chapter I. Purpose and Need for Action**
   - 1.5 Issues and Related Resource Topics Identified Through
     - 1.5.1 Issues and Related Resource Topics Retained for Further Consideration in this RMPA/EIS 1.5.2 Clarification of Planning Decisions in the 2015 ARMPA/ROD
     - 1.5.3 Issues and Resource Topics Not Carried Forward for Additional Analysis (Scoping Issues Outside the Scope and Scoping Issues Previously Analyzed)
   - 1.6 Relationship to Other Policies, Plans, and Programs
     - 1.6.1 State Plans
     - 1.7 Changes between Draft RMPA/EIS and Proposed RMPA/Final EIS
3. **Chapter 2. Proposed Plan Amendment and Alternatives**
   - 2.2 Alternatives Considered but Not Analyzed in Detail
     - 2.2.1 Varying Constraints on Land Uses and Development Activities
   - 2.3 Description of Draft RMPA/EIS Alternatives
     - 2.3.1 No-Action Alternative
     - 2.3.2 Management Alignment Alternative
     - 2.3.3 Proposed Plan Amendment
   - 2.4 Comparative Summary of Alternatives
   - 2.5 Comparison of Alternatives
4. **Environmental Consequences**
   - 4.2 Analytical Assumptions
   - 4.3 General Method for Analyzing Impacts
   - 4.3.1 No-Action Alternative with the Inclusion of SFAs (No-Action Alternative)
     - 4.3.2 Management Alignment Alternative
     - 4.3.3 Proposed Plan Amendment
   - 4.5 Impacts on Greater Sage-Grouse and Greater Sage-Grouse habitat
     - 4.5.1 No-Action Alternative with the Inclusion of SFAs (No-Action Alternative)
     - 4.5.2 Management Alignment Alternative
     - 4.5.3 Proposed Plan Amendment

IV. Concise Statement of Why the State Director's Decision is Wrong: Various Ways the Bureau of Land Management Acted Unlawfully or in Error

AEMA is concerned that several provisions from the 2015 Amendments have been retained and carried over in the PRMPA/FEIS and will have significant impacts on AEMA members. Specifically, the restrictions it will impose on surface-disturbing activities, and the limitation on mineral exploration and development in the future do not comply with the multiple use mandates under BLM's organic act. AEMA is also concerned that BLM's proposed mitigation and net gain standards unlawfully delegates public lands management authority to the states. This protest focuses on several areas in which the Proposed Plan fails to comply with applicable laws, regulations, policies, and overall responsibilities to manage public lands, especially related to minerals. Significant aspects of the Proposed Plan must clarify that BLM's authority over locatable minerals is non-discretionary and limited to the provisions found under the Mining Law and FLPMA. Explicit clarifications regarding the management of locatable minerals are necessary for the regulated community and future administrations in order to minimize the potential for future confusion, permitting delays, and litigation. Therefore, it is in the mutual best interest of the mining industry and BLM to make the requested clarifications described below.

V. Statement of Why the State Director's Decision is Wrong: THE PROPOSED PLAN FAILS TO ADDRESS LEGAL INSUFFCIENCIES FOUND IN THE 2015 AMENDMENTS

During the 2015 greater sage-grouse land use planning process, several memoranda, studies, and reports were prepared in response to and, in many cases, relied upon to adopt restrictions on multiple use on federal lands for the purported purpose of protecting an unlisted species. These documents include:

1. NTT Report;[2]
2. COT Report;
3. SO 3330;
4. 2014 FWS Memo;
5. 2014 FWS Mitigation Framework;
6. 2014 USGS Lek Buffer Study;
7. "Range-Wide Network of Priority Areas for Greater Sage-Grouse—A Design for Conserving Connected Disturbances or Isolating Individual Zoos?" by Michele R. Crist, Steven T. Knick, & Steven E. Hanser (USGS, Open-File Report 2015-1158) ("Crist Study"); and
8. Monograph.

These documents suffer from significant defects, including being outcome-orientated and reverse-engineered. Most importantly, these documents rely on landscape-scale land use planning principles that Congress rejected when it used the Congressional Review Act (5 U.S.C. §801 *et seq*. "CRA") to rescind BLM's Planning 2.0 Rule[3] [4]. In overturning the Planning 2.0 Rule, Congress reaffirmed its intent that DOI must develop resource management plans like the GSG LUPs in compliance with the land management principles in FLPMA, which does not authorize the landscape-scale planning measures embraced in the Planning 2.0 Rule and the 2015 GSG LUPAs. Because the CRA prohibits agencies from reinstating a similar rule through rulemaking, BLM must not replicate the now defunct policies in its Planning 2.0 Rule in the 2018 PRMPA. Congress has made it clear that FLPMA does not authorize landscape-scale

[2] The NTT Report has been thoroughly scrutinized. In particular, reviewers and the public have questioned its scientific validity, its use of professional judgment in place of science, and its simplistic management consideration that, *inter alia*, fail to account for variations in the location, timing, and use of habitat by the greater sage-grouse. *E.g.*, Megan Maxwell, *BLM's NTT Report: Is it the Best Available Science or a Tool to Support a Pre-determined Outcome?* (May 20, 2013); Rob Roy Ramey II, Ph.D, *Review of Data Quality Issues in A Report on National Greater Sage-Grouse Conservation Measures Produced by the BLM Sage-Grouse National Technical Team (NTT) Dated December 21, 2011* (Sept. 19, 2013). True and accurate copies of these articles are attached hereto as Exhibits 3 and 4, respectively.

