WESTERN ENERGY ALLIANCE

May 16, 2016

Submitted via email to: BLM_WY_Continental_Divide_Creston@blm.gov

Bureau of Land Management
Attn: Jennifer Fleuret
Rawlins Field Office
P.O. Box 2407 (1300 North Third Street)
Rawlins, WY 82301-2407

Re: Final Environmental Impact Statement for the Continental Divide-Creston Natural Gas Development Project, Wyoming

Dear Ms. Fleuret:

Western Energy Alliance generally supports the draft Final Environmental Impact Statement (FEIS) for the Continental Divide-Creston (CDC) Natural Gas Development Project. However, we urge BLM to address the concerns outlined below, especially regarding mitigation in Appendix S, prior to finalization of the Record of Decision (ROD). Appendix S is troublesome both for the immediate impact on the CDC project area and for the precedent it may set for compensatory mitigation requirements for other oil and natural gas projects authorized by BLM.

Western Energy Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Alliance members are independents, the majority of which are small businesses with an average of fifteen employees. Alliance members will be impacted by the FEIS because they hold valid existing lease rights within the CDC Project Area and plans to develop natural gas.

Compensatory Mitigation

The mitigation requirements in Appendix S are inconsistent with valid existing rights, and BLM lacks statutory authority to require compensatory mitigation from lessees to address impacts from the CDC Project. BLM should revise the draft FEIS to address these concerns prior to issuing the ROD.

BLM cannot require mitigation to achieve standards of no net loss and net conservation gain. In Appendix S, BLM directs that mitigation for pronghorn antelope and mule deer result in no net loss of crucial winter range and migration corridors. Similarly, BLM directs that mitigation for the Greater Sage-Grouse (GrSG) achieve a net conservation gain to primary habitat and no net loss of general habitat. The standards of no net loss and net conservation gain are inconsistent with section 302(b) of the Federal Land Policy

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Management Act (FLPMA), which directs that the Secretary, in managing the public lands, "take any action necessary to prevent unnecessary or undue degradation."

The directive that BLM prevent "unnecessary or undue degradation" of the public lands has been described as the "heart" of FLPMA.[1] Unnecessary or undue degradation has been interpreted as "undue or excessive" and "something more than the usual effects anticipated" from a given land use, and the standard assumes that some degradation, and thus some impact, may occur to the public lands. [2] The mitigation standards of no net loss and net conservation gain do not, however, allow some impacts to occur to public lands; rather, they require that all impacts be mitigated. Because the mitigation standards in Appendix S are inconsistent with FLPMA's prohibition on unnecessary or undue degradation, BLM may not require mitigation that achieves these standards as part of the CDC Project.

Appendix S also does not explain how the mitigation standards of no net loss and net conservation gain are achieved. In particular, BLM do not justify how it developed the calculations for net conservation gain. For instance, no information is provided on why spatial multipliers for primary GrSG habitat must be two to eight times more than the multiplier for general habitat to obtain a net conservation gain. If no net loss will maintain the baseline habitat, presumably a multiplier slightly greater than the multiplier for no net loss will achieve a net conservation gain. In other words, if a multiplier of two is required to achieve no net loss of habitat, then presumably a multiplier of 2.1 will achieve a net conservation gain. BLM, however, offers no justification as to how its multipliers achieve the mitigation standards and why alternative multipliers would be inadequate.

Valid Existing Rights

In Appendix S, BLM incorrectly suggests it may require compensatory mitigation when impacts "are likely to inhibit" the achievement of resource objectives in the Rawlins Resource Management Plan (RMP) and Casper, Kemmerer, Newcastle, Pinedale, Rawlins, and Rock Springs Field Offices (9-Plan) RMP Amendment for the Greater Sage-Grouse (Wyoming GrSG RMP Amendment). Furthermore, BLM incorrectly cites FLPMA as providing it with authority to require compensatory mitigation. In fact, FLPMA makes clear that BLM may not require compensatory mitigation, and that the standard, rather, is to prevent "undue degradation."

