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Memorandum

To: Director, Bureau of Land Management, Washington, D.C.

From: Director

Subject: Bureau of Land Management Proposed Rule for Grazing Administration--Exclusive of Alaska and the Proposed Revisions to Grazing Regulations for the Public Lands Draft Environmental Impact Statement

The U.S. Fish and Wildlife Service has reviewed the Bureau of Land Management Proposed Rule for Grazing Administration--Exclusive of Alaska (Proposed Revisions) and the Proposed Revisions to Grazing Regulations for the Public Lands Draft Environmental Impact Statement (DEIS). We appreciate the extension of time to provide substantive comments on both documents. The Service provides the following comments pursuant to section 7(a)(2) of the Endangered Species Act of 1973, as amended (50 CFR 402.13), the Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703-712, the Bald and Golden Eagle Protection Act (BGEPA) (16 U.S.C. § 668-668d, as amended), the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. 4321, and the Fish and Wildlife Coordination Act, 48 Stat. 401, as amended, 16 U.S.C. 661 et seq.

We have combined our comments for both the Proposed Revisions and the DEIS to reduce duplication since our comments are common to both documents. Our comments are divided into four sections: 1) general comments, 2) specific comments for both documents, 3) sage-grouse, and 4) water rights (**Proposed Revisions**, Section 4120.3-9). Comments on the last two issues were developed separately to emphasize the current importance of both.

GENERAL COMMENTS

General Comments for Both Documents

Our comments relate to the possible implication for the Service mission of the Proposed Revisions. We appreciate the Bureau of Land Management's (BLM) efforts to streamline the

rules for grazing administration. Our comments and concerns focus primarily on the following: 1) abandoning some of the rules adopted following the 1994 rangeland reform efforts; 2) increasing consultation requirements of grazing advisory boards and States; 3) reducing consultation opportunities of the "interested public"; 4) streamlining overall cooperation and consultation with affected parties; 5) significantly modifying the BLM's consideration of prohibited acts by permittees when using the BLM authority to withdraw, suspend, or cancel grazing permits; and 6) shared ownership of range improvements including water rights. Additional concerns are the potential for the Proposed Revisions to compromise the BLM's desire to instill a greater commitment by grazing permittees to the health, diversity, and productivity of public lands. The Proposed Revisions would modify the time frames by which the BLM must take action to remediate adverse effects to resources following a conclusion that accepted rangeland health standards are not being met. Finally, the Proposed Revisions may reduce the ability of the BLM solely to make management decisions on their lands if cooperative enhancement projects are co-owned between the BLM and grazing allotment permit holders.

General Comments on Fish and Wildlife Resources

Overall, we are concerned that the Proposed Revisions have the effect of making grazing a priority use over other uses. This seems contrary to the regulations in the Federal Land Policy Management Act which specify multiple uses, but do not prioritize them. Additionally, the Proposed Revisions constrain biologists and range conservationists from recommending and implementing management changes based on their best professional judgment in response to conditions that may compromise the long-term health and sustainability of rangeland resources. Taken together we believe these aspects of the Proposed Revisions have the potential to be detrimental to fish and wildlife resources. Our concerns are elaborated further under *Specific Comments*.

SPECIFIC COMMENTS

Proposed Revisions (PR), *Section II, Background and* ***DEIS*** *Section 1.1, Background*

PR, Page 68452, Column 3, last paragraph: We agree that the relationship with livestock permittees and the interested public needs to be more than regulatory to meet the stated standards for open space, watershed, and habitat. As we state below, we do not agree that some of the proposed regulatory changes promote this goal.

DEIS, Page 1-5, Section 1.1.2, *Grazing Regulations*: One of the goals of the 1995 Rangeland Reform was to "Streamline the BLM and the Forest Service grazing administration and reduce administrative costs (BLM, USDA-FS, 1995)." The environmental consequences analysis stated that the 1995 changes would "allow the BLM and the Forest Service to gain efficiency and consistency, although agency regulations for leasing and advisory groups would remain inconsistent." The current proposal would lead once again to inconsistency (and presumably inefficiency) between the BLM and the Forest Service in the areas of water rights, management of Federal trust resources, range improvement ownership, temporary nonuse, prohibited acts, and the definition and role of the interested public. The final Environmental Impact Statement should address the effects of reinstating administrative inconsistencies between the BLM and the

Forest Service on their ability to ensure that fish and wildlife resources are managed sustainably across administrative boundaries.

***PR** Section III, Why We are Proposing this Rule*

PR, Page 68454, Column 2: Removing some requirements to consult with the "interested public" while adopting a requirement to cooperate with State, county, or locally established grazing advisory boards (**PR** section 4120.5-2) conveys preferential treatment to one group over another. We believe adopting this modification is inconsistent with current Department of the Interior objectives to promote coordination, cooperation, and consultation with all entities to accomplish conservation. The defined community for public land use decisions should encompass all individuals in the United States, and give equal consideration to all views without attention to a person's proximity to the grazing allotment. We, therefore, do not agree that the modification to allow preferential treatment will ensure "a consistent community-based decision-making process . . ." (**PR** page 68461).

The BLM proposes to restrict mandatory interested public consultation requirements to plan-level or program-level decisions. Information and decisions presented at this level are often too broad and general to allow specific and meaningful evaluations or comments. The more site-specific resource issues are left to a voluntary BLM decision to solicit public comment. Generally, it is the more site-specific actions that have the greatest potential for impacts to federally listed species. Therefore, we believe it is important to retain public consultation requirements for site-specific resource decisions.