[3] *See* joint resolution, H.J., Resolution 44, which President Trump signed into law on March 27, 2017.

[4] As one of the last rules promulgated during the Obama administration, BLM published the Resource Management Planning Rule (Planning 2.0 Rule) on December 12, 2016 (81 FR 89580). The rule became effective on January 11, 2017. BLM's Planning 2.0 Rule, which was developed after the 2015 LUPs, was a reverse-engineered, after-the-fact regulation designed to require BLM to use the landscape-scale land use planning principles that are the foundation of the 2015 GSG LUPs in all future resource management planning efforts.

management of public lands. Therefore, the 2018 PRMPA must not be based on landscape-scale management philosophies.

AEMA has long been concerned with the policy and conservation measures found in these documents and has continually raised the issue in our various comments. Additionally, these documents were prepared and relied on to adopt restrictions on uses on the federal lands, including mining that the public never had an opportunity to comment upon or provide critique. The NTT Report, COT Report, Buffer Report and the Monograph are subject to DQA challenges filed by multiple petitioners, including AEMA. AEMA incorporates by reference the findings of these DQA challenges.

Further, the NTT and COT Reports are severely flawed and outdated and should be discarded and replaced with a more complete review of the body of literature on sage-grouse. The DQA challenges have uncovered serious flaws including, but not limited to:

NTT Report:

- Was developed with unsound research methods including partial and biased presentation of information;
- Ignores studies that do not support its theses;
- Jumps to conclusions that are not scientifically supported but are pure conjecture; and
- Disseminates information that is neither objective nor reliable and that lacks scientific integrity;

The COT Report:

- Misused the scientific method to reverse-engineer the report's recommendations
- Includes population numbers, habitat, range, threats and viability that are all acknowledged uncertainties;
- Relies upon studies with significantly flawed assumptions, questionable analytic models and questionable statistical procedures;
- Is biased by the use of policy-driven assumptions, inferences, and uncertainties that are not supported by scientific data;
- The degree to which threats are present is based on highly questionable sources and databases.

More specifically, the studies used in the NTT Report, COT Report, and Buffer Report are based upon:

- Statistically invalid lek count data used to estimate population trends as a basis or need for management. The imprecise data, non-random sampling, and the fact that sage grouse populations are known to fluctuate, means that it is impossible to discern any pattern in the data that could be used to guide management actions, or that would be scientifically defensible;
- Assumptions that even a temporary decline in lek count data is representative of a population decline;

- Outdated data and opinion in reports and papers, rather than more current data and information;
- Speculations about the benefits to sage-grouse, particularly with respect to disturbance caps, and buffer distances.

AEMA's members are harmed because the 2015 Amendments retained in the Proposed Plan contain provisions including several restrictions on mineral exploration and development, that violate, *inter alia*, the Mining Law, Mining and Minerals Policy Act, FLPMA, NEPA, and DQA discussed in detail in our 2015 protest letter (incorporated by reference). Many of these unlawful provisions and restrictions were also promulgated in violation of the notice and comment requirements of NEPA and the Administrative Procedure Act (hereinafter "APA"). These unlawful and unnecessary provisions include but are not limited to the requirement of compensatory mitigation, imposition of a net conservation gain or benefit mitigation standard, uniform lek buffer distances, disturbance caps, seasonal timing restrictions, and travel restrictions. These unlawful and unnecessary provisions must be removed from the Proposed Plan Amendment regardless of whether or not a state requested amendments or changes to the 2015 Plans. We incorporate by reference as though fully set out herein our formal protest dated June 29, 2015 in conjunction with the release of the *Nevada and Northeastern California Greater Sage-Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement* at 80 FR 3071(May 29, 2015).

Remedy

BLM must clarify that certain restrictions in the 2015 Amendments do not apply to locatable minerals. The 2015 Amendments contain restrictions including disturbance and density caps on human activity, uniform lek buffers, travel and transportation restrictions, seasonal timing restrictions, and compensatory mitigation (i.e. net gain/benefit standard). Each of these restrictions must not apply to locatable mineral exploration and development operations which are non-discretionary activities. BLM's discretionary authority to regulate locatable mineral operations is limited to preventing unnecessary or undue degradation. *See* 43 U.S.C. §1732(b).

AEMA recommends that BLM clarify that the restrictions cited above do not apply to locatable minerals and that mitigation above that of preventing unnecessary or undue degradation as defined in the 43 CFR Subpart 3809 regulations is not lawful, as discussed further below.

VI. Statement of Why the State Director's Decision is Wrong: THE PROPOSED PLAN FAILS TO COMPLY WITH THE MINING LAWS AND AGENCY POLICY FOR MANAGING MINERALS[5]

A. The PROPSED PLAN fails to comply with § 22 of the General Mining Law

[5] *See* AEMA June 29, 2015 Protest; and July 31, 2018 Comment Letter.