Congress expressly directed that all actions under FLPMA, including the approval of land use plans, are "subject to valid existing rights," which include oil and natural gas leases.[3] The Interior Board of Land Appeals (IBLA), which acts with the delegated authority of the Secretary of the Interior, has explained that "[t]he authority conferred by FLPMA is expressly made subject to valid existing rights, and therefore an RMP prepared pursuant to

[1] *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of the Interior*, No. 3:08-CV-00616-LRH-WVG, 2012 WL 13780, at *6 (D. Nev. Jan. 4, 2012).
[2] *Mineral Policy Ctr. v. Norton*, 292 F. Supp.2d 30, 41 (D. D.C. 2003); *Biodiversity Conservation Alliance*, 174 IBLA 1, 5-6 (2008).
[3] *Colo. Envtl. Coal.*, 165 IBLA 221, 228 (2005)

FLPMA's authority, after lease execution and after drilling and production has commenced, is likewise subject to [the lessee's] valid existing right to exploit its lease, and cannot serve to defeat or materially restrain that right."[4] Accordingly, management actions and objectives established in an RMP cannot extinguish or restrain rights of existing oil and natural gas lessees.

The resource objectives in the Rawlins RMP and Wyoming GrSG RMP Amendment that the CDC Project could purportedly inhibit are subject to valid existing rights, including oil and natural gas leases. BLM may not condition approval of an application for permit to drill (APD) on compensatory mitigation when the APD would prevent BLM from achieving objectives in its RMPs. Otherwise, the objectives in RMPs would "serve to defeat or materially restrain" the lessee's right to develop.[5] Because Appendix S is inconsistent with valid existing rights, BLM may not approve Appendix S as part of the CDC Project Record of Decision (ROD).

Authority to Require Compensatory Mitigation

Not only is Appendix S inconsistent with valid existing rights, it exceeds BLM's authority. A compensatory mitigation requirement is inconsistent with the terms of federal oil and natural gas leases, which do not contain any express requirement to provide compensatory mitigation. Rather, Section 6 of the federal oil and natural gas lease form only contemplates that lessees minimize, rather than mitigate, the impacts of their actions:

> Lessee must conduct operations in a manner that minimizes adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources, and to other land uses or users. Lessee must take reasonable measures deemed necessary by lessor to accomplish the intent of this section. To the extent consistent with lease rights granted, such measures may include, but are not limited to, modification to siting or design of facilities, timing of operations, and specification of interim and final reclamation measures.[6]

For this reason, BLM has consistently taken the position over nearly two decades that it would not require compensatory mitigation from lessees. Because federal oil and natural gas leases only allow BLM to impose measures to minimize, rather than mitigate, adverse impacts associated with oil and natural gas development, Appendix S exceeds BLM's authority.

Moreover, BLM's position that compensatory mitigation is required when impacts cannot be avoided is inconsistent with the fundamental rights granted by a federal lease. By issuing an oil and natural gas lease, BLM grants the right to explore and develop the lease,

[4] *Id.* at 228.
[5] *Id.*
[6] BLM Form 3110-11, *Offer to Lease and Lease for Oil and Natural Gas § 6* (Oct. 2008) (emphasis added).

including reasonable use of the surface for exploration and development. Absent a stipulation prohibiting surface occupancy, BLM cannot deny the lessee the right to use the surface of the lease.[7]

Appendix S requires compensatory mitigation unless the lessee chooses to forgo exercising its rights under its lease. Specifically, Appendix S requires compensatory mitigation when impacts are unavoidable. Appendix S defines mitigation as including "avoiding the impact altogether by not taking a certain action or parts of an action." Under this definition, avoidance measures would include an oil and natural gas operator not developing its oil and natural gas lease. The fact that BLM now seeks to condition any development on an existing lease on the lessee's provision of compensatory mitigation materially alters the fundamental contract between the lessee and the United States.