We are most concerned that under the list of voluntary consultation issues, public coordination is not required for renewal or issuance of grazing permits/leases. Grazing permits/leases comprise long-term use of the public lands. Improperly managed permits or leases could have negative effects for listed and sensitive species. Public input is an important component of ensuring complete and accurate analyses for long-term land use activities. At a minimum, the new grazing administration Proposed Revisions should clarify that section 7 consultation and consideration for State-listed sensitive species would still be applicable to all grazing activities. If adjustments to allotment boundaries, changes in grazing preferences, issuance of emergency closures, renewal or issuance of grazing permits or leases, modification of permits or leases, or issuance of temporary and nonrenewable grazing permits may affect listed species, section 7 consultation would be required (50 CFR 402.14). Coordination with State and Federal wildlife agencies regarding effects to sensitive species is important if we are to maintain stable or increasing populations, minimize threats, and preclude listing.

PR, Page 68454, Column 3: While we appreciate that the BLM should be sensitive to social, cultural, and economic consequences of decisions affecting grazing, we believe the primary responsibility of the BLM is to protect and manage Federal lands under its jurisdiction for long-term sustainability of its many resources, including fish and wildlife. This is acknowledged in the Background section of the Proposed Revisions which states that "Our shared purpose must be to sustain the open space, habitat, and watershed values that the public and private lands together can offer." We believe that to fulfill that responsibility, sometimes difficult decisions

need to be made, regardless of consequent impacts outside of the jurisdiction of the Federal land management agency.

We appreciate that the BLM is attempting to modify definitions and rules to allow changes in allotment use for conservation purposes to comply with the 10th Circuit Court of Appeals decision in *Public Lands Council v. Babbitt* (Decision). Since conservation use permits are no longer authorized as a result of the Decision, we encourage the BLM to continue to work within applicable laws and regulations for ways to implement this approach to allocating rangeland uses that achieve multiple-use goals, such as providing important wildlife habitat and contributing to water quality and soil retention, while providing compensation to the public commensurate with what other range users provide. This allows rangelands to be allocated and managed according to currently perceived priorities and the highest and best use.

PR, Page 68455, Column 1: The entire discussion regarding the 3-year temporary nonuse and conservation use is confusing to read. Later, in the Federal Register notice, it is clarified, but this column should be rewritten for clarity.

PR, Page 68455, Column 1, last paragraph: We strongly recommend that the BLM consider amending the provision that, "Failing to make substantial grazing use as authorized for 2 consecutive fee years is prohibited under current grazing regulations." This provision should include a clear exception if nonuse would be beneficial for listed or sensitive species and their habitats.

This section states also, "the BLM may deny nonuse if the permittee cannot justify that nonuse is for resource stewardship." Verbiage should be included that describes what type of information and documentation is necessary for a permittee to "justify" his/her nonuse decision. If the level of detail necessary is too great, it may become too burdensome on the permittee at the expense of the wildlife or habitat resource. Similarly, the requirement that nonuse is authorized on a 1-year-only basis could prove burdensome to the permittee, and should be evaluated. These requirements may ultimately conflict with the letter and intent of sections 7(a)(1) and 7(a)(2) of the Endangered Species Act (ESA) as well as available Conservation Agreements and Strategies for sensitive species.

*Specific Comments on **PR** Part IV, Section-by-Section Analysis, and **DEIS,** Chapter 2, Description of the Proposed Action and Alternatives*

PR Section 4100.0-5, Page 68457, *Definitions*: Please define the following terms to further clarify their meaning in context of the Proposed Revisions: "affiliate," "terms and conditions," "cooperator," "qualified applicant," "community-based decision making,"and "court of competent jurisdiction."

PR Section 4100.0-5, Page 68458, Column 1, *Definitions*: We do not believe it is appropriate to expand the definition of "grazing preference" to include an amount of forage on public lands attached to a rancher's base property. We understand that this definition change is an attempt to explain and differentiate between "active use" and "suspended use" for purposes related to the

10th Circuit Court decision, among others. However, we have the following concerns: First, the amount of forage varies according to climate and range condition, and, therefore, is unrelated to any attributes of the base property. Second, because climate and range condition change, forage amount will always be changing. There is no single "quantitative meaning" for grazing preference. Third, there are other features of range resources that are not quantifiable on a livestock forage basis that will always need to be taken into consideration, such as species composition, species diversity, vegetation structure and maturity, rare or ephemeral species, and soil condition. These do not necessarily relate either to livestock forage quantity or to base property attributes. Defining grazing preference in terms of livestock forage gives an inappropriate expectation to the livestock manager about what is "his." The Federal range manager must, or should, take other range attributes into consideration in determining type and amount of rangeland use.

PR Section 4110.2-4, Page 68459; Column 2, *Allotments*: We assume that consultation will occur with the Service as required under section 7(a)(2) of the Endangered Species Act (50 CFR 402.14), although the Service is not specifically mentioned in this section.

Additionally, the opportunity for public input on the operation and administration of public lands is essential. This is particularly important for grazing management decisions because they affect water quality, aquatic habitat, wildlife habitat, floral and faunal biodiversity, and the public's enjoyment of wildlife on their rangelands. Further, there is no reason why decision making in one arena (grazing) is any more or less in the public's interest than decision making in other arenas, such as mining, wildlife habitat improvements, and recreation.

Grazing allotment plans have so much flexibility and contingency built into them that they inhibit proper scrutiny of actual on-the-ground management at any given time. By removing public comment opportunities from daily or seasonal grazing operations, the public is essentially removed from any substantive decision-making processes.

If a permittee is given an opportunity to comment and submit relevant information regarding a grazing permit Environmental Assessment, other members of the public should be provided the opportunity to do so as well. The Taylor Grazing Act allows a permittee to comment on *proposed* actions described in an Environmental Assessment that *may* affect the rancher's permit. However, as stated above, since grazing management affects so many other resources of importance to fish and wildlife, we believe it is valuable to allow predecisional comments from all interested parties to be introduced into the public record. These are not necessarily protests or appeals. Rather, they are opportunities for interested parties to provide information that may be relevant to the decision-making process.