The Mining Law authorizes and governs the exploration, discovery and development of valuable minerals, and allows citizens of the United States the opportunity to enter, use and occupy public lands open to location to explore for, discover, and develop certain valuable mineral deposits (30 U.S.C. §22). Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase…(*Id.*). 30 U.S.C. §22 ensures *pre-discovery* access, use, and occupancy rights to enter lands open to location for mineral exploration and development. Prohibiting or restricting mineral exploration and development on lands co-located with sage-grouse habitat, by way of limits placed upon surface disturbance,[6] travel and transportation management (roads),[7] application of lek buffers,[8] seasonal timing restrictions,[9] and compensatory mitigation[10] is contrary to the rights granted by § 22 of the Mining Law, and therefore the Proposed Plan is in violation of the Mining Law and FLPMA, and cannot be implemented.

AEMA contends that BLM has a legal obligation to comply with the General Mining Law, the Mining and Minerals Policy Act, the Materials and Minerals Policy, Research and Development Act of 1980, and FLPMA to recognize the Nation's need for domestic sources of minerals and the right to explore. Despite, and in direct conflict with this legal obligation, BLM nevertheless has retained severe restrictions and prohibitions from the 2015 Amendments including:

- Section 2.6.2, Action SSS 2; Section 2.6.3, GRSG-GEN-DC-002, GRSG-GEN-ST-004-Standard (2015 PLUPA/DEIS);
- Sections 2.6.2 and 2.6.3: Action CTTM 2, Action CTTM 3, Action CTTM 5, Action CTTM 6, GRSG-RT-ST-081-Standard, GRSG-RT-ST-083-Standard, GRSG-RT-GL-089-Guideline;
- Action SSS 2; Appendix B
- Section 2.6.2, Action CTTM 2, Action CTTM 3; Section 2.6.3, GRSG-RT-ST-081-Standard (2015 PLUPA/DEIS).

AEMA discussed in depth the issues and concerns related to the above cited management actions in our formal protest dated, June 29, 2015, which is incorporate by reference herein. BLM cannot include restrictions, including but not limited to those listed above, that interfere with mineral exploration, mining operations, and the exercise of Section 22 rights. Each of these restrictions must not apply to locatable mineral

[6] Specific part of the 2015 Amendments being protested: Section 2.6.2, Action SSS 2; Section 2.6.3, GRSG-GEN-DC-002, GRSG-GEN-ST-004-Standard.
[7] Specific part of the 2015 Amendments being protested: Section 2.6.2, and 2.6.3: Action CTTM 2, Action CTTM 3, Action CTTM 5, Action CTTM 6, GRSG-RT-ST-081-Standard, GRSG-RT-ST-083-Standard, GRSG-RT-GL-089-Guideline.
[8] Specific Part of the 2015 Amendments being protested: Action SSS 2; Appendix B
[9] Specific part of the Proposed Plan being protested: MD SSS 2E, MD SSS 3D.
[10] Specific part of the Proposed Plan being protested: MD MIT 1, MD MIT 2, Appendix F, Appendix N.

exploration and development operations which are non-discretionary activities. BLM's discretionary authority to regulate locatable mineral activities is limited to the FLPMA mandate to prevent unnecessary or undue degradation, discussed in detail below. *See* 43 U.S.C. §1732(b) and 43 C.F.R. § 3809.415.

The 2015 Amendments include seasonal and year-round travel and transportation restrictions, lek buffers, disturbance caps, seasonal timing restrictions, among others that, if applied to locatable mineral activities, would violate rights granted by the Mining Law (30 U.S.C. § 22) and FLMPA, including rights of ingress and egress.

Thus, FLPMA's Section 202 land use planning process may not be used to impose the restrictions cited above on locatable mineral operations, or in any way impair the rights of locators, including rights of ingress or egress.

Restrictions that interfere with mineral activities also violate Executive Orders (hereinafter "EOs") 13783 and 13817, and Secretarial Order (hereinafter "SO") 3359. In our scoping comments for this current planning process, we discussed in depth, the issues related to the net gain, lek buffers, travel restrictions, and disturbance caps. We incorporate by reference as though fully set out herein our comments dated January 5, 2018.

BLM must ensure that it continues to appropriately recognize its limitations on discretion as it did in both the Bald Mountain and Gold Bar EIS' where it states:

> The proposed project is a non-discretionary 43 CFR 3809 action, with discretion limited to preventing unnecessary and undue degradation to a resource.[11]

AEMA recommends that BLM make clear that the restrictions cited above do not apply to locatable minerals and that mitigation above that of preventing unnecessary or undue degradation as defined in the 43 CFR Subpart 3809 regulations is not lawful. Although AEMA appreciates the clarifications in the Bald Mountain and Gold Bar EIS' that locatable mineral activities are non-discretionary, this clarification needs to be in the PRMPA/FEIS, which is a programmatic NEPA document to which subsequent project-level NEPA documents can be tiered and incorporate by reference.

