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*Attorneys for Proposed Intervenor-Plaintiffs*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH**

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GARY R. HERBERT, in his official capacity as  
Governor of the State of Utah, *et al.*,  
  
Plaintiffs,  
  
and  
  
UTAH FARM BUREAU FEDERATION; and  
AMERICAN FARM BUREAU FEDERATION,  
  
Proposed Intervenor-Plaintiffs,  
  
v.  
  
S.M.R. JEWELL, in her official capacity as  
Secretary of the United States Department of the  
Interior, *et al.*,  
  
Defendants, and  
  
THE WILDERNESS SOCIETY, *et al.*,  
  
Intervenor-Defendants.

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**No. 2:16-cv-00101-DAK**  
  
**[PROPOSED] INTERVENOR-  
PLAINTIFFS' COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

Intervenor-Plaintiffs American Farm Bureau Federation (“AFBF”) and Utah Farm Bureau Federation (“UFBF”) (collectively, “Plaintiffs”), by and through their undersigned counsel, respectfully submit this Intervenor Complaint seeking declaratory and injunctive relief for violations of Federal law and its implementing regulations, and allege as follows:

### **INTRODUCTION**

1. This Complaint is brought by Plaintiffs against S.M.R. Jewell, in her official capacity as Secretary of the United States Department of the Interior (“DOI”); Janice Schneider, in her official capacity as Assistant Secretary for Land and Minerals Management of the United States Department of the Interior; Neil Kornze, in his official capacity as the Director, Bureau of Land Management; Jenna Whitlock, in her official capacity as the Acting Utah State Director, Bureau of Land Management; and the Bureau of Land Management (“BLM”); Thomas J. Vilsack, in his official capacity as the Secretary of the United States Department of Agriculture (“USDA”); Thomas L. Tidwell, in his official capacity as the Chief, United States Forest Service; Nora Rasure, in her official capacity as Regional Forester of the Intermountain Region of the United States Forest Service; and United States Forest Service (“USFS”), hereinafter collectively, Federal Defendants, for multiple violations of Federal law.

2. This action seeks review of the BLM Utah Greater Sage-Grouse Approved Resource Management Plan Amendment (“Utah ARMPA”) and USFS Utah Land Management Plan Amendments (“Utah LMPAs”), their underlying land use decisions and analyses, and the BLM and USFS Records of Decision for the Great Basin Region Greater Sage-Grouse Sub-regions (Idaho and Southwestern Montana, Nevada and northeaster California, Oregon, and Utah) (“Utah Great Basin RODs”), approving the Utah ARMPA and Utah LMPAs (collectively referred to herein as the “Challenged Decisions”).

3. The Challenged Decisions, together with the underlying Final Environmental Impact Statement (“FEIS”) that supports those decisions, are contrary to the National Environment Policy Act (“NEPA”), Federal Land Policy and Management Act (“FLPMA”), National Forest Management Act (“NFMA”), and their implementing regulations; the Administrative Procedure Act (“APA”), the Federal Advisory Committee Act (“FACA”), and other applicable Federal law.

4. The stated purpose of the Federal Defendants’ decisions and actions is the need to address the perceived present or threatened destruction, modification, or curtailment of Greater Sage Grouse (“Sage-Grouse”) habitat or range and the inadequacy of existing regulatory mechanisms for conserving Sage-Grouse habitat. Federal Defendants specifically identify wildland fire, invasive species, conifer encroachment, infrastructure, minerals extraction, grazing and recreation as major threats to the Sage-Grouse species or Sage-Grouse habitat on BLM-administered lands in the Utah Subregion.

5. The challenged Federal decisions and actions involve Federal land use plans and plan amendments covering 48,209,900 acres (“Total Planning Area”), of which several millions of acres (“Decision Area”) are identified as either primary habitat management areas (“PHMA”) or general habitat management areas (“GHMA”) of the Sage-Grouse.

6. These Federal decisions, and supporting environmental analyses, violate numerous Federal laws and regulations. By this Complaint, Plaintiffs seek declaratory relief and an order enjoining implementation of the challenged final agency actions.

### **JURISDICTION AND VENUE**

7. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 as this action arises under the laws of the United States, including NEPA, 42 U.S.C. §§ 4321 *et seq.*, FLPMA, 73

U.S.C. §§ 1701 *et seq.*, NFMA, 16 U.S.C. §§ 1600 *et seq.*, and their implementing regulations; the APA, 5 U.S.C. §§ 551-706; FACA, 5 U.S.C. § App. 2 §§ 1, *et seq.*, the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*; and the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.*

8. An actual, justiciable controversy now exists between Plaintiffs and Federal Defendants. The requested relief is therefore proper under 28 U.S.C. §§ 2201-2202 and 5 U.S.C. §§ 701-706.

9. Venue lies in this Court pursuant to 28 U.S.C. § 1391. Federal Defendants have offices in the District of Utah, a substantial part of events and omissions complained of occurred in this District, and the Federal property that is the subject of the action is situated in this District. Furthermore, members of Plaintiffs operate on Federal lands impacted by the Challenged Decisions.