Onerous compensatory mitigation requirements effectively serve as a potential ban on development. BLM cannot unilaterally modify the terms of federal oil and natural gas leases to demand compensatory mitigation in exchange for approving any development on a lease.

Off-Lease Mitigation

Appendix S fails to recognize that BLM may not require compensatory mitigation when surface locations are located off of federal leases. Guidance from BLM expressly recognizes that it lacks such authority, stating, "NEPA does not give the BLM substantive authority, and the BLM lacks authority under the Federal Land Policy and Management Act and the Mineral Leasing Act to require, mitigation of surface impacts on non-Federal [non-split estate] land or to enforce agreements between the surface owner and the operator."[8] BLM must recognize that it lacks any authority to require compensatory mitigation for impacts to non-federal surface when surface locations are sited off of federal leases.

Greater Sage-Grouse

Appendix S is inconsistent with the Wyoming GrSG RMP Amendment and the State of Wyoming's Core Area Strategy to protect the GrSG set forth in the State of Wyoming's Executive Order No. 2015-4. As a result, Appendix S violates BLM's regulation requiring that its authorizations conform to approved RMPs.

Neither BLM's RMP Amendment nor the Core Area Strategy requires compensatory mitigation to offset all surface disturbance in GrSG habitat. BLM's RMP Amendment directs that "[w]hen necessary, offsite compensatory mitigation will be applied consistent with Wyoming's Core Area Strategy." The Wyoming Core Area Strategy relies heavily on

[7] *See Conner v. Burford*, 848 F.2d 1441, 1450 (9th Cir. 1988) ("it would be clearly inconsistent with the purpose of the leases if the government prevented all drilling, roadbuilding, pipe-laying, and other lease-rated surface-disturbing activities").

[8] Instruction Memorandum 2009-78 (Feb. 20, 2009).

avoidance and minimization measures to conserve the GrSG rather than compensatory mitigation.

The executive order first identifies core areas where GrSG and its habitat would be more effectively conserved. Then, the executive order limits the density of development and amount of surface disturbance within core areas. The executive order contemplates that compensatory mitigation will only be used "when Core Population Area thresholds are exceeded." The U.S. Fish and Wildlife Service has recognized that the Core Area Strategy will provide adequate protection for sage grouse and their habitats in the state.

Appendix S is inconsistent with the 9-Plan RMP Amendment and the Core Area Strategy because it may be interpreted as requiring compensatory mitigation when not otherwise required by the Core Area Strategy. More specifically, Appendix S appears to require compensatory mitigation absent a finding that core area thresholds have been exceeded. Appendix S justifies its compensatory mitigation requirements based on a finding that "[t]he impacts analysis in this EIS indicates that valid existing rights may result in development occurring inside [Primary Habitat Management Areas] in areas that may exceed established disturbance thresholds and would result in residual impacts." Thus, Appendix S can be interpreted as requiring compensatory mitigation because of the possibility that core area thresholds will be exceeded, regardless of whether thresholds have actually been exceeded.

To conform to the RMP Amendment and Core Area Strategy), BLM cannot require compensatory mitigation absent a finding that core area thresholds have actually been exceeded.

Impacts from Development

The substantial mitigation requirements in Appendix S are not commensurate with the anticipated impacts of oil and natural gas development. BLM does not take into consideration that modern development with directional and horizontal drilling has significantly reduced surface impact in Wyoming, up to 70%, resulting in less impact on sage grouse habitat.[9] Failing to recognize this, BLM is requiring significant and disproportionate mitigation requirements that will discourage oil and natural gas development on federal lands, resulting in lost revenue to BLM and the state. With this forgone development, BLM loses the opportunity for oil and natural gas lessees to perform reasonable habitat improvements. Imposing compensatory mitigation with heavy costs and uncertain approval measures could amount to a taking if lessees are actually or effectively prevented from developing their leases.