Remedy

As previously stated, BLM must clarify in the PRMPA/FEIS that certain restrictions in the 2015 Amendments as well as the Proposed Plan do not apply to locatable minerals. The 2015 Amendments contain restrictions including disturbance and density caps on human activity, lek buffers, travel and transportation restrictions, and compensatory mitigation (i.e. net gain/benefit standard). Each of these restrictions must not apply to

locatable mineral exploration and development operations which are non-discretionary activities. BLM's discretionary authority to regulate locatable mineral operations is limited to preventing unnecessary or undue degradation. *See* 43 U.S.C. §1732(b).

1. Definition of valid existing rights is too narrow

Throughout the PRMPA/FEIS, BLM refers to "Valid Existing Rights" (hereinafter "VERs") with the implication that the impact of certain restrictions, guidelines, and objectives would be mitigated because the VER would be protected. For example, BLM in Appendix G: *Response to Substantive Public Comments* makes the following statement numerous times: "All proposed actions contained in RMPA will be subject to valid existing rights, including those associated with the 1872 Mining Law." As another example, BLM refers to VERs two times in discussing the Proposed mitigation protocol/standard in Table 2-2 (2-13 to 2-19).

For locatable minerals the term "valid existing right," is a specific term that is reserved for those claims after a "discovery" of a valuable mineral deposit has been made. Therefore, the proposal to honor VERs does not clearly encompass and protect the Mining Law Section 22 rights associated with claims prior to a discovery of a valuable mineral deposit. In the context of the PRMPA, VERs must clearly mean all mining claims in good standing – with or without a discovery.

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

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

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

AEMA requests that the Glossary in the Proposed Plan be expanded to include a modified VER definition to clarify that all rights pursuant to the Mining Law,

including the access and occupancy rights at 30 U.S.C. § 22 and reiterated at 43 U.S.C. § 1732(b) are included in the definition of VER. The modified definition should also clarify that for rights pursuant to the Mining Law and FLPMA, a VER is not synonymous with a "valid claim" (i.e., a claim with a discovery of a valuable mineral deposit), nor is validity of a claim a prerequisite to a VER.

Remedy

In order to ensure all locatable mineral rights are adequately protected AEMA recommends the definition of VER in the 2018 RMPA Glossary be modified as shown below:

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

Explicit clarifications regarding the management of locatable minerals are necessary for the regulated community and future administrations in order to minimize the potential for future confusion, permitting delays, and potential litigation. Therefore, it is in the mutual best interest of the mining industry and BLM to make the requested clarification described above.

2. BLM's mitigation protocol/standard is in violation of the General Mining Law

The Mining Law allows citizens of the United States the opportunity to enter, use and occupy public lands open to location to explore for, discover, and *develop* certain valuable mineral deposits (30 U.S.C. §22, emphasis added), and is only restricted by the FLPMA mandate to prevent unnecessary and undue degradation of public lands. The Mining Law authorizes and governs the exploration, discovery, and development of valuable minerals:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and un-surveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase…(*Id*.)

BLM explains that the mitigation standard in the Proposed Plan "is modified to reflect BLM's determination that compensatory mitigation must be voluntary *unless required by other applicable law* but in recognition that states *may require mandatory compensatory mitigation* in accordance with state law" (PRMPA/FEIS at 4-13, emphasis added). BLM also states that it would not deny authorizations solely on the basis that a project proponent does not propose or agree to undertake voluntary compensatory mitigation (*Id*.). BLM needs to clarify how it will handle situations when the State requires compensatory mitigation, in light of rights granted under the Mining Law to develop and occupy both unpatented and patented mineral claims.

BLM cannot require compensatory mitigation regardless of whether state laws or policies require it because compensatory mitigation, applied to mining operations, would require operators to improve sage-grouse habitat above that provided for under FLPMA's standard of preventing unnecessary or undue degradation. As previously mentioned, BLM's authority to impose mitigation is limited to that provided for in FLPMA and the 43 CFR 3809 surface management regulations, discussed in detail below.

BLM goes to great effort to recognize the states authority over wildlife, citing 43 CFR 24.3(a) numerous times. The 43 CFR 24.3 regulations guide how the BLM cooperates with the States regarding fish and resident wildlife, *in the absence of specific, overriding federal law*. BLM's obligations to uphold the Mining Law, FLPMA, the Mining and Minerals Policy Act, and the Materials and Minerals Policy, Research and Development Act of 1980 clearly override the State of Nevada's compensatory mitigation requirements and cannot be set aside in the face of conflicting state laws or requirements.

Specifically, BLM's discretionary authority to regulate locatable mineral operations is limited to preventing unnecessary or undue degradation. *See* 43 U.S.C. §1732(b). Compensatory mitigation is not authorized under Federal law, and interferes with mineral exploration, mining operations, and the exercise of Section 22 rights, which guarantee the right to use and occupy federal lands open to mineral entry, with or without a mining claim, for prospecting, mining and processing and all uses reasonably incident thereto, including but not limited to ancillary use rights, and rights of and associated with ingress and egress.