10. The Federal government has waived sovereign immunity in this action pursuant to 5 U.S.C. § 702.

## **THE PARTIES**

### ***Plaintiffs***

11. AFBF is an independent, non-profit, non-governmental, voluntary organization governed by and representing farm and ranch families united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity, and social advancement. AFBF is the voice of agricultural producers at all levels, whether local, county, state ~~or~~, national ~~or international~~. AFBF represents ~~about more than~~ six million member families ~~and other supporters of American agriculture~~ through member organizations in all fifty states and Puerto Rico, including in Utah. Each state Farm Bureau is an independent entity,

affiliated with AFBF through a membership agreement. These member organizations include UFBF. Individual and family Farm Bureau members are associate members of AFBF. Many of the AFBF member families own and operate farms and ranches on both private and public lands that produce the crops and livestock that provides safe and affordable food for Americans and a growing global population.

12. UFBF is member an affiliate of AFBF, and the largest voluntary organization of farmers and ranchers in Utah, consisting of more than 29,000 member families living in all 29 counties in Utah. UFBF represents all commodity interests and is involved in all issues that are of concern to the state's farmers and ranchers, with a mission to improve economic opportunities, ensure America's food security, protect the natural resources of Utah and improve the overall quality of life in the State and Nation through educational and informational means.

13. Many of Plaintiffs' members own and operate ranches under grazing permits and leases that are issued by BLM and the Forest Service under FLPMA, NFMA, and the Taylor Grazing Act. Those members will be affected by the challenged management plan amendments. During the agency proceedings below, UFBF participated throughout the NEPA process, including, in particular, submitting comments on the Utah Greater Sage-Grouse Draft Land Use Plan Amendments and Environmental Impact Statement ("EIS"). And following the Federal Defendants' issuance of the final management plan amendments and final EIS, UFBF filed a formal protest with the BLM in accordance with 43 C.F.R. § 1610.5-2.

14. Plaintiffs' member ranchers face new requirements as a result of the challenged land management actions. BLM's ROD and Utah ARMPA sets forth a suite of management decisions and actions that "will be applied" to guide day-to-day activities on public lands, including stipulations, guidelines, best management practices, and required design features.

Likewise, the Forest Service ROD and Utah LMPA establish final and immediately effective standards and guidelines that are now governing ranching activities. Those standards and guidelines cannot be modified or removed without a further Land Management Plan amendment. The Forest Service ROD clarifies that no additional site-specific NEPA analysis or decision is anticipated before implementation of the new grazing prescriptions. Rather, implementation will occur as soon as practicable, with term grazing permits of affected allotments being modified by the 2017 grazing season for most units and no later than 2018 for all units.

15. Among the management actions, standards, and guidelines that will apply to ranching activities on Federal public lands are minimum height requirements for vegetation; constraints on structural range improvements (*e.g.*, fencing, water tanks, corrals); and prohibitions on the construction of livestock ponds and new water developments in certain areas. These new requirements place significant burdens on Plaintiffs' member ranchers. On information and belief, the challenged RODs and management plan amendments already have devalued grazing permits and ranch property values.

16. S.M.R. Jewell is the United States Secretary of the Interior and exercises supervisory control over the BLM. Defendant Jewell is sued in her official capacity.

17. Janice Schneider is the Assistant Secretary for Land and Minerals Management of the DOI and duly executed each Record of Decision, constituting final Federal agency action for the BLM in this matter. Defendant Schneider is sued in her official capacity.

18. Neil Kornze is the Director of the BLM, the agency responsible for developing and making the decisions under Federal law challenged in this Complaint. Defendant Kornze is sued in his official capacity.

19. Jenna Whitlock is the Acting Utah State Director of the BLM who, together with Defendant Rasure, approved the environmental analysis and protest resolution process challenged in this Complaint. Defendant Whitlock is sued in her official capacity.

20. The BLM is an agency of the United States within the DOI.

21. Thomas J. Vilsack is the United States Secretary of Agriculture and exercises supervisory control over the USFS. Defendant Vilsack is sued in his official capacity.

22. Thomas L. Tidwell is the Chief of the USFS, the agency responsible for preparing and making decisions and analyses under Federal law on behalf of the USDA challenged in this Complaint. Defendant Tidwell is sued in his official capacity.

23. Nora B. Rasure is the Regional Forester for the Intermountain Region of the USFS that includes Utah and Defendant Rasure duly executed the USFS Great Basin ROD, along with Leanne M. Marten. Defendant Rasure is sued in her official capacity.

24. The USFS is an agency of the United States within the USDA.

### **LEGAL FRAMEWORK**

#### ***The National Environmental Policy Act (NEPA)***

25. When BLM or the Forest Service promulgates a land use plan or plan amendment under FLPMA or NFMA, it must comply with the requirements of NEPA.

26. NEPA is a procedural statute that does not mandate particular results, but requires Federal agencies to undertake a thorough and public analysis of the environmental consequences of proposed Federal actions; the major mechanism for review and public disclosure is through an Environmental Impact Statement (“EIS”), required for any “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4.