Spatial multipliers grossly inflate mitigation obligations to the point that they bear no correlation to the actual impacts of development. The spatial multipliers for the sage grouse in Appendix S may inflate mitigation obligations relative to per-acre disturbance by

[9] *Oil & Gas Impacts on Wyoming's Sage-Grouse: Summarizing the Past & Predicting the Foreseeable Future, 8 Human-Wildlife Interactions*, David H. Applegate & Nicholas L. Owens, Fall 2014, 288.

as much as 2,800%. Even in a scenario where roads and pads will be built entirely in unsuitable habitat up to four miles from the nearest lek, spatial multipliers could inflate mitigation obligations by 900%. These wildly inflated ratios do not reflect the nature of the impact or the underlying fair market value of the impacted land.

Furthermore, BLM cites no scientific basis for these multipliers, which range from two to sixteen. BLM, however, offers no justification for the values it assigned to the different multipliers and does not explain the relative differences between the multipliers. For example, BLM offers no scientific justification for its assertion that *unsuitable* habitat within core areas but outside of 0.6 miles from a lek is four times as valuable as *suitable* general habitat outside of core, regardless of proximity to a lek. Likewise, BLM does not explain why high-use migration corridors are only 2/3 as valuable as crucial winter range. BLM must disclose the scientific basis for these multipliers and demonstrate they reflect current science about impacts of development on the species.

BLM arbitrarily requires compensatory mitigation when development activities, including their indirect impacts, will be located in unsuitable habitat. When activities occur in unsuitable habitat, no impacts to the species occur because the habitat is unsuitable for the species' use. Accordingly, there are no impacts to mitigate. Therefore, BLM should not require any compensatory mitigation when activities occur in unsuitable habitat.

Given that BLM should not require compensatory mitigation for activities in unsuitable habitat, the relative values of suitable and unsuitable habitat in Appendix S are particularly arbitrary. Appendix S values unsuitable habitat as three-quarters the value of suitable habitat even though suitable habitat is capable of supporting a species and may even be occupied. In contrast, unsuitable habitat would require active management in order for the habitat to support the species.

Given the importance of suitable habitat and the work necessary to restore or enhance unsuitable habitat, BLM's proposal to value unsuitable habitat at three-quarters the value of suitable habitat overstates the importance of unsuitable habitat. BLM should eliminate the requirement to mitigate for activities in unsuitable habitat or at least reduce the multiplier associated with unsuitable habitat to more accurately reflect the value of unsuitable habitat to the species.

<u>Compensable Takings</u>

If BLM attempts to require mitigation calculated using the formulas in Appendix S, BLM risks a compensable taking under the Fifth Amendment of the U.S. Constitution. The U.S. Supreme Court has held that a compensable taking occurs when the government conditions approval of a land use permit on the dedication of property or money to the

public unless there is a "nexus" and "rough proportionality" between the government's requirements and the impacts of the proposed land use.[10]

The Supreme Court reasoned that "[e]xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation."[11] The substantial and arbitrary mitigation described in Appendix S lacks any nexus or rough proportionality to the impacts of oil and natural gas development. Accordingly, implementation of Appendix S may result in a compensable taking.

Obligations Imposed on Other Land Uses

The mitigation requirements in Appendix S are not proportionate to obligations imposed on other land uses such as solar, wind, or transmission projects or cattle grazing. BLM does not tie the compensatory mitigation calculations to ongoing efforts to develop landscape-level mitigation plans. BLM appears to have crafted the mitigation requirements in Appendix S particularly for the CDC Project, in advance of other policies currently under review and development.

Not only is this type of *ad hoc* mitigation structure inconsistent with the principles of landscape-level mitigation directed by the Secretary of the Interior, it results in inconsistent mitigation requirements for different land uses. Western Energy Alliance is not aware that BLM is imposing such substantial compensatory mitigation requirements on other land uses. BLM must ensure that the compensatory mitigation required of oil and natural gas projects is consistent with the compensatory mitigation required of other land uses.