We understand that one of the purposes of this proposed change is to allow a "rapid response" to changing rangeland conditions. We concur that it may be appropriate to exempt from public interest review "temporary changes within the terms and conditions of the permit or lease" that would not carry forward into the next year. However, other exemptions are justified because the public will have an opportunity for review under the National Environmental Policy Act process. We are concerned that this may not allow for timely and site-specific public input. This is

because efforts to simplify and streamline the National Environmental Policy Act process can result in the agencies and the public only being informed about or invited to comment on those projects that warrant an Environmental Impact Statement. The majority of proposals for changes in rangeland management are evaluated as Environmental Assessments.

PR Section 4110.3-3 Page 68460, Column 1 *Implementing Changes in Active Use,* and **DEIS,** Page 2-16, Section 2.2.2, *Implementation of Changes in Grazing Use*: The BLM proposes to phase in changes in active use of "more than 10 percent over a 5-year period unless either the affected permittee or lessee agrees to a shorter period or the changes must be made . . . to comply with applicable law." Section 2.2.2 of the DEIS clarifies that "if a Biological Opinion under section 7 of the Endangered Species Act (ESA) required an immediate implementation of a change in active use, then the ESA would take precedence and there would not be a 5-year phase in . . . ."

Grazing decreases or increases are typically recommended under two circumstances: 1) a relatively sudden change in climatic or environmental conditions and thus rangeland conditions, such as onset of drought, and 2) observation or evidence of gradual change in range condition. In the latter case, we can understand that under some circumstances, it may be possible to phase in changes in grazing of more than 10 percent over a 5-year period without compromising long-term range sustainability. However, generally in the west, environmental and, therefore, vegetation changes happen stochastically, rapidly, and often involve extremes. As such, it is important for the BLM range professionals to respond immediately and to the extent necessary to avoid a change in range condition from which it may take decades to recover, if ever.

The proposed 5-year period may be inadequate to protect other sensitive species and their habitat, including migratory birds, Conservation Agreement species, State sensitive species, and species petitioned for listing. The 5-year implementation period may be too long to begin necessary and effective range management changes (for example, in the event of extended drought) and thus result in irreversible long-term impacts to vegetation communities and associated wildlife species. Additional complications may arise in areas susceptible to invasive plant species; i.e., cheatgrass in sage-brush communities and tamarisk in riparian habitats.

Please clarify if Alternative 2 (Proposed Action) allows for livestock numbers to be adjusted over a shorter period of time to protect candidate or the BLM-sensitive wildlife and plants. It is our understanding that the BLM policy mandates that no BLM-authorized activity contributes to the need to list a candidate species under the Endangered Species Act. Would this alternative take precedence over this BLM-policy?

Alternatively, the Service knows of situations when it is desirable to increase grazing to enhance habitat for Federal trust species. An example would be to increase grazing to benefit nesting mountain plovers. In this example, can the BLM solicit livestock from any other operator, or would permission be required of the public land grazing permit holder, or granted only to a "qualified applicant?"

As an alternative, we support the proposal under Alternative 3 (**DEIS** Section 2.3.1, Page 2-25), which would make phasing changes in livestock use greater than 10 percent over a 5-year period discretionary rather than mandatory. The Fish and Wildlife Service supports this alternative because it increases the flexibility the BLM would have in adjusting livestock numbers to protect natural resources. Decreases greater than 10 percent, if needed to protect BLM-sensitive or candidate species habitats, would allow for quicker recovery and maintain public support for proposed management changes.

PR Section 4120.3-2, Page 68460, Column 2, *Cooperative Range Improvement Agreements* and **DEIS,** Page 2.16, Section 2.2.3, *Range Improvement Ownership*: The Proposed Revisions state that "subject to valid existing rights, cooperators and the United States would share title to permanent structural range improvements constructed under cooperative range improvement agreements on public lands." The Service is concerned that "sharing of titles on permanent structures" may limit the ability of the BLM to retain sole authority over the management of its grazing allotments.

This section should clarify ESA and NEPA responsibilities for shared range improvements. We assume that the BLM will maintain Federal responsibility to comply with all applicable laws. Would a title holder accrue a privilege that precludes his range improvement from consideration under Federal consultations required under NEPA that are triggered by a Federal nexus?

In addition, the BLM should consider and allow opportunity to modify range improvements if they are negatively affecting sensitive species (i.e., fences result in sage-grouse mortalities). Modifications to range improvements may be necessary to minimize effects and avoid jeopardy to listed species. If the BLM permittees share title to range improvements, they may be accountable for any take under ESA that occurs as a result of these improvements. Diversions entraining endangered fish, fences that harm or kill listed or migratory birds (Gunnison sage-grouse and raptors), and pipelines that dewater springs that support listed springsnails are some examples. In addition, structures and improvements on public lands that are paid for by public dollars should remain in public ownership. By relinquishing ownership, the BLM compromises its ability to manage the public's resources to the degree necessary to ensure their health. Giving private ownership of range improvements also may make it more difficult to impose restrictions or otherwise modify grazing management because of issues regarding "take" and access to private property. Will the BLM have independent authority to remove, replace, or modify the structure, or would the cooperator's permission be required?

While granting title to improvements is not, perhaps, a grant of title to the underlying lands, will the grantee be receiving special privileges concerning the land on which their "titled" property is located? For example, would future rights or privileges to access "titled" improvements be conveyed to those holding the title that would not be extended to the general public? An example would be providing motorized access to check on a permittees "titled" improvement within areas that are mandated as roadless, wilderness, or seasonally closed. Additionally, would any priority be conveyed to the "titled" holder for any land leases?