27. The environmental analysis must identify and publically disclose the direct and indirect effects and cumulative impacts of a proposed action. Direct effects are those effects “that are caused by the action and occur at the same time and place.” Indirect effects are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” Cumulative impacts “result from the incremental impact of the action when added to other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. §§ 1508.7, 1508.8.

28. An agency must consider, among other things, the cumulative economic and social effects of an agency decision upon the “human environment.” The “human environment” includes economic and financial impacts on the people and communities affected by agency decision. 40 C.F.R. §§ 1502.1, 1508.14.

29. NEPA and its implementing regulations require Federal agencies to take a “hard look” at the environmental impacts of a proposed action, based on and informed by public comment and the best available scientific information. 42 U.S.C. § 4332(c)(i).

30. “Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implement NEPA.” Statements in a NEPA document “shall be supported by evidence that the agency has made the necessary environmental analyses.” Agencies “shall insure the professional integrity, including scientific integrity, of the discussions and analyses in [NEPA documents].” 40 C.F.R. §§ 1500.1(b), 1502.1, 1502.24.

31. To ensure public involvement, before issuing a final EIS, the agency must prepare a draft EIS and submit it for public comment. The draft EIS describes the purpose and need for the proposed action, the affected environment, the alternatives (including the preferred

alternative or alternatives), the environmental impacts of those alternatives, and a description of the agency's consultation and coordination in developing the plan. 40 C.F.R. § 1502.9.

32. The requirement that Federal agencies study, develop, and describe alternative courses of action “in any proposal which involves conflicts concerning alternative uses of available resources” serves to “inform decisionmakers and the public of reasonable alternatives that would avoid or minimize adverse effects” of a proposal. The purpose of analyzing alternatives is to “present the environmental impacts of the proposal and the alternatives” and to “thus sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public.” The alternatives analysis is “the heart of the environmental impact statement,” and the agency must “rigorously explore and objectively evaluate all reasonable alternatives.” 42 U.S.C. § 4332(2)(e), 40 C.F.R. §§ 1502.1, 1502.14, 1500.2(e); 1508(9)(b).

33. The range of alternatives considered includes all reasonable alternatives and a no action alternative. 40 C.F.R. § 1502.14.

34. NEPA further requires Federal agencies to supplement a draft EIS when there is substantial new information or substantially new alternatives considered, and to make that supplement available to the public for comment. A supplemental EIS is required when “[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c).

35. NEPA's implementing regulations were promulgated by the Council on Environmental Quality (“CEQ”). The CEQ regulations prohibit agency predetermination by mandating that an agency must not commit resources that would prejudice selection of

alternatives before making a final decision. This prohibition is necessary so that the final EIS serves as the means of assessing the environmental impacts of a decision and is not used solely as a tool to rationalize or justify decisions already made.

***The Federal Lands Policy and Management Act of 1976 (“FLPMA”)***

36. FLPMA requires the Federal government manage public lands under principles of multiple use and sustained yield, “managed in a manner which recognizes the Nation’s need for domestic sources of minerals, food, timber, and fiber from the public lands.” 43 U.S.C. § 1701(a)(12).

37. FLPMA defines “multiple use” to mean “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 or related services” while providing “a combination of balanced and diverse resource uses,” including among those range, “without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources.” 43 U.S.C. § 1702(c).

38. FLPMA defines “sustained yield” as the “achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use.” 43 U.S.C. § 1702(h).

39. FLPMA defines “principal or major uses” to include, and be limited to, “domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production.” 43 U.S.C. § 1702(i).

40. FLPMA requires that in managing public lands, “the Secretary shall, by regulation or otherwise, take any action necessary to prevent the unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b).

41. FLPMA commands the Secretary to, “with public involvement and consistent with the terms and conditions of [FLPMA], develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands,” and in the development and revision of land use plans, the Secretary shall use and observe the principles of multiple use and sustained yield set forth in [FLPMA] and other applicable law.” 43 U.S.C. § 1712(a).

42. FLPMA directs the Interior Secretary to make land use plans consistent with state and local plans “to the maximum extent” consistent with law. 43 U.S.C. § 1712(c)(9).

43. FLPMA requires that any Secretarial management decision under a land use plan that excludes a principal or major use of the public lands such as domestic livestock grazing on 100,000 acres or more must be reported by the Secretary to the U.S. House of Representatives and the U.S. Senate for review and approval. 43 U.S.C. § 1712(e)(2).

44. FLPMA requires Federal agencies to provide adequate notice and opportunity to comment on land use plan amendments and revisions, and planning regulations allow any person who participated in the planning process and who has an interest that may be adversely affected by the planning decisions to protest proposed planning decisions. The decision on protests by the BLM Director is the final decision of the DOI. 43 U.S.C. § 1712(f), 43 C.F.R. § 1610.2.

45. Neither FLPMA nor its implementing regulations governing the development, maintenance, or revision of land use plans require or provide for “compensatory mitigation” or “net conservation gain” mitigation. *See* 43 U.S.C. §§ 1701, 1702, 1712.