Further, the mitigation requirements in Appendix S do not reflect transparent decision-making. BLM offers no scientific or other justification for the mitigation requirements in section F2 of Appendix S. For example, BLM only cites general scientific literature in support of the spatial multipliers, but offers no explanation of how it arrived at these numbers. Furthermore, BLM did not seek public input on the mitigation calculations in section F2. Any mitigation obligations must be the product of transparent decision-making and a public process.

The burdensome compensatory mitigation requirements that Appendix S imposes creates a risk that oil and natural gas development will shift from federal lands to state and private lands, where development may proceed without onerous compensatory mitigation requirements. On state and private lands in Wyoming, compensatory mitigation is not required when core area thresholds are exceeded. Incentivizing development on state and private lands could result in unintended impacts to the GrSG. Private lands contain some key habitat for the sage grouse, and a shift of development from federal lands to private

[10] *Koontz v. St. Johns River Water Mgmt. Dist.*, __ U.S. __, 133 S. Ct. 2586, 2595 (2013); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).
[11] *Koontz*, 133 S. Ct. at 2589-90.

lands could disproportionately impact these habitats. Moreover, the different conservation requirements on state and federal lands, and the resulting disproportionate development, are inconsistent with principles of landscape-level conservation. To minimize the risk of competing requirements, BLM should not impose compensatory mitigations on federal lands that are wildly out of proportion with state requirements on adjacent private and state lands.

Mitigation Credits

Appendix S contains no discussion of the mitigation credits that operators must obtain to offset debits. Without this information, Appendix S does not promote predictability for operators and transparency for the public.

Operators and the public cannot fully assess the mitigation strategy for the CDC Project because BLM has not disclosed how credits will be valued. The debit calculations only present half of the calculation. The credit calculations are also necessary to understand the commitments that will be required of operators and to help assess the potential cost of mitigation. The significance of debit amounts is best understood when compared to the credit calculations.

For the sake of example, if the credit calculation demonstrates that enhancement or preservation of one acre of habit will yield 1,500 credits, then relatively little mitigation must be secured to offset the example project described on pages S-18 and S-19 of Appendix S (i.e., one acre). In contrast, if the credit calculation demonstrates that enhancement or preservation of one acre of habit will yield only one-half credit, then a significant and burdensome amount of mitigation must be secured to offset the example project (i.e., 3,034 acres). Thus, without credit calculations, operators and the public lack the necessary context to meaningfully assess the debit requirements set forth in Appendix S.

Appendix S and the CDC EIS generally contains no assessment of the availability of the necessary credits to offset development. BLM must evaluate whether, under its proposed debit calculations, sufficient mitigation will be available to offset planned development. Furthermore, BLM must assess the potential cost of such credits and whether the total costs of credits will affect the economic feasibility of development. Just as BLM does not consider the availability of mitigation credits, it does not consider the cost of fulfilling mitigation obligations and the effect on the economic feasibility of development. Therefore, BLM must estimate the cost of implementing the mitigation requirements in Appendix S.

Furthermore, Appendix S contains no discussion of whether sufficient mitigation opportunities are available in the CDC project area. Currently, only one mitigation bank has been approved for the GrSG anywhere in the United States (the Sweetwater River Conservancy Greater Sage-Grouse Habitat Bank.) According to the Regulatory In-Lieu Fee and Bank Information Tracking System, this bank currently has 32,110 credits available and

a potential for 18,466 additional credits. [12] BLM's example project in Appendix S demonstrates that these credits will offset relatively little development.

The example in Appendix S would require 1,517.1 credits for two wells on a single pad, an access road, and related infrastructure. Thus, the 50,576 credits available or potentially available through the Sweetwater River Conservancy Greater Sage-Grouse Habitat Bank would only offset 33 such small-scale projects. Under the proposed debit calculations, the approved credits would cover a fraction of the wells to be drilled the first year of the CDC Project and a miniscule portion of the overall project.