We believe that a grazing permit gives permission for an enterprise to utilize and receive benefits from a public resource under certain conditions. It is not an entitlement. As such, allowing title to certain permanent range improvements gives away some of the public rights on public lands. This, in turn, will make it more difficult for the public to redirect or reallocate the use of that portion of public lands as public priorities change. For example, if an allotment is more suited to provide critical habitat for wildlife, additional compensation by the public will have to be provided to "buy" out the grazing enterprise's title to improvements. Public rights should not be given away that would have to be purchased back by the public at a later date as circumstances change. There is ample evidence that public values for rangelands and desires for rangeland uses are changing (Society for Range Management Annual Meeting, Plenary Session entitled "Rangelands in Transition," 2004, Salt Lake City, Utah). Fish and wildlife resources, biodiversity, clean water, and ecosystem function are priorities in many areas. To the extent that livestock grazing and associated range improvements compromise these priorities, efforts that could serve to make changing rangeland uses more difficult or expensive should not be undertaken by the BLM.

PR, Page 68461, Column 3, Section 4130.3, *Terms and Conditions*: There is a need to clarify exactly which "terms and conditions" in a permit or lease are eligible for Office of Hearings and Appeals (OHA) appeal. The BLM should distinguish "terms and conditions" cited here from those commonly included with biological opinions to exempt the BLM from ESA section 9 prohibitions. We believe the BLM probably means a broader set of stipulations than those required to authorize incidental take during a formal consultation, but it should be clarified.

The Service does not believe OHA appeal should be allowed for reasonable and prudent alternatives, or any other stipulation, resulting from interagency programmatic consultations, or interagency coordination intended to substitute for formal consultation. For example, the BLM and the Service are now conducting many programmatic consultations and developing biological screens to satisfy the Department of the Interior objectives to accomplish conservation through greater cooperation and coordination. It is anticipated that the results of these efforts will substitute for many ESA consultations, thereby improving administration efficiency. Many conservation actions are identified in these programmatic consultations or species screens to minimize or avoid anticipated adverse effects, or promote the viability of federally listed or candidate species. If these stipulations can be removed through appeal, reinitiation of any formal section 7 consultation or renegotiation of interagency agreements may be required to address adverse effects to federally listed species, which would negate the streamlining efforts by both the BLM and the Service. We would also expect the BLM to implement alternative measures for nonfederally listed species to ensure the BLM's compliance with its policy to prevent any species from trending to a need for Federal listing. The BLM should therefore clarify specifically which "terms and conditions" of a permit or lease may be appealed to the OHA and discuss how a successful appeal may affect Federal trust wildlife resources.

The decision whether to allow continued grazing if a decision on the matter is "stayed" should not be made *a priori*. Rather, it should be made based on what action is best for the public's resource. If a decision is made to reduce or remove livestock from an allotment because of poor resource conditions brought on by livestock, the rational approach would be to remove the

livestock until an administrative appeal is completed. On the other hand, if the physical act of grazing is not correlated with the BLM decision affecting the permit (e.g., permit cost or range improvement schedule), authorization of continued grazing pending appeal could be warranted. As such, these decisions should be made by the resource managers on a case-by-case basis to retain flexibility in the process.

PR, Page 68462, Column 1, Section 4130.3-3, *Modifications of Permits or Leases* and **DEIS**, Page 2-17, Section 2.2.5 *Review of Biological Assessments and Evaluations*: The Fish and Wildlife Service supports broader involvement in participation in the section 7 process. While accepting outside comments from the affected permittee, State, and interested public, the BLM should keep biological assessment and evaluation preparation within the legislated time lines during the formal consultation process. The BLM must start the biological assessment within 90 days of receiving the species list or request an update (50 CFR 402.12(e). The biological assessment must be completed within 180 days of receiving the list unless a different time period is agreed to by the Fish and Wildlife Service and the BLM (50 CFR 402.12(i). The BLM should clarify that the Federal Agency maintains sole responsibility and authority to ensure the biological accuracy of the biological assessment and its conclusions therein, and to ensure that listed species are not jeopardized, irrespective of economic considerations.

PR, Page 68462, Columns 2 and 3, Section 4130.4, *Authorization of Temporary Changes in Grazing Use Within the Terms and Conditions of Permits and* Leases and **DEIS**, Page 2-17, Section 2.2.6, *Temporary Nonuse*: The proposed policy removes the current 3-consecutive-year limit on temporary nonuse of a grazing permit. Permittees would be allowed to apply for nonuse for up to 1 year at a time, whether for conservation or business purposes. There would be no limit to consecutive years in which the permittee could apply for nonuse. The Fish and Wildlife Service supports this change in policy because it gives the BLM and permittee more flexibility in resting allotments to protect and restore natural resources. This is timely considering the current drought situation in the West. The Fish and Wildlife Service supports including resource protection as a legitimate purpose of temporary nonuse. The effects of this change should be included in the Environmental Consequences section of the Final EIS.

PR, Page 68463, Section 4140, *Prohibited* Acts, and **DEIS**, Page 2-23, Section 2.2.16, *Prohibited Acts*: Neither the Proposed Revisions nor the DEIS provide the BLM's record of permit suspension or revocation following violation of prohibited acts by grazing permittees, and the Service is not aware of any instance when the BLM has suspended or revoked a grazing permit. The BLM could, therefore, argue that this proposed amendment is one with no practical consequence to its current grazing permit program administration. However, recognizing that the BLM currently has the authority to suspend or revoke permits for violations, we are making the following comments.

First, the Proposed Revisions imply that a permittee convicted of violating the Bald and Golden Eagle Protection Act on any lands outside the BLM grazing permit boundary would not risk loss of grazing privileges. Statute 16 USC 668(c) provides specifically for revocation of permits for violations of the BGEA regardless of where the violation occurs; i.e., the violation does not have to occur on the BLM administered lands. The Proposed Revision indicates that the violation

does have to occur on the BLM administered lands. This needs to be corrected in the Final Rule to recognize the current statute.