46. FLPMA directs the Secretary of the Interior to prioritize the designation and protection of areas of critical environmental concern (“ACECs”) when amending resource management plans. An ACEC is an area of public land where special management attention is needed to protect and prevent irreparable damage to important wildlife resources and for other purposes.

47. BLM regulations implementing FLPMA’s provisions governing ACECs require the agency to evaluate the relevance of a given wildlife resource and its importance beyond local significance and worth when determining whether to designate ACECs. When the BLM State Director approves a draft resource management plan amendment, she must public a notice in the *Federal Register* that lists each proposed ACEC and describes any applicable resource use limitations. The public then has 60 days to comment on that proposal. An approved resource management plan amendment constitutes the formal designation of an ACEC, including any limitations on the use of those areas.

***The National Forest Management Act (NFMA)***

48. NFMA is the primary statute governing the administration of the national forests.

49. NFMA requires the USDA Secretary, acting through the USFS, to “assure” that natural forest plans “provide for multiple use and sustained yield” in accordance with the Multiple-Use Sustained-Yield Act of 1960 (“MUSYA”). 16 U.S.C. § 1604(c).

50. Because “the majority of the Nation’s forests and rangeland is under private, State and local government management,” NFMA instructs the Federal government to “be a catalyst to encourage and assist [private, State, and local government owners] in the efficient long-term use and improvement of these lands and their renewable resources consistent with the principles of sustained yield and multiple use.” 16 U.S.C. § 1600(5).

51. NFMA directs USFS to manage Federal lands for multiple uses, and requires USFS to use “a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences” and to consider both environmental and economic goals. 16 U.S.C. §§ 1604(b), 1604(g).

52. NFMA defines “multiple use,” in part, to mean “[t]he management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services.” 16 U.S.C. § 1604(e)(2).

53. NFMA defines “sustained yield of several products and services” to mean “the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forest without impairment of the productivity of the land.” 16 U.S.C. § 531(b).

54. The Agriculture Secretary is obligated to provide for public involvement in the development of plan amendments and must make plan amendments available to the public; if a forest plan amendment would result in a “significant change” to a plan, there must be adequate public involvement. 16 U.S.C. §§ 1604(d), 1604(f)(4).

55. USFS regulations implementing NFMA include special procedures for designating special management areas. Areas other than wilderness or wild areas that should be managed principally for recreation use may be given special classification under 36 C.F.R. § 294.1.

56. Forest Service Manual 2370 includes additional procedures for designating such areas, including “zoological areas,” which are units of land that contain animal specimens, groups, or communities that are significant because of their occurrence, habitat, location, life

history, ecology, rarity, or other features. That manual implements the Forest Service’s policy of designating or recommending administrative designation of special areas with outstanding natural characteristics or unique recreation or cultural values.

57. The Secretary of Agriculture must designate zoological areas equal to or greater than 100,000 acres. Additionally, the Chief of the Forest Service must notify Congress of any such pending designations. When designating zoological areas, the forest plan must include an analysis of the need and desirability of special areas.

***The Administrative Procedure Act (“APA”)***

58. Federal administrative rulemaking procedures are governed by the APA and require both notice and the opportunity to comment when an agency proposes a substantive rule. 5 U.S.C. § 553.

59. The APA permits an affected party to challenge final agency actions in Federal court. 5 U.S.C. §§ 702, 704.

60. Under the APA, the reviewing court must “hold unlawful and set aside agency action” determined to be “(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law,” and the court must set aside an agency action “unless it is supported by substantial evidence in the administrative record.” 5 U.S.C. § 706(2)(A)-(E).

***Federal Advisory Committee Act (“FACA”)***

61. FACA applies to any committee, task force, or similar group that is established or utilized by one or more Federal agencies to obtain advice or recommendations for the agencies. 5 U.S.C. § App. 2 § 1.

62. FACA and NFMA and their implementing regulations require BLM and USFS to establish and utilize advisory committees that are transparent and balanced and not inappropriately influenced by the appointing agency. 5 U.S.C. § App. 2.

63. FACA requires, among other procedural measures, that agencies prepare and file a charter for the advisory committee, balance its membership, publish notice of its meetings, and prepare and maintain meeting minutes. 5 U.S.C. § App. 2.

64. Federal Defendants are only exempt from FACA if the meetings are held “exclusively” between Federal officials and elected State officers (or their designated employees with authority to act on their behalf). 5 U.S.C. § App. 2.

**FACTUAL BACKGROUND**

***State-Based Conservation Efforts***

65. The Greater Sage-grouse (*Centrocercus Urophasianus*) is the largest North American grouse species. There are an estimated 165 million acres of Sage-Grouse habitat across 11 western states, including in excess of 4 million acres in the State of Utah. The BLM manages approximately 52% of Sage-Grouse habitat, the USFS manages approximately 8%, and state agencies oversee the remainder of the habitat consisting of state and private lands.

66. States and their respective wildlife agencies have primary authority over the regulation and management of unlisted species, including the Sage-Grouse, and states have

voluntarily taken actions to conserve the Sage-Grouse and its habitat on Federal, state and private land.