Compensatory Mitigation Mechanisms

Western Energy Alliance disagrees with BLM's proposal to select the compensatory mitigation mechanism to offset development of the CDC Project. Operators should have the freedom to select a mitigation mechanism that yields the necessary credits for a given project. Conditions on the ground may favor one mitigation mechanism over another. For example, an operator that owns or controls the surface of lands rather than just the mineral rights may find that implementing its own mitigation activities is more cost-efficient than using a mitigation bank. Similarly, a shortage of credits in available mitigation banks may favor other strategies such as non-profit organization mitigation activities to maximize the conservation value of funds provide.

From BLM's perspective, an operator's decision to pursue in-lieu fee mitigation, mitigation banks, or proponent-responsible mitigation should be irrelevant, so long as the selected mitigation mechanism delivers comparable conservation benefits as the others. Appendix S, however, does not afford operators the choice to select a mitigation mechanism. Appendix S directs that "BLM will determine the [compensatory mitigation] mechanism(s), taking into account the preferences of the applicant," an arbitrary requirement.

If BLM determines that compensatory mitigation mechanisms deliver comparable conservation benefits, then operators should be free to utilize the mitigation mechanism of its choosing. Indeed, the Appendix S provides BLM with oversight over credits acquired as compensatory mitigation. BLM does not dictate operators' choices of implementing other requirements within the FEIS. For example, BLM does not prescribe which brand of drill rig operators should utilize; instead, BLM prescribes standards, and operators determine how to best meet these standards based on their own needs. Compensatory mitigation mechanisms are no different. Accordingly, BLM should prescribe appropriate standards for compensatory mitigation mechanisms, and operators should have the freedom to select which mechanism satisfies these standards.

[12] *Regulatory In-Lieu Fee and Bank Information Tracking System,* U.S. Army Corps of Engineers et. al, May 2016, available online at ribits.usace.army.mil/ribits_apex/f?p=107:2.

Mitigation Calculations

The example mitigation calculation for the sage grouse in Appendix S includes a passing reference to the indirect impacts associated with an access road. Specifically, the calculation assumes, without explanation, that an access road that will directly impact 2.5 acres will also result in 160.98 acres of indirect impacts. BLM must provide its basis for assuming that indirect impacts from the access road will be many times greater than the direct impacts, as this dramatic amount of indirectly impacted acreage exponentially increases the mitigation calculation. BLM must disclose how it will assess indirect impacts from project infrastructure.

BLM must also explain why it assumed an upgrade of an existing access road would result in indirect effects but other infrastructure, such as the well pads, would not result in indirect effects. BLM must disclose the effect of and rationale for the "sigmoidal decay curve" used to determine indirect effects. Without this information, operators and the public cannot meaningfully assess the scope of mitigation obligations under Appendix S. Similarly, BLM must provide any other undisclosed assumptions underlying the mitigation calculations in Appendix S.

Appendix S references potential adjustments BLM may make to compensatory mitigation calculations, but does not provide enough detail for operators and the public to assess the significance of such adjustments and the scientific basis for them. Specifically, Appendix S states that after BLM calculates the base amount of compensatory mitigation, it will adjust this amount to account for "risk or other relevant factors," "differences between the quality of resources at the impacted site and those expected to be produced at the compensatory mitigation site, any lack of timeliness, the degree of durability of the compensatory mitigation site, and the type of compensatory mitigation."

BLM should not make these adjustments to the extent BLM cannot scientifically justify them, and to the extent BLM can scientifically justify these adjustments it must disclose how it will make these adjustments. For example, if BLM plans to use multipliers to account for timeliness, BLM must disclose the multipliers. Otherwise, the mitigation strategy offers no predictability to operators and no transparency to the public. Given the Department of the Interior's emphasis on using mitigation to increase predictability and transparency, Appendix S falls short of the Department's vision for an effective mitigation strategy.