Second, the Proposed Revisions do not provide for revocation of a permit when a violation of prohibited acts occur outside of the grazing permit boundary This change contradicts the stated objectives to improve cooperation, promote practical mechanisms for assessing rangeland change, and enhance administrative efficiency (**PR** page 68453, *Background*). The Proposed Revisions convey the message of promoting cooperation among affected parties and the interested public, with the implied goal of instilling a stronger land ethic among all public land users, but grazing permittees specifically. We believe this message is compromised by conceding that the only prohibited acts that will be considered when assessing permit renewal, suspension, or withdrawal are those that occur within the grazing permit boundary only. This may give the appearance to the public that the BLM is improving cooperation, practical mechanisms, and administrative efficiency, but it is likely to be at the expense of efforts by National Wildlife Refuge (NWR) managers attempting to promote identical land ethic values on National Wildlife Refuge lands. For example, numerous BLM grazing allotments are contiguous with NWR lands throughout the West. Livestock trespass violations onto NWR lands have been documented. Under the current rules, the BLM may use these violations to assess eligibility for permit renewal, suspension, or withdrawal and communicates to the permittees the broader Department of the Interior goal to implement sound land ethic standards on all public and private lands. It is likely that the knowledge by permittees of the BLM's current authority to revoke or suspend a permit for grazing trespass violation has some deterrent value, thereby minimizing the number of trespass violations that now occur.

Under the proposed amendment, the owner of the trespassing livestock that are found on NWR lands, for example, would no longer risk loss or suspension of his BLM grazing permit. Such a change communicates to permittees that attention to a healthy rangeland ethic ends at their permit boundary. It is highly likely that adopting this modification may result in more trespass violations on NWRs, with significant adverse effects to fish and wildlife resources the Service is mandated to protect, as well as increased operational expenses by the NWR. We, therefore, believe the proposed amendment not only contradicts the objectives of the Proposed Revisions, but also the direction of the Department of the Interior to promote conservation through cooperation and coordination among agencies and the general public.

Because the BLM/Service shared boundaries are pervasive throughout the West, this amendment has significant implications to the efficient management of grazing program on NWRs. We, therefore, adamantly oppose the adoption of this amendment. The BLM should have the option of revoking or restricting a livestock operator's permit if said operator is convicted of violating a Federal, State, or other law and the violation *occurs on other Federal lands*. We recommend revocation either administratively or judicially. The Proposed Revisions would not allow the BLM to penalize a permittee by altering his/her permit if convicted of trespassing on another allotment, trespassing on a non-BLM allotment (e.g., the Forest Service), destroying government property on Federal lands other than his/her allotment, or violating other laws on Federal lands. The BLM should retain the flexibility to revoke a grazing permit in these types of scenarios

because it may be the most effective way to mitigate the loss of fish and wildlife resources lost through the permittee's actions.

It should be reported in the Final EIS, Page 3-8, Section 3.4, *Grazing Administration* the miles of boundaries shared by the BLM grazing allotments and Service National Wildlife Refuge lands. This will allow a better assessment of the implications of the amendments to the Service mission, as discussed above in reference to Section 4140, *Prohibited Acts*. The Service offers to help provide information in order to report this number accurately.

With the current high level of attention to the adverse impacts of invasive plants on native ecosystems, in general, and the Nation's rangelands, in particular, we believe that "Failure to comply with the use of certified weed seed free forage, grain, straw, or mulch when required by the authorized officer" currently only included in Modified Alternative 3, should be included as a prohibited act under the Proposed Action.

PR Page 68464, Column 2, Section 4160.1, *Proposed Decisions* and **DEIS,** Page 2-24, Section 2.2.18, *Treatment of Biological Assessments and Evaluations in the Grazing Decision-Making Process:* The Fish and Wildlife Service supports the clarification that biological assessments and evaluations, when prepared in accordance with section 7 of the Endangered Species Act, are not considered part of the grazing decision and, therefore, are not subject to appeal or protest. Biological assessments and evaluations are prepared using the best science available.

We do, however, propose changing the language in the second paragraph of Section 4160.1 which reads currently, "biological assessments and biological evaluations are tools that the Service and the National Marine Fisheries Service (NMFS) use to decide whether to initiate formal consultation under section 7 of the Endangered Species Act (ESA)." The Service would like to see this language changed to properly state that "biological assessments refer to the information prepared by or under the direction of the Federal agency (i.e. the BLM) concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation of potential effects of the action on such species and habitat."

PR , Page 68465, Section 4160.4, *Appeals* and **DEIS,** Page 2-23, Section 2.2.17, *Grazing Use Pending Resolution of Appeals When Decision Has Been Stayed*: The BLM needs to clarify how Federal trust resources (e.g., federally listed species and declining species) or their habitat will be protected from harm during the time grazing continues while the Office of Hearings and Appeals (OHA) appeal is being resolved. As we stated above, it is likely that some stipulations in a grazing permit (i.e., terms and conditions) will result from interagency cooperation, interagency species "screens" or a biological opinion. If these stipulations are appealed, how will the BLM ensure that adverse impacts to the species or its habitat will not occur while the appeal is resolved? How will the BLM ensure that any loss of species or its habitat be restored following resolution of the OHA appeal? Every effort should be made to increase the flexibility and discretion of professional range managers and biologists to manage for long-term range resource sustainability in the face of changing environmental conditions.