67. The Utah Department of Wildlife Resources (“UDWR”), in response to a potential decline in Sage-Grouse populations and loss of habitat, initiated and implemented a comprehensive and successful Sage-Grouse management plan in 2002. UDWR revised and updated the management plan in 2009. By all accounts, the State of Utah conservation plans have been successful in conserving the Sage-Grouse and Sage-Grouse habitat. Moreover, a recent report by the Western Association of Fish and Wildlife Agencies, estimated a minimum breeding Sage-grouse population of over 424,645 birds, with positive trends identified in Utah, Wyoming and Idaho since 1965. *See Greater Sage Grouse Population Trends: An Analysis of Lek Court Databases 1965-2015* (August 2015).<sup>1</sup>

68. On March 23, 2010, the FWS – in responding to a petition to list the Sage-Grouse - determined the Sage-Grouse was warranted for protection under the ESA but precluded, citing higher listing priorities. The finding indicated that existing state regulatory mechanisms were insufficient to protect the Sage-Grouse.

69. In response to this finding, DOI announced its National Greater Sage-Grouse Planning Strategy (“National Planning Strategy”), to be coordinated by the BLM and USFS. The focus of the National Planning Strategy was to amend, pursuant to FLPMA and NFMA, 98 Federal land use plans covering Sage-Grouse habitat, for the ostensible purpose of avoiding the listing of the GrGS under the ESA.

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<sup>1</sup> This report is available at <http://www.wafwa.org/Documents%20and%20Settings/37/Site%20Documents/News/Lek%20Trend%20Analysis%20final%2008-14-15.pdf>.

70. In accordance with FLPMA, then DOI Secretary Salazar invited governors of western states, including Utah, to initiate and/or renew efforts to create state-based conservation plans and regulatory mechanisms, consistent with the state's knowledge of Sage-Grouse observations and to specifically tailor them to the state's Sage-Grouse habitat quality, population characteristics, ecosystems, economic activities, and threats.

71. Thereafter, western governors, BLM, and FWS created a Sage-Grouse task force ("Task Force") to pursue a coordinated, multi-state, range-wide effort to conserve Sage-Grouse and its habitat; for its part, FWS created a Conservation Objectives Team ("COT"), composed of state and Federal representatives. The State of Utah then adopted a detail Sage-Grouse conservation plan.

### ***Increasing Federal Involvement***

72. Concurrent with the implementation of the National Planning Strategy, BLM established the National Technical Team ("NTT") to serve as an "independent, technical and science-based team to ensure that the best information related to Sage-Grouse management is fully reviewed, evaluated and provided to the BLM for consideration in the land use planning process."

73. On December 21, 2011, the NTT released "A Report on National Greater Sage-Grouse Conservation Measures," ("NTT Report"), purportedly providing the latest science and best biological judgment to assist in making Sage-Grouse management decisions.

74. On March 22, 2013, the COT published a report ("COT Report") providing a state-specific approach to conservation, recognizing the benefit of state-based management practices, monitoring and implementations to address state-specific issues. In addition, the COT Report identified priority areas for conservation ("PACs"), described as key habitats that

essential for Sage-Grouse conservation and listed thirteen threats – including improper grazing and agriculture conversion – affecting Sage-Grouse habitat.

75. The COT Report recommended conducting “grazing management for all ungulates in a manner consistent with local ecological conditions that maintains or restores healthy sagebrush shrub and native perennial grass and forb communities and conserves the essential habitat components for sage-grouse.”

***Draft Federal Plan Amendments and Subsequent Federal Actions***

76. On October 11, 2013, Federal defendants released the Utah Greater Sage-Grouse Draft Land Use Plan Amendments and Draft EIS (“Draft LUPAs and DEIS”). On information and belief, the Draft LUPAs and DEIS relied upon stale data compiled by the State of Utah in 2009, rather than more recent scientific information and maps that the State provided to BLM in 2012.

77. The Draft LUPAs and DEIS did not reflect that Utah’s conservation plan and other conservation measures taken by the State were considered as part of the “No Action” alternative. The DEIS claimed instead to analyze a variation of the Utah conservation plan as one of the alternatives.

78. On September 3, 2014, after the public comment period for the Draft LUPAs and DEIS had closed, the FWS released a mitigation guidance titled “Greater Sage-Grouse Range-wide Mitigation Framework: Version 1.0” (“FWS Mitigation Framework”), incorporating a “net conservation gain” standard and including a goal of “achiev[ing] a net positive” in conservation. The FWS Mitigation Framework defined “net conservation gain” as “the actual benefit or gain above baseline conditions, after deductions for impacts, in habitat function or value to species covered by a mitigation program.”

79. On information and belief, on October 1, 2014, Federal Defendants participated in a meeting with the FWS described as a “leadership discussion.”