Case-By-Case Determinations

Appendix S suggests that BLM will specify mitigation obligations on a site-specific basis as it approves development for the CDC Project. Western Energy Alliance encourages BLM to reduce the number of individualized mitigation determinations. First, BLM lacks the resources and expertise to constantly perform case-by-case determinations, which will further burden already overtaxed BLM staff. Furthermore, BLM lacks sufficient staff with the expertise to make the biological determinations required by Appendix S. Any

mitigation framework implemented by BLM should be streamlined and require as few individualized determinations as possible.

Second, the individualized determinations required by Appendix S do not allow an operator to anticipate its mitigation obligations, both on an individualized basis and in the aggregate. An operator should not have to wait until site-specific development is proposed to understand its mitigation obligation. By providing a generalized mitigation framework that does not depend on individualized mitigation determinations, BLM will provide more predictability and certainty regarding mitigation obligations, and enable operators to better plan projects that more coherently and effectively provide mitigation.

Finally, the number of individualized mitigation determinations will lead to inconsistent mitigation determinations. The Department of the Interior has stressed the need to promote consistency in mitigation decisions, yet the risk of inconsistent decisions is heightened by the fact that Appendix S is not based on any coordinated mitigation plan or analysis. A generalized mitigation framework that does not rely on individualized mitigation determinations will provide more consistent mitigation decisions.

Other Mitigation Issues

Appendix S directs that, to be used as compensatory mitigation for the CDC Project, a mitigation mechanism must be accompanied by "financial assurances, as appropriate, to guarantee the implementation and effectiveness of compensatory mitigation measures and cover administration, durability, monitoring, and reporting." To avoid confusion and disagreement regarding implementation of Appendix S, BLM must identify acceptable and reasonable financial assurances. These financial assurances should be applied uniformly to all impacts, including impacts associated with renewable energy development, housing development, and grazing activities.

<u>Duration of Monitoring</u>

BLM's suggestion that compensatory mitigation measures and sites "must be durable for the duration of the impact" suggests that monitoring may be required for the life of the impact. A requirement that monitoring occur for the life of a project is unnecessarily restrictive. Monitoring should be required only as necessary to demonstrate that mitigation objectives have been achieved. For example, if the mitigation objective is to restore habitat, monitoring should not be required once the habitat has been demonstrably restored.

<u>Definitions</u>

BLM has no regulatory basis to define Practicable as "available and capable of being done after taking into consideration existing technology, logistics, and cost in light of a mitigation measure's beneficial value and a land use activity's overall purpose, scope, and scale." That definition was promulgated by the U.S. Army Corps of Engineers in its regulations governing discharges under Section 404 of the Clean Water Act. Neither BLM

nor the Council on Environmental Quality (CEQ) has formally adopted this definition, and BLM offers no explanation for adopting this definition. Accordingly, BLM's definition of practicable is arbitrary and capricious.

The definition of disruptive activities in Appendix S arbitrarily limits noise to ambient levels. Specifically, Appendix S states that a restriction on disruptive activities will "prohibit[ ] or limit[ ] the physical presence of sound above ambient levels." The Department of the Interior's own scientists have recognized that considerable scientific uncertainty exists regarding the effects of noise on species such as GrSG.[13] In particular, the amount of noise above ambient levels that species can tolerate is still unknown and may differ between resources.

Because BLM lacks a scientific basis for limiting noise to ambient levels, BLM acts arbitrarily by evaluating noise levels with a comparison to ambient levels. If BLM chooses to retain a definition of disruptive activities in the ROD, it should revise the definition to state that this phrase "prohibits or limits the physical presence of sounds to prescribed levels," thus recognizing that impactful noise levels may vary by resource.

Conservation Easements

The mitigation measures listed in Section F1.5 of Appendix S identify the option of "establish[ing] conservation easements on public . . . land in high-quality habitat. Western Energy Alliance is not aware of any BLM policy or guidance on how it may grant conservation easements on lands it manages. BLM should disclose the mechanisms it will use to grant conservation easements. Furthermore, BLM should disclose the criteria it will consider to select sites on public lands. BLM must also ensure that conservation easements will not decrease the total amount of lands available for multiple use and that conservation easements will not interfere with valid existing rights.