PR, Page 68466, Section 4180, *Fundamentals of Rangeland Health and Standards and Guidelines for Grazing Administration* and **DEIS**, Page 2-18, Section 2.2.8, *Timeframe for Taking Action to Meet Rangeland Health Standards*: Extending the deadline for initiating an appropriate course of action to make remedial changes in grazing practices that significantly contribute to an allotment's failure to meet rangeland health standards from 12 to 24 months could be extremely detrimental to long-term range health and fish and wildlife resources. The reason given in the Proposed Revisions for this change is a statement of additional time needed for completing tasks required by law, such as ESA section 7 consultations. If ESA consultation is required, a 2-year hiatus of action following a conclusion of failing standards could result in detrimental consequences for the species in question. If the implementation of an ESA consultation is needed for range improvements, action should be taken in a more expedient manner. Extending the deadline for action to 2 years may result in a required ESA consultation being postponed, with adverse consequences to federally listed species or their habitat.

In the arid West, biological and many physical resources are usually already near thresholds of change. Additionally, as mentioned earlier, extreme changes in environmental conditions happen frequently and unpredictably. It is imperative that Federal land managers be able to respond as rapidly as necessary to changing conditions. We already have seen large areas of rangelands transition to a new state (with less biodiversity, less habitat value, less palatable forage, and less resilience) from which recovery to the preexisting state is no longer possible. Every effort should be made to increase, not decrease, the flexibility and discretion of professional range managers and biologists to manage for long-term range resource sustainability in the face of stressful and changing environmental conditions. We understand and sympathize with the purpose of the extension to allow the BLM staff time to bring together the appropriate information and conduct necessary public involvement. However, we believe that a timely response to changing resource conditions overrides this purpose.

The language requires clarification because some of the terms used are confusing making it difficult to determine the effect of the temporal change on the viability of a species. For example, the wording "to take action" does not indicate if the deadline of 2 years requires action be "initiated" or "completed" by that date. Therefore, if the 2-year deadline requires only that actions be "initiated" following a conclusion of "failing standards," both a species and its habitat found on the allotment could be adversely affected for an indefinite period. In our view, such a result compromises the BLM's responsibilities to "preserve the public rangelands from destruction or unnecessary injury" (**PR,** Page 68465). A more thorough discussion is needed in the Final EIS to better describe the delays that may be incurred with adoption of this amendment, and potential affects to Federal trust resources associated with a delay.

PR, Page 68466, 2nd and 3rd columns, *Section 4180.2 Standards and Guidelines for Grazing Administration*: Rangeland health determinations are the first step in identifying a need, if any, for changes in livestock management to improve range condition and to ensure the sustainability of fish and wildlife resources. Until such a determination is made, only limited management actions to improve range conditions can be initiated. Under current management, there are no specific requirements regarding how these determinations are made. The Service supports the

need for a comprehensive monitoring strategy to chronicle the influence of grazing on rangeland health and Federal trust species found on each of the allotments.

The BLM proposes that, "assessments of standards attainment and monitoring be required to support a determination that grazing practices are a significant factor in failing to achieve, or not making significant progress toward achieving rangeland health standards." The Service is consistently told by the BLM that they lack time, sufficient personnel, and adequate funding to implement even the most basic monitoring (i.e., stubble height) even in cases where the take of a listed species is at issue. Our experience shows that monitoring of rangeland standards is not being completed in a timely, effective manner under current requirements due to funding and staffing limitations. The BLM should remove this requirement from the Proposed Revisions, or at a minimum, set up an alternative evaluation process for instances where adequate monitoring data is not available. An interdisciplinary team, including the BLM range and wildlife specialists, State and Federal wildlife agencies, and the permittee or lessee should be able to effectively evaluate current range conditions and determine appropriate management strategies during a 1-time site visit in the absence of available long-term monitoring data.

DEIS, P. 4-28 to 4-29, Section 4.3.8**,** *Special Status Species*: The requirement that monitoring precede a rangeland health determination also has implications for measures needed to conserve special status species in order to preclude listing. While it may be true, as the DEIS states, that there are alternative ways to avoid impacting special status species, these methods are most applicable to specific individual cases usually within a single grazing allotment. Where proactive rangewide measures are needed, such as in the case of the sage grouse, a requirement for monitoring before a remedial action can even be initiated may amount to an inadequate regulatory mechanism since, by their own admission, the BLM lacks both adequate staff and funding to implement the most basic of monitoring programs. The Final EIS should assess and disclose the impacts of the monitoring requirement on the BLM's ability to take timely action in order to effectively implement conservation strategies that preclude the need to list special status species, especially those with wide ranges.

DEIS, Page 4-24, Section 4.3.2.1, *Riparian and Wetland Vegetation*: The document estimates an improvement rate of streams classified as "properly functioning" and "functioning at risk with upward trend" at 1.5 to 3.5 percent annually. It is unclear how these rates were formulated. In addition, no estimations were provided for those streams classified as "functioning at risk-no trend," "functioning at risk-downward trend," or "non-functioning." These are the very streams that are most susceptible to alterations and should be considered when making management decisions. We recommend clarification of what the percentages mean for improved conditions for fish and wildlife resources. The BLM may want to evaluate whether this is an appropriate and sufficient rate of improvement.

DEIS, Page 4-28, Section 4.3.7, *Wildlife*: It is stated that the changes under the proposed action "would have little to no effect on wildlife as the changes provide clarifications of the existing regulations or bring the regulations into compliance with court orders." The Proposed Revisions would change fundamentally the way the BLM lands are managed temporally, spatially, and philosophically. These changes could have profound impacts on wildlife resources. Water

developments, fencing, and livestock stocking rates are all impacted by these Proposed Revisions and all could have meaningful consequences to species that use rangelands. Wild ungulates, sage grouse, neotropical migrant birds, pygmy rabbits, and various raptors are all influenced by the presence and distribution of livestock in the western sagebrush-steppe ecosystem. The Proposed Revisions seek to change the ways livestock will be managed spatially and temporally. It then seems unlikely that the Proposed Revisions would have no impact on the wildlife using the range and effects should be analyzed more thoroughly in this section of the DEIS.