80. A memorandum dated October 27, 2014 (“October Memorandum”), authored by the FWS Director and addressed to the USFS Chief and the BLM Director, “purported to respond to a request from BLM during the “leadership discussion” to “identify a subset of priority habitat most vital to the species persistence, within which [FWS] recommend the strongest levels of protection.” FWS identified areas within PHMAs, termed “strongholds,” having the highest densities of the species and other criteria important for the persistence of the species. According to FWS, “[s]trong, durable, and meaningful protection of federally administered lands in these areas will provide additional certainty and help obtain confidence for long-term sage-grouse persistence.” FWS did not consult with states to confirm the accuracy of the positions espoused in the October Memorandum.

81. The October Memorandum recommended that some 16.5 million acres of “stronghold” habitat be afforded “enhanced protections” substantially restricting multiple uses, including grazing.

82. On November 21, 2014, the United States Geological Society (“USGS”) published a study entitled “Conservation Buffer Distance Estimates for Greater Sage-Grouse – A Review” (“USGS Lek Buffer Study”), recommending a minimum lek buffer distance of 3.1 miles for surface disturbance, with a maximum lek buffer disturbance of 5.0 miles.

### ***Proposed Federal Plan Amendments and Final EIS***

83. BLM and USFS released their proposed resource and land management plan amendments and the supporting FEIS on May 29, 2015. The proposed resource and land management plan amendments rejected the Utah conservation plan, and instead adopted an

alternative incorporating numerous and significant modifications neither described nor analyzed in the DEIS, including the concept of “stronghold” priority habitat areas – now termed Sagebrush Focal Areas (“SFAs”) – initially proposed in the October Memorandum; the “net conservation gain” standard, and the USGS Lek Buffer Study recommendations.

84. Federal Defendants designated a total of 233,300 acres of land in Utah as SFAs, subject to enhanced protections and restricted uses. On information and belief, the Federal Defendants decided to designate SFAs even before completing the requisite analysis of environmental impacts under NEPA. On information and belief, the Federal Defendants included SFA designations into the final resource and land management plan amendments so that FWS could reach a determination, by an agreed upon deadline of September 30, 2015, that Sagegrouse did not require listing under the ESA. And the Federal Defendants did so without conducting a supplemental NEPA analysis because such an analysis risked causing the FWS to miss that deadline.

85. The SFA designations amount to improper *de facto* ACEC and zoological area designations and fundamentally call into question the entire flawed resource management plan amendment process, including the closely-related PHMA designations. In so designating those areas, BLM circumvented FLPMA provisions, as well as its own regulations and guidance, governing designation of ACECs. Likewise, the Forest Service circumvented its own regulations and manual governing designation of zoological areas.

86. The FEIS also adopted, for the first time, a “net conservation gain” mitigation standard. This new requirement was never subject to public review and comment, and it differed from what was proposed in the DEIS. BLM did not analyze this new standard in a supplemental

EIS. The “net conservation gain” standard is not authorized by FLPMA, NFMA, or any other federal law, and it conflicts with FLPMA’s and NFMA’s multiple use directives.

87. The FEIS also adopts lek buffers that are based on the USGS Lek Buffer Study, which was published after the close of the public comment period on the Draft LUPAs and DEIS. With respect to livestock grazing, in particular, the proposed land use plan amendments and Final EIS adopt 1.2-mile buffers for fence construction and reconstruction and new permanent livestock facilities (*e.g.*, windmills, water tanks, and corrals), which correspond to potential conservation buffers for low structures set forth in the USGS Lek Buffer Study. These lek buffers were not analyzed in a supplemental EIS, nor did it analyze the direct, indirect, or cumulative effects of these new buffers.

88. Finally, the FEIS adopted many of the recommendations in the NTT Report. For example, the Best Management Practices proposed in the NTT Report are the Required Design Features in the FEIS. Indeed, a BLM Instruction Memorandum required BLM offices to review and analyze the NTT Report’s recommendations as part of the range of alternatives considered in the Sage-grouse resource management planning effort.

#### ***Administrative Protests and Federal Defendants’ Response***

89. On June 11, 2015, Plaintiffs submitted timely protests to BLM concerning the PRMPA and FEIS, noting that Plaintiffs supported Federal Defendants’ general goal of managing the Sage-Grouse and its habitat, but objecting to the portions of the PRMPA and FEIS which grossly understated the importance of predation and overestimated the acreage that is potential Sage-Grouse habitat.

90. The Federal Defendants published the Utah Sub-Regional Greater Sage Grouse Land Use Plan Amendment / Final Environmental Impact Statement Protest Resolution Report, addressing the following protest issues:

- a. Agencies cannot irrationally or unlawfully close grazing allotments, particularly without providing for the payment of the value of range improvements per FLPMA and without notification to Congress as required by law;
- b. BLM failed to give notice to Congress and satisfy other procedural requirements when implementing PHMA designations and grazing restrictions, thereby creating a de facto withdrawal of Federal lands to the exclusion of a major use;
- c. Reducing grazing operations for the sole benefit of the Sage-Grouse was inconsistent with the multi-use mandate of NFMA and FLPMA, and prioritizes wildlife use over other productive uses;
- d. BLM and USFS failed to comply with NEPA requirements for scoping, identification of issues, analysis, disclosure, and resolution of inconsistencies regarding livestock grazing;
- e. The Utah LUPA/FEIS failed to incorporate or weigh the Utah Sage-Grouse conservation plan, instead adopting management provisions that conflict with state and local plans in material respects, including livestock grazing.
- f. Imposition of regulatory changes regarding livestock grazing was arbitrary and capricious where neither the FWS nor the BLM have found that the

existing regulatory mechanisms applicable to livestock grazing and range management pose a threat to Sage-Grouse habitat or populations;