Remedy

In response to this protest, BLM must prepare a Supplemental EIS and a Revised PRMPA that comply with Section 22 of the Mining Law. BLM must clarify that compensatory mitigation, even when requested by the State of Nevada, cannot be applied to locatable mineral projects, as it exceeds BLM's authority granted under Federal law.

B. The Proposed Plan fails to comply with § 21(a) Mining and Mineral Policy Act

The 2015 restrictions incorporated by reference and retained in the Proposed Plan that place an overly restrictive burden on locatable mineral operations conflict with the mandate that it is the continuing policy of the Unites States to recognize our Nation's need for domestic mineral resources. As raised in our scoping comments, Draft EIS comments, and 2015 Protest (each incorporated by reference herein), BLM must demonstrate its compliance with the mandate under the Mining and Minerals Policy Act (30 U.S.C. §21(a)), and FLPMA (43 U.S.C. §1701(a)(12)) to recognize the Nation's need for domestic minerals.

Moreover, EO 13817 has made clear that critical mineral development is a priority moving forward stating:

> …it is the policy Federal Government to reduce the Nation's vulnerability to disruptions in the supply of critical minerals…The United States will further this policy for the benefit of the American people and in a safe and environmentally responsible manner, by:
> (a) identifying new sources of critical minerals;
> (b) increasing activity at all levels of the supply chain, including exploration, mining, concentration, separation, alloying, recycling, and reprocessing critical minerals…
> (d) streamlining leasing and permitting processes to expedite exploration, production, processing, reprocessing, recycling, and domestic refining of critical minerals.

Remedy

In response to this protest, BLM must prepare a Supplemental EIS and a Revised PRMPA that comply with EO 13817, and the directive under the Mining and Minerals Policy Act §21(a) to recognize the Nation's need for domestic sources of minerals.

C. The Proposed Plan fails to comply with the National Materials and Minerals Policy, Research and Development Act

The 2015 restrictions incorporated by reference and retained in the Proposed Plan that place an overly restrictive burden on locatable mineral operations conflict with the National Materials and Minerals Policy, Research and Development Act of 1980 (30 USC § 1601 *et seq*., "MMPRDA"), which Congress enacted four years after passing FLPMA to reiterate and reinforce the mineral polices established in FLPMA and the Mining and Mineral Policy Act . Section 1602 establishes that:

> …[I]t is the continuing policy of the United States to promote an adequate and stable supply of materials necessary to maintain national security, economic well-being and industrial production, with appropriate

> attention to a long-term balance between resource production, energy use, a healthy environment, natural resources conservation, and social needs.

This policy directive reiterates that domestic sources of minerals are critically important to our Nation, as Congress has repeatedly found that activities restricting mineral development must be avoided, and that a balance of resources must be achieved. Section 1602 *et seq*. goes on to state:

> The Congress further declares that implementation of this policy requires that the President shall, through the Executive Office of the President, coordinate the responsible departments and agencies to, among other measures… identify materials needs and assist in the pursuit of measures that would assure the availability of materials critical to commerce, the economy, and national security… promote and encourage private enterprise in the development of economically sound and stable domestic materials industries; and…encourage Federal agencies to facilitate availability and development of domestic resources to meet critical materials needs.

AEMA discussed at length in our 2015 protest (incorporated herein) that numerous restrictions would have significant adverse impacts to locatable minerals. The many overly burdensome restrictions from the 2015 Amendments that are retained in the Proposed Plan remain inconsistent with the MMPRDA, the Mining Law, Mining and Minerals Policy Act, FLPMA, and EO 13817.

Remedy

In response to this protest, BLM must prepare a Supplemental EIS and a Revised PRMPA that comply with the Mining Law, EO 13817, MMPRDA, and the directive under the Mining and Minerals Policy Act §21(a) to recognize the Nation's need for domestic sources of minerals.

VII. Statement of Why the State Director's Decision is Wrong: THE PROPOSED PLAN FAILS TO COMPLY WITH FLPMA AND MMPRDA

AEMA's members remain harmed because their patented and unpatented mining claims, future plans to enter, explore, and locate mining claims, and current and future mining operations on federal lands in the planning area remain adversely affected by the 2015 Amendments. This is because the 2015 Amendments contain provisions including several restrictions on mineral exploration and development, that violate the Mining Laws, FLPMA AND MMPRDA. Unfortunately, the 2018 PRMPA/FEIS perpetuate many of these restrictions.

The Proposed Plan fails to comply with FLPMA's multiple use and sustained yield mandate under § 102(a)(7), and in the land use planning title of FLPMA at §202(c)(1), and the directive under § 102(a)(12), to recognize the Nation's need for domestic sources of

minerals. Further, the multiple and cumulative restrictions on surface use retained from the 2015 Amendments in the Proposed Plan creates widespread, and cumulative de facto withdrawals across the entire planning area, which violate the multiple-use mandates under FLPMA §102(a)(7), and the directive under § 1732(b) that clearly establishes that FLPMA does not "amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including but not limited to, rights of ingress and egress.