DEIS, Page 4-29 Section 4.3.8, *Special Status Species*: With specific reference to the second sentence in the next to last paragraph of the Special Status Species section, we suggest that the word "most" be inserted before the word "likely." As written, it is somewhat misleading.

SAGE-GROUSE

The U.S. Fish and Wildlife Service (Service) has received several petitions to list the greater sage-grouse (*Centrocercus urophasianus*) under the Endangered Species Act of 1973, as amended (Act), 16 U.S.C. 1531 *et seq*. The causes for the greater sage-grouse rangewide decline are not completely understood and may be influenced by local conditions. However, habitat loss and degradation, as well as loss of population connectivity are important factors (Braun 1998, Wisdom *et al.* 2002).

Livestock grazing and sage-grouse

Livestock grazing has been identified in the scientific literature as well as most of the listing petitions received by the Service as negatively impacting the greater sage-grouse. It is unlikely that sage-grouse evolved with intensive grazing by wild herbivores, such as bison, due to the absence of habitat overlap (Connelly *et al.* 2000). Therefore, livestock grazing in areas of sage-grouse habitat should be considered a relatively new activity rather than a compensatory activity, with domestic livestock replacing wild herbivores. Little experimental evidence directly links grazing management to declining sage-grouse population trends (Braun 1998). However, many studies have concluded that the reduction of grass heights in nesting and brood rearing areas negatively affects nesting success by reducing cover necessary for predator avoidance (Gregg *et al.* 1994; DeLong *et al.* 1995; Connelly *et al.* 2000). In addition, livestock consumption of forbs may reduce food availability for sage grouse. This is particularly important for prelaying hens, as forbs provide calcium, phosphorus and protein. A hen's nutritional condition affects nest initiation rate, clutch size, and subsequent reproductive success (Connelly *et al.* 2000). Livestock grazing also may result in trampling mortality of seedling sagebrush (Connelly *et al.* 2000). This information suggests that grazing by livestock could reduce breeding habitat, subsequently negatively affecting sage-grouse populations (Beck and Mitchell 2000). Exclosure studies have demonstrated that domestic livestock grazing also reduces water infiltration rates and cover of herbaceous plants and litter, as well as compacting soils and increasing soil erosion (Braun 1998). This results in a change in proportion of shrub, grass, and forbs components in the affected area, and an increased invasion of exotic vegetative species which do not provide suitable habitat for sage-grouse (Miller and Eddleman 2000).

General Comments Related to Sage-Grouse

In 2000, the U.S. Forest Service, the BLM, and the Service signed a Memorandum of Understanding (MOU) with the Western Association of Fish and Wildlife Agencies to conserve the greater sage-grouse and its habitat. This MOU outlined the participation of Federal and State wildlife agencies in greater sage-grouse conservation. The BLM should consider these commitments under the Proposed Revisions to grazing regulations. Additionally, in areas where the BLM does not have site-specific information available, greater sage-grouse habitat should be managed following the guidelines by Connelly *et al.* 2000, as agreed to under the 2000 MOU.

In 2003 the Bureau completed a draft Sage-Grouse Habitat Conservation Strategy which outlines how the Bureau intends to achieve its goal of managing public lands to maintain, enhance and restore sage-grouse habitats while providing for sustainable uses and development of public lands. We strongly encourage the BLM to consider the potential impacts of implementing the Proposed Revisions for grazing management on their ability to effectively implement the sage-grouse habitat conservation strategy. We encourage the BLM to consider how the Proposed Revisions for grazing may affect the ability of local sage-grouse working groups to implement conservation actions for this species.

Specific Comments on the Proposed Revisions Related to Sage-Grouse

PR, Page 68460, Section 4120.3-2, Paragraph 1, Lines 1-8: The Proposed Revisions state that "subject to valid existing rights, cooperators and the United States would share title to permanent structural range improvements constructed under cooperative range improvement agreements on public lands." Facilities associated with livestock grazing can negatively affect greater sage-grouse habitats. Fence construction for herd containment and management provide perching locations for raptors and travel corridors for mammalian predators, thereby increasing greater sage-grouse predation (Braun 1998; Connelly *et al.* 2000). Greater sage-grouse avoidance of habitat adjacent to fences, presumably to minimize the risk of predation, effectively results in habitat fragmentation even if the actual habitat is not removed (Braun 1998). Fences also present a collision hazard (Call and Maser 1985; Braun 1998). In addition, spring and other water developments to support livestock in upland shrub-steppe habitats can artificially concentrate domestic and wild ungulates in important sage-grouse habitats, thereby exacerbating grazing impacts in those areas. The Service is concerned that this "sharing of titles on permanent structures" may limit the ability of the BLM to implement effective conservation measures for sage-grouse, or to remove or modify structures which may be negatively impacting sage-grouse.

PR, Page 68466, Section 4180.1, Paragraph 4, Lines 1-10: The Proposed Revisions state that "the BLM proposes . . . to change the amount of time the BLM would need to take action to ensure that resource conditions conform to the requirements of this section." The Service is concerned that, by extending the amount of time the BLM would take to make needed grazing changes to ensure that resource conditions conform to the requirements, resources necessary for the long-term conservation of sage-grouse may become increasingly degraded during the interim. Additionally, greater sage-grouse often have a delayed response to management actions of up to

several years. Therefore, the BLM should not assume that constancy in sage-grouse numbers and/or presence equates to "no impact" to this species.