Biological Environment

In section D of Appendix S, as well as in Appendix C, BLM identifies the use of remote monitoring of project facilities as a mitigation measure to minimize human presence at well sites. BLM should revise this mitigation measure to recognize that it may not be appropriate in all circumstances. In GrSG habitat, for example, remote monitoring may increase predation risk to the species because it requires installation of transmission facilities that provide nesting opportunities for raptors such as ravens. BLM must recognize that remote monitoring should only be considered as a mitigation measure when consistent with other biological objectives.

[13] *Conservation Buffer Distance Estimates for Greater Sage-Grouse—A Review* 7, U.S. Geological Survey, 2014, ("Although noise has been clearly demonstrated to influence sage-grouse (Blickley and others, 2012), the influence of individual roads or networks of roads on sage-grouse habitat use and demographic parameters remains a research need.").

Federal Advisory Committee Act

Appendix S directs that a CDC "discussion group" will be formed that consists of BLM, state agencies, local governments, conservation districts, local landowners, and permittees. Among other responsibilities, this group "would need to create and add to/refine a list of projects/mitigation mechanisms that could be implemented as compensatory mitigation measures for residual impacts to GrSG, pronghorn antelope, and mule deer as a result of development of the CDC field." BLM will then analyze compensatory mitigation mechanisms in site-specific analysis under the National Environmental Policy Act and make the final determinations as to the type of compensatory mitigation measure selected.

Because this discussion group would consist of members who are not federal, tribal, state, or local government employees, BLM must structure this process to be compliant with the Federal Advisory Committee Act (FACA). BLM should not establish, manage, or control the group, or should ensure that the group does not render specific advice or recommendations to BLM. Furthermore, BLM should reexamine Appendix S to ensure the discussion group is compliant with FACA and, if necessary, revise the group's structure or responsibilities.

Air Quality

The CDC FEIS inappropriately attempts to extend BLM's reach to air quality beyond its statutory authority and fails to acknowledge the State of Wyoming's primacy over air quality issues. BLM does not have direct authority over air quality or air emissions under the Clean Air Act (CAA); in Wyoming, the Environmental Protection Agency (EPA) has delegated that authority to the Wyoming Department of Environmental Quality (WDEQ). Therefore, BLM does not have the authority to impose regulations or mandate control measures on emission sources, including oil and gas operations within Wyoming.

Additionally, BLM may not impose additional air quality restrictions through the NEPA process. NEPA is a procedural statute intended to produce informed decision making by federal agencies, and it does not require BLM to elevate environmental concerns over other valid concerns so long as BLM adequately analyzes the environmental impacts of its actions. Given these limitations, BLM cannot attempt to impose air emission regulations or cap project emissions through the CDC ROD. BLM should simply inform the public that WDEQ will monitor and enforce air quality standards and that BLM will assist the WDEQ actions to the extent permitted by law.

Socioeconomic Benefits

Domestic oil and natural gas development is vital to Wyoming's economy, providing billions of dollars in revenues to the state and local governments that support roads, schools, public safety and other critical services. Production on BLM lands is especially important in the West, where federal land ownership is extensive, and the benefits that result from this production are vital to many local communities. The CDC Project exemplifies responsible development of the federal public lands to increase domestic

energy sources, and the socioeconomic importance of the CDC Project demonstrates the importance of BLM approving the project without unnecessary restrictions on development.

Conclusion

The myriad problems with Appendix S and the fact that this FEIS is the first time the public has had the opportunity to view it mean that BLM should revise it substantially prior to issuing a ROD. Thank you for considering our comments, and please do not hesitate to contact me should you have questions.

Sincerely,

Kathleen M. Sgamma
Vice President of Government & Public Affairs