A. The Proposed Plan fails to comply with FLPMA §§ 102(a)(7), 102(a)(12), and 103(c);

In enacting FLPMA in 1976, Congress directed the Secretary of the Interior to consider a broad range of resource issues, land characteristics, and public needs and values in determining how public lands should be managed. With passage of the MMPRDA in1980, Congress clarified the need to balance environmental protection with mineral resource development. (30 U.S.C. § 1602). FLPMA directs BLM to manage public lands for multiple uses and to consider a wide range of resource values – including the need to protect wildlife and quality of habitat – in the context of the Nation's needs for minerals, energy, food, fiber, and other natural resources. Section 102(a)(8) requires BLM to manage the public lands in a "manner that will protect the quality of scientific, scenic historical, ecological, environmental…values" (U.S.C. 1701(a)(8)).

Section 102(a)(7) establishes multiple use and sustained yield land management directives and requires the Secretary to develop "… goals and objectives [that are] established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law" (U.S.C. 1701(a)(7)). In defining the term "multiple use" FLPMA § 103(c) directs the Secretary to ensure:

> …the management of the public lands and their various resource values so that they are *utilized in the combination* that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources…to conform to changing needs and conditions; the use of some land for less than all of the resources; *a combination* of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, *minerals*, watershed, *wildlife* and fish, and natural scenic, scientific and historical values. (43 U.S.C § 1702(c), emphasis added).

Under the multiple use requirements, minerals and wildlife are on equal footing. Consequently, BLM must strike an appropriate balance between potentially competing interests and land management objectives. For BLM this balance is to be achieved in the Section 202 land use planning process and the resulting RMPs. FLPMA does not authorize the subordination of any of these uses in preference for a single land use such as sage-grouse habitat conservation outside the requirements under § 202(c)(3), and

BLM's planning regulations at 43 C.F.R. § 1610.7-2. Furthermore, the MMPRDA, which post-dates FLPMA, restates and emphasizes Congress' intent that the public lands be managed in a way that balances the need for minerals and environmental protection and resource conservation.

The land use restrictions and prohibitions that have been retained from the 2015 Amendments and identified *supra* Section VI(A) and below are not consistent with multiple use mandate and raise sage-grouse conservation and aesthetics above all other resources in the planning area.

Further, the 2015 restrictions and the proposed mitigation protocol/standard are not in compliance with the specific directive pertaining to minerals under FLPMA § 102(a)(12) and the directives in MMPRDA § 1602:

> … the public lands [shall] be managed in a manner that recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including the implementation of the Mining and Minerals Policy Act of 1970 [at] 30 U.S.C. 21a… (43 U.S.C. 1701(a)(12)).
>
> …[I]t is the continuing policy of the United States to promote an adequate and stable supply of materials … with appropriate attention to a long-term balance between resource production, energy use, a healthy environment, natural resources conservation, and social needs.

The Proposed Plan directly conflict with FLPMA's and MMPRDA's requirement that the Secretary must manage public lands to respond to the Nation's needs for minerals. Specifically, the restrictions that are retained from the 2015 Amendments that are contrary to FLPMA's directive include:

- **Section 2.6.2**: Objective SSS 1, Action SSS 2, Action SSS 5, Action, Action SSS 6, Action SSS 7, Action CTTM 2, Action CTTM 3, Action CTTM 5, Action CTTM 6, Action LR-LUA 2, Action LR-LUA 4, Action LR-LUA 5, Action LR-LUA 6, Action LR-LUA 16, Action LR-LUA 19, Action LR-LUA 21, Action LR-LW 1, Action LOC 2;

- **Section 2.6.3**: GRSG-GEN-DC-002, GRSG-GEN-ST-004-Standard, GRSG-RT-ST-081-Standard, GRSG-LR-SUA-ST-014-Standard, GRSG-LR-SUA-ST-015, GRSG-LR-SUA-ST-016-Standard, GRSG-LR-LW-GL-025-Guideline, GRSG-RT-ST-081-Standard, GRSG-RT-GL-089-Guideline.

BLM must acknowledge that it is required to fully consider the need for minerals and achieve an appropriate balance between mineral development and conservation of other resources.

In addition, BLM's effort to allow certain waivers or modifications to seasonal timing restrictions (Table 2-2 at 2-23 to 2-24; MD SSS 2E; MD SSS 3D; Appendix G), falls short and fails to actually address the concerns AEMA raised our 2015 protest, which explained that the seasonal timing restrictions are put in place during most of the practical exploration and development season, and include large No Surface Occupancy (hereinafter "NSO") buffer zones leading to *de facto* withdrawal from mineral entry on lands with sage-grouse habitat. FLPMA does not authorize using restrictions, and prohibitions such as those associated with travel and transportation management, ROW management to achieve *de facto* mineral withdrawals.

Remedy

In response to this protest, BLM must prepare a Supplemental EIS and a Revised PRMPA that comply with FLPMA's multiple use mandate and the MMPRDA, and directive to balance resources. BLM must also clarify that the 2015 restrictions retained in the Proposed Plan do not apply to locatable minerals, which are governed by the 3809 regulations.