- g. Proposed grazing restrictions were not evaluated in light of their impact on grazers and ranchers;
- h. BLM and USFS ignored the documented positive impacts of agriculture and grazing, such as preservation of open space, noxious weed management, production of forb growth preferred by Sage-Grouse in grazed areas, wildfire control, water facilities and predator management;
- i. BLM and USFS failed to identify why livestock grazing was identified as a major species conservation threat to Sage-Grouse;
- j. BLM and USFS failed to resolve inconsistencies nature of surface disturbance caused by livestock grazing;
- k. SFAs impermissibly place additional restrictions on livestock grazing permits and leases;
- l. BLM and USFS impermissibly restricted use of off-road vehicles necessary for livestock management and improvement maintenance; and
- m. SFA designations constitute *de facto* designations of ACECs without adherence to BLM regulations governing the designation of ACECs.

91. BLM summarily dismissed the protested issues as being consistent and in accordance with FLPMA, NFMA, their implementing regulations, and CEQ guidelines.

92. With respect to designation of ACECs, in particular, BLM responded to a protest that no new ACECs were designated by asserting that SFAs offer the highest level of protection for Sage-Grouse in the most valuable habitat.

### ***BLM and USFS Records of Decision***

93. Also in September 2015, BLM and USFS issued the Utah Great Basin RODs and associated approved resource management plan amendments and approved land management plan amendments, including the Challenged Decisions.

94. The Utah Great Basin RODs state that the Challenged Decisions “provide a comprehensive, coordinated, and effective conservation strategy for addressing the threats to the [Sage-Grouse] identified by the FWS [...] consistent with measures identified or recommended in the NTT Report, the COT Report, recent USGS studies, and other relevant research and analysis.”

95. The NTT was a FACA committee, but BLM did not comply with the requirements of FACA. Not surprisingly, the NTT Report was widely opposed by states, the regulated community, and other fish and wildlife scientists as inappropriately recommending a generic approach that was failed to account for state-specific considerations.

96. Contrary to the COT Report, the Utah Great Basin RODs identify grazing as a threat to Sage-Grouse in Utah, and impose numerous prohibitions and restrictions on grazing permitting and leasing. In addition, the Challenged Decisions limit or eliminate surface disturbance in certain Sage-Grouse habitat, and all forms of new development in PHMAs, including grazing structures, are excluded, avoided or allowed only if the resultant effect is neutral or beneficial to the Sage-Grouse.

97. The following are among the many requirements, prohibitions, and restrictions established by the Challenged Decisions that will significantly affect Plaintiffs’ operations:

- a. When grazing occurs within 4 miles of occupied leks during breeding and nesting season, perennial grass heights should be maintained at 7” or higher until June 15;
- b. When grazing occurs within 4 miles of occupied leks after breeding and nesting season, perennial grass heights should be maintained at 4 inches or higher from June 16 through October 30;
- c. Drought and degraded habitat cannot be used as a basis to adjust grass height table requirements;
- d. Stubble height for certain vegetation should be maintained at 4” or higher during brooding season;
- e. Sheep camps cannot be located within 1.2 miles from the perimeter of a lek from March 1 to April 30;
- f. Fences and roads identified as negative impacts on Sage-Grouse habitats by increasing fragmentation or diminishing habitat quality must be minimized;
- g. No fence construction or reconstruction will be permitted within 1.2 miles from the perimeter of occupied leks unless the collision risk can be mitigated through design features or markings;
- h. Construction of new permanent livestock facilities including windmills, water tanks, and corrals will not be permitted within 1.2 miles from the perimeter of occupied leks;
- i. Construction of new “water developments” in PHMA will not be permitted, unless determined neutral or beneficial to Sage-Grouse habitat;

- j. Review and processing of grazing permits and leases within SFAs will be prioritized, followed by PHMAs;
- k. Field checks will be prioritized in SFAs, followed by PHMAs, to ensure compliance;
- l. Only range improvements that do not adversely impact Sage-Grouse or that provide a conservation benefit to Sage-Grouse will be allowed; and
- m. Livestock ponds built in perennial channels that are negatively impacting riparian habitats must be removed and no new ponds will be permitted in these areas.

98. The Challenged Decisions instruct BLM to follow the newly established standards and determine when livestock management practices are not compatible with PHMA Sage-Grouse habitat goals, and to implement changes in grazing management through grazing authorization modifications, or allotment management plan implementation. Authorized modifications include, but are not limited to, changes in season or timing of use, numbers of livestock, distribution of livestock use, duration and/or level of use, kind of livestock, and grazing schedules.