WATER RIGHTS

General Comments on Water Rights

PR, Page 68460, Section 4120.3-9: Water Rights for the Purpose of Livestock Grazing and **DEIS**, Page 1.2.2.12, Water Rights

A major issue in the DEIS are the changes in the BLM policy toward livestock water rights. In the West, surface water is of the utmost importance to properly functioning ecosystems and is often the limiting factor in the function of xeric environments. The 1995 Rangeland Reform EIS stated that "private water users seeking exclusive control of a water source on public lands for livestock grazing purposes would reduce habitat quality (for wildlife) by promoting wildlife-livestock conflicts" and that this would "have a slow, long-term adverse effect on wildlife as a whole and biological diversity in general" and that "where the BLM does not control the water, livestock watering facilities are often shut off when livestock are absent but wildlife could use the facilities." Since 1995, the BLM applied for appropriative livestock water rights in conformance with State Law and held such totally in the name of the United States. The current proposal seeks to remove the requirement that any water right for livestock be acquired, perfected, maintained, and administered in the name of the United States to the extent allowed by State law. The proposed alternative would also allow the BLM to share livestock water rights with the permittee or lessee. The effects of these changes are not discussed. Numerous sensitive wildlife and plants species depend upon water for all or part of their life cycle. The DEIS does not clearly describe potential impacts of the proposed regulation changes to sensitive wildlife and plant habitat management. The potential impacts of this change on wildlife should be analyzed and disclosed, especially in light of the statements in the 1995 Rangeland Reform Environmental Impact Statement.

The DEIS states "Current regulations limit the BLM's flexibility to cooperatively pursue livestock water rights with permittees and lessees." Please clarify the need for the BLM to cooperatively pursue water rights with the permittee.

Would the BLM's ability to make changes in livestock management on an allotment to protect sensitive wildlife or plants or their critical habitats be affected by the permittee or lessee having shared water rights? The BLM would in theory have water rights to protect wildlife habitat and provide water for livestock [A.R.S. 45-151(A) beneficial use]. The permittee would have a water right for livestock. Under the current policy, the BLM holds the entire water rights and this would not become an issue. As long as the BLM water right was for livestock and wildlife it would remain valid.

Currently, the BLM can file for water rights at a spring to provide water for livestock and (sensitive) wildlife. The BLM can control the amount of water used for livestock in order to protect sensitive wildlife by fencing or piping limited amounts of water outside of the spring.

This could be critical under the current drought conditions. Please clarify if this ability to control water at the spring would be affected if the water rights were shared by a permittee or lessee.

We believe it is extremely important for the BLM to seek ownership of water rights on the BLM land where allowed by State law. If the BLM authorizes a water development on public land, the associated water rights should belong to the public. There is no more important resource for fish and wildlife resources in the arid West than water.

Specific Comments on Water Rights

DEIS, Page 2-21, Section 2.2.12, Alternative Two (Proposed Action), Water Rights: This section does not discuss the need for the BLM to have flexibility in cooperatively pursuing water rights with the permittee or lessee. Under a cooperative water right, would the BLM have the senior water right?

Would removing the provision that the BLM must acquire livestock water rights put the State in a position where they could prevent the BLM from holding livestock water rights? Does this revised provision concern only livestock waters or would the BLM filings for wildlife, fish or instream flow be affected?

DEIS, Page 2-23, Section 2.2.16, Alternative Two (Proposed Action), *Prohibited Acts*: The BLM has the authority and discretion to apply penalties for specific prohibited acts, including violations of the Endangered Species Act. The BLM may withhold, suspend, or cancel a grazing permit. Please clarify the BLM's flexibility if the permittee had a shared livestock water right on that allotment. The State water right can be looked upon as a property right. This could make it difficult for the BLM to transfer a cancelled permit to a new permittee.

DEIS, Page 4-6, Section 4.2.1, Environmental Consequences for Alternative One (No Action) *Grazing Administration:* Please include a discussion regarding the environmental consequences on water rights in Alternative One. What are the environmental consequences to sensitive wildlife and plants if the BLM were to solely acquire livestock water rights from the State, without cooperatively sharing them with the permittee or lessee?

DEIS, Page 4-21, Section 4.3.1, Environmental Consequences for Alternative Two (Proposed Action) *Grazing Administration: Water Rights:* Please expand on the environmental consequences of the BLM cooperatively sharing livestock water rights with the permittee or lessee. The lack of flexibility in allowing cooperative livestock water rights is presented as a major need for the proposed action in the introduction. How will these cooperative water rights affect the BLM's ability to manage sensitive wildlife and plants on an allotment? Would the BLM management become less flexible if water rights become cooperative? Appendix B of the DEIS lists numerous sensitive wildlife and plant species dependent upon riparian and aquatic resources.

DEIS Page 4-27; 4.3.5, Environmental Consequences for Alternative Two (Proposed Action), *Water Resources: Water Rights:* We are concerned with the statement "The proposed rule would have little or no effect on present water resource conditions." Giving up water rights inhibits the BLM flexibility in making management decisions and has the potential to impact water resources. Depending on the location of a diversion and locations of any pollutant, there could be a greater potential for that system to fail quality standards since many standards are measured by concentrations (parts per million, parts per billion, or as a percentage). Simply having less water to manage will constrain the BLM opportunities and having less flexibility in diversion locations, timing, duration, and quantity all impact the BLM's ability to address and adjust to seasonal or long-term rangeland resource conditions.

Conclusions

Thank you for the opportunity to review the Proposed Revisions and DEIS. We would be glad to meet with the BLM staff and other interested parties to discuss our concerns. We believe that many of the Proposed Revisions would give priority to a use that is often in competition with fish and wildlife resources, and thus could be detrimental to fish and wildlife habitats and populations. We would like to work with the BLM to ensure that the Proposed Revisions would not hamper the ability of knowledgeable professional range resource managers and biologists to recommend and implement the best management practices to ensure range resource health and sustainability for all of the public's multiple uses.

If you have any questions regarding this letter or your responsibilities under the Fish and Wildlife Coordination Act, the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, or the Endangered Species Act, please contact Connie Young-Dubovsky at (303) 236-7400, extension 264.

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Draft approved by:_____ _____
Regional Director Date

E-mail to JGallihugh: _____
Date/Initials

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