B. The BLM's proposed mitigation protocol/standard fails to comply with FLPMA § 1732(b)

BLM's proposed mitigation protocol/standard violates the directive under § 1732(b) that clearly establishes that FLPMA does not "amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act. FLPMA expressly provides that none of its land use planning provisions, among others "*shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress*" (43 U.S.C. § 1732(b), emphasis added). 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).

The last sentence of 43 U.S.C. § 1732(b) provides that BLM may "take any action necessary to prevent unnecessary or undue degradation of the lands." *Id.; see* 43

C.F.R. § 3809.5 (defining "unnecessary or undue degradation").[12] Thus, in passing FLPMA, Congress granted BLM only limited authority to infringe on the rights granted by the Mining Law. As relevant here, that authority is limited to "prevent[ing] unnecessary or undue degradation." 43 U.S.C. §1732(b). This authority was further confirmed by IM 2018-093 where it is stated that BLM's authority in managing public lands is to prevent unnecessary or undue degradation, not more.

BLM explains that the mitigation standard in the Proposed Plan "is modified to reflect BLM's determination that compensatory mitigation must be voluntary *unless required by other applicable law* but in recognition that states *may require mandatory compensatory mitigation* in accordance with state law" (PRMPA/FEIS at 4-13, emphasis added). BLM also states that it would not deny authorizations solely on the basis that a project proponent does not propose or agree to undertake voluntary compensatory mitigation (*Id.*).

However, BLM cannot require compensatory mitigation regardless of whether state laws or policies require it because compensatory mitigation, applied to mining operations, would require operators to improve sage-grouse habitat above that provided for under FLPMA's standard of preventing unnecessary or undue degradation. As previously mentioned, BLM's authority to impose mitigation is limited to that provided for in FLPMA and the 43 CFR 3809 surface management regulations.

The regulations at 43 CFR 24.3 guide how the BLM cooperates with the States regarding fish and resident wildlife, *in the absence of specific, overriding federal law*. *See* 43 CFR 24.3. Nowhere in the regulations does it state that BLM may confer or delegate management to the states. To the contrary, BLM has obligations to uphold under the Mining Law, FLPMA, MMPRDA, and the Mining and Minerals Policy Act, which clearly overrides the State of Nevada's compensatory mitigation requirements and cannot be set aside in the face of conflicting state laws or requirements.

BLM's discretionary authority to regulate locatable mineral operations is limited to preventing unnecessary or undue degradation. *See* 43 U.S.C. §1732(b). Compensatory mitigation is not authorized under Federal law, and interferes with mineral exploration, mining operations, and the exercise of Section 22 rights, which guarantee the right to use and occupy federal lands open to mineral entry, with or without a mining claim, for prospecting, mining and processing and all uses reasonably incident thereto, including but not limited to ancillary use rights, and rights of and associated with ingress and egress.

[12] Unnecessary or undue degradation" means "conditions, activities, or practices that: (1) Fail to comply with one or more of the following: the performance standards in§ 3809.420, the terms and conditions of an approved plan of operations, operations described in a complete notice, and other Federal and state laws related to environmental protection and protection of cultural resources

Remedy

In response to this protest, BLM must prepare a Supplemental EIS and a Revised PRMPA that complies with 43 U.S.C. §1732(b). BLM must clarify that compensatory mitigation, even when requested by the State of Nevada, cannot be applied to locatable mineral projects, as it exceeds BLM's authority granted under Federal law.

C. The PLUPA/FEIS fails to comply with § 202(c)(1), § 202(c)(2), § 202(c)(7)

Section 202 of Title II of FLPMA, Land Use Planning, Land Acquisition, and Disposition, governs the DOI's land use planning process for developing and amending land use plans. Section 202(c) establishes land use planning directives to accomplish the FLPMA Section 102 declaration of policy that the public lands be managed to achieve multiple-use and sustained yield, which are the overarching purpose of FLPMA. Multiple-use and sustained yield require the Secretary to manage public lands to balance the various resources on public lands to best meet the present and future needs of the American people in a manner that recognizes the Nation's need for domestic sources of minerals including implementation of the Mining and Minerals Policy Act.[13] This balancing requirement puts wildlife and minerals (as well as the other listed resource values) on the equal footing.

Many of the FLPMA Section 202 land use planning requirements contain explicit provisions to ensure that the Secretary's land use plans achieve an appropriate balance of resource values consistent with FLPMA's multiple-use and sustained yield mandate.

FLPMA Section 202(c) states that: "In the development and revision of land use plans, the Secretary shall" –

> (1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;
>
> (2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;
>
> (6) consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;
>
> (7) weigh long-term benefits to the public against short-term benefits.

As described in detail in our 2015 protest at VI.B. the 2015 Amendments fail to comply with FLPMA multiple-use and sustained yield requirements. The PRMPA/FEIS perpetuates many of the numerous and severe flaws in the 2015 Amendments, as BLM has failed to eliminate the problematic issues contained in the 2015 Amendments. As

[13] 43 U.S.C. 1701(a)(12).

such, the PRMPA/FEIS unlawfully prefers conservation of sage-grouse habitat to the exclusion of other uses including grazing, agriculture and mineral development. FLPMA's land use planning requirements mandate the Secretary consider the relative scarcity of values, weigh long-term benefits, and use and observe principles of multiple-use and other applicable laws (such as the General Mining Law and Mining and Minerals Policy Act) rather than subordinate all other uses of public land and make sage-grouse conservation the dominant use of public lands. BLM must reconcile inconsistencies found in the 2015 Amendments and retained in the Proposed Plan and provide additional public review for substantial changes and/or prepare a Supplemental EIS and a Revised Proposed RMPA in order to comply with FLPMA Section 202(c)(1).