99. The Utah Great Basin RODs require Federal Defendants issue Instruction Memoranda for livestock grazing management direction within 90 days of the publication of the Utah Great Basin RODs. To date, said Instruction Memoranda have not been issued; however, a May 27, 2016 draft Instruction Memoranda circulated within the BLM provides that BLM will, among other things, shorten grazing seasons and permit fewer cows per allotment in order to maintain grass heights deemed necessary to conserve the Sage-Grouse and Sage-Grouse habitat.

## **FIRST CAUSE OF ACTION**

### **Failure to Comply with National Environmental Policy Act**

100. Plaintiffs reassert and incorporate by reference each of the allegations set forth in above.
101. Federal Defendants violated NEPA by:
  - a. Failing to prepare a Supplemental Environmental Impact Statement pursuant to 40 C.F.R. § 1502.9(c)(1) after making substantial changes in the proposed action and in response to significant new information or circumstances;
  - b. Failing to adequately describe and consider the “No Action” alternative;
  - c. Failing to take the required “hard look” at the environmental impacts of the proposed action pursuant to 42 U.S.C. § 4332(c)(i), including but not limited to the failure to adequately assess the socio-economic effects related livestock grazing as required by 40 C.F.R. §§ 1502.23, 1508.14;
  - d. Failing to adequately consider the cumulative effects of the proposed action together with other reasonably foreseeable present and future actions;
  - e. Irreversibly and irretrievably committing to a desired outcome before it was adequately evaluated under NEPA;
  - f. Unreasonably relying on incorrect or outdated data;
  - g. Not obtaining the special expertise of State and Federal Wildlife Services regarding an environmental impact related to the FEIS; and

- h. Failing to prepare an EIS that meets NEPA's readability and understandability requirements.

102. Federal Defendants' failure to comply with NEPA requirements is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, or without observation of proceedings required by law.

### **SECOND CAUSE OF ACTION**

#### **Failure to Comply with the Federal Land Policy and Management Act of 1976**

103. Plaintiffs reassert and incorporate by reference each of the allegations set forth in above.

104. Federal Defendants violated FLPMA by:

- a. Failing to adhere to the consistency requirements of 43 U.S.C. § 1712(c)(9) by neither adopting the Utah Conservation Plan nor resolving inconsistencies between the Federal and state plans;
- b. Failing to comply with the multiple use and sustained yield mandates under FLPMA, as well as the unnecessary or undue degradation standard that flows from those mandates;
- c. Ignoring FLPMA, BLM regulations, and BLM guidance and required procedures in designating certain Federal lands including SFAs, which are effectively *de facto* ACECs; and

105. Federal Defendants' failure to comply with FLPMA is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, or without observation of proceedings required by law.

### **THIRD CAUSE OF ACTION**

#### **Failure to Comply with the National Forest Management Act**

106. Plaintiffs reassert and incorporate by reference each of the allegations set forth in above.

107. Federal Defendants violated NFMA by:

- a. Federal Defendants' failure to comply with the multiple use and sustained yield requirements under NFMA;
- b. Designating certain Federal lands as SFAs without designating them and providing for management as special zoological areas under Forest Service regulatory and manual provisions; and
- c. Determining to classify the Final Federal Plan Amendments as non-significant under 16 U.S.C. § 1604(f)(4).

108. Federal Defendants' failure to comply with NFMA is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, or without observation of proceedings required by law.

### **FOURTH CAUSE OF ACTION**

#### **Failure to Comply with Federal Advisory Committee Act**

109. Plaintiffs reassert and incorporate by reference each of the allegations set forth in above.

110. Federal Defendants violated FACA by:

- a. Establishing and utilizing advisory committees in violation of FACA;
- b. Creating, using and relying on the NTT and NTT Report in violation of the procedural and due process requirements of FACA;

111. Federal Defendants' failure to comply with the procedural and due process requirements under FACA is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs respectfully request that this Court:

- A. Declare that Federal Defendants violated the APA in creating, adopting and executing the Challenged Decisions;
- B. Declare that the Challenged Decisions are contrary to Federal law, including but not limited to, NEPA, FLPMA, NFMA, and FACA, or are otherwise arbitrary, capricious, an abuse of discretion, in excess of statutory jurisdiction, authority, or limitations, or *ultra vires*;
- C. Enter an order setting aside, vacating and remanding the Challenged Decisions, including but not limited to the Utah Great Basin RODs, ARMPAs, LUPAs, and the underlying FEIS;
- D. Enter an order precluding future use of the NTT Report in agency analysis or decision-making related to Sage-Grouse;
- E. Permanently enjoin and restrain Federal Defendants, their agents, employees, successors, and all persons acting in concert or participating with them from enforcing, applying or implementing the Challenged Decisions;
- F. Remand the Challenged Decisions for further action as directed by the Court;
- G. Award Plaintiffs attorneys' fees and costs incurred in pursuing this action; and
- H. Grant such other relief as the Court deems proper.

June \*\*, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on June \*\*, 2016, I electronically filed the foregoing Complaint with the Clerk's Office using the CM/ECF system, which will send a notice of this filing to all registered CM/ECF users.

/s/ DRAFT  
\_\_\_\_\_  
Andrew Deiss