Remedy

In response to this protest, BLM must prepare a Supplemental EIS and a Revised PRMPA that complies with sections 202(c)(1)(2)(7) of FLPMA.

D. The Proposed Plan fails to comply with § 202(c)(9)

Section 202(c)(9) establishes that it is the policy of the United States to strive to achieve consistency with the laws governing the administration of the public lands and that the Secretary coordinate the land use planning process with State and local governments.

> Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds *consistent with Federal law and the purposes of this Act…* (43 U.S.C. 1712(c)(9), emphasis added).

FLPMA 202(c)(9) does not mandate that the land use plans developed under the Act be entirely consistent with State and local plans. Rather, Congress in passing FLPMA had the foresight to presume there would be times when State and local plans and policy may not be consistent with Federal policies and therefore only requires the Secretary to:

> …assist in resolving, to the *extent practical*, inconsistencies between Federal and non-Federal Government plans…(43 U.S.C. 1712(c)(9), emphasis added).

Although FLPMA Section 202(c)(9) gives State and local governments a specific statutory role in the federal land use planning process,[14] it does not authorize BLM to defer to State or local plans if they conflict with Federal law and the purpose of FLPMA.

[14] "Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him."

With respect to the proposed mitigation protocol/standard, BLM has unlawfully deferred to the States of Nevada and Idaho and appears to have capitulated to the States' demands for consistency rather than seeking to resolve the conflicts between the States' plans and federal law. For example, BLM states:

> Compensation, which involves replacing or providing substitute resources for the impacts (including through payments to fund such work), would be considered only when: voluntarily offered by a proponent; *or, when the appropriate state agency*, through coordination with the BLM, *determines a state regulation, policy, or program requires or recommends compensatory mitigation.* The BLM commits to cooperating with the State to analyze applicant-proposed or *state-required or recommended compensatory mitigation to offset residual impacts* (PRMPA/FEIS at ES-9)

BLM goes on to state that "at the project level, BLM would consider compensatory mitigation only when offered voluntarily by project proponents *or when required by state statutes* (PRMPA/FEIS at 2-5). Whether BLM analyzes compensatory mitigation at the RMP level or the project level is irrelevant because it is unlawful at both levels of NEPA analysis and cannot be implemented broadly or narrowly because it would be in violation of Section 22 of the Mining Law, and FLPMA.

IM 2018-093 clearly establishes that FLPMA does not authorize compensatory mitigation but at the same time is internally inconsistent because it inappropriately and illogically defers public lands management to state government by allowing state governments to require compensatory mitigation on public lands. AEMA acknowledges that the states have authority to manage wildlife that is not listed as a Threatened or Endangered Species. However, Congress has not given BLM the authority to defer management of public lands to the states or to accede to a state's compensatory mitigation requirement on public land.

Again, BLM's discretionary authority to regulate locatable mineral operations is limited to preventing unnecessary or undue degradation. *See* 43 U.S.C. §1732(b). Compensatory mitigation is not authorized under Federal law, and interferes with mineral exploration, mining operations, and the exercise of Section 22 rights, which guarantee the right to use and occupy federal lands open to mineral entry, with or without a mining claim, for prospecting, mining and processing and all uses reasonably incident thereto, including but not limited to ancillary use rights, and rights of and associated with ingress and egress. State governments cannot interfere with these rights as established in *Granite Rock v. Calif. Coastal Comm'n*, 480 U.S. 572 (1987), in which the court ruled that a state program cannot supersede or interfere with mineral development on federal land.[15]

[15] In Granite Rock, the Court held that mining on the National Forest was governed by federal law that preempted state coastal regulation.

Remedy

BLM has failed to comply with multiple provisions under FLPMA and its implementing regulations. In response to this protest, BLM must prepare a Supplemental EIS and a Revised PRMPA that comply with FLPMA. Because the PRMPA/FEIS violates FLPMA, it cannot be implemented and is thus, fatally flawed. BLM must uphold AEMA's protest because it "does not comply with applicable laws, regulations, policies and planning procedures."

VIII. OTHER COMMENT AND PROTEST LETTERS

AEMA incorporates by reference as though fully set out herein the Protest Letter submitted Western Exploration Inc.

IX. CONCLUSION

As discussed above, the entire planning process from 2015 to the present and the resulting PRMPA/FEIS are fraught with substantial procedural, legal and scientific flaws which can only be corrected in a Revised PRMPA and Supplemental EIS, which the public must be allowed to review and comment upon. BLM must uphold AEMA's protest of the Proposed Plan because it "does not comply with applicable laws, regulations, policies and planning procedures."

Respectfully submitted,

Laura Skaer

Executive Director