

LESSONS LEARNED FROM THE GREATER SAGE-GROUSE LAND USE PLANNING EFFORT

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I. INTRODUCTION

The sage-grouse land use planning effort across the western United States was unprecedented. What began as a model for collaboration and conservation on a landscape level ended with distrust and failed promises.

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Though the federal planning effort began with the best intentions, the collaborative nature of the process deteriorated in the waning months of planning, culminating in federal land use plans that, in the state of Idaho's view, violated multiple federal laws and cut out vital partners from the decision making process. Idaho developed a collaborative locally developed plan based on the best available science, but it was ultimately abandoned in favor of a federal "top-down" approach. If the U.S. Department of Interior truly wishes to engage in state-federal collaboration in the future, states must have an opportunity to be an equal partner at every stage. Local federal officials must be empowered to work with state partners to make pragmatic decisions at the local level.

II. IDAHO WAS INVITED TO THE PROM BY THE FEDERAL GOVERNMENT ONLY TO BE STOOD-UP AT THE LAST MINUTE (A.K.A. THE BACKGROUND)

A. The Federal Government Invited Idaho to the Big Dance ...

In 2010, the U.S. Fish and Wildlife Service ("Service") determined that the greater sage-grouse were "warranted" for listing under the Endangered Species Act ("ESA"), but "precluded" due to other listing priorities.¹ The "warranted but precluded" decision cited to habitat degradation and inadequate regulatory mechanisms as the primary threats to the species.² That same year, a cohort of environmental groups sued the Service demanding the agency take action on over 250 species awaiting ESA decisions.³ To settle the case, the Service agreed to a series of deadlines, including a September 30, 2015, deadline to make a determination on the greater sage-grouse.⁴

1. 12-Month Findings for Petitions to List the Greater Sage-Grouse, 75 Fed. Reg. 13,910, 13,986-88 (proposed Mar. 23, 2010) (to be codified at 50 C.F.R. pt. 86).

2. *Id.* at 14,010.

3. Defendants' Unopposed Motion to Extend Final Listing Determination Deadline For The Gunnison Sage-Grouse Under Gaurdians Agreement (Expedited Review Sought), *In re* Endangered Species Act Section 4 Deadline Litig., 277 F.R.D. 1 (D.D.C. 2011) (MDL No. 2165) (this motion to extend the deadline was filed May 5, 2014).

4. *Id.* at 2.

In response to the “warranted but precluded” finding, the Obama Administration announced it would amend 88 resource management plans across eleven western states on Bureau of Land Management (“BLM”) and U.S. forest Service land. This amendment process would require National Environmental Policy Act (“NEPA”) review, and originally, the sage-grouse specific amendments were to be finalized by September 2014.⁵

In December 2011, Interior Secretary Ken Salazar invited the eleven western states to develop state-specific management plans for sage-grouse and cited to BLM’s adoption of Wyoming’s core area strategy as such an example.⁶ The Secretary told the western governors that if they developed a plan, and the Service “concurred” with all or portions of that plan, it would be eligible for an exemption from the BLM’s national sage-grouse interim management strategy.⁷ A state’s plan would also be analyzed and considered in the NEPA planning process. Governor Otter accepted this offer and assembled a task force to develop an Idaho sage-grouse conservation plan.⁸

By June 2012, the Governor’s Sage-Grouse Task Force submitted its recommendations to the Governor.⁹ Two months later, the Governor submitted his sage-grouse plan (“Idaho Plan”) to the BLM for consideration as an alternative in the NEPA planning

5. Notice Of Intent To Prepare Environmental Impact Statements And Supplemental Environmental Impact Statements To Incorporate Greater Sage-Grouse Conservation Measures Into Land Use Plans And Land Management Plans, 76 Fed. Reg. 77,008 (Dec. 09, 2011).

6. See EXEC. DEP’T. OF WYO., OFFICE OF THE GOVERNOR, EXEC. ORDER No. 2011-5, GREATER SAGE-GROUSE CORE AREA PROTECTION (2011), <http://will.state.wy.us/sis/wydocs/execorders/EO2011-05.pdf>.

7. See Press Release, Salazar, Mead Reaffirm Commitment Toward Development of Landscape Level Greater Sage-Grouse Conservation Strategy in the West, (Dec. 09, 2011), <https://www.doi.gov/news/pressreleases/Salazar-Mead-Reaffirm-Commitment-toward-Development-of-Landscape-Level-Greater-Sage-Grouse-Conservation-Strategy-in-the-West>.

8. See EXEC. DEP’T. OF IDAHO, OFFICE OF THE GOVERNOR, EXEC. ORDER No. 2012-02, ESTABLISHING THE GOVERNOR’S SAGE-GROUSE TASK FORCE (2012), https://gov.idaho.gov/mediacenter/execorders/eo12/eo_12_02.pdf.

9. GOVERNOR C.L. “BUTCH” OTTER, FEDERAL ALTERNATIVE OF GOVERNOR C.L. “BUTCH” OTTER FOR GREATER SAGE-GROUSE MANAGEMENT IN IDAHO 2 (Sept. 5, 2012), <https://species.idaho.gov/pdf/Idaho%20Sage-Grouse%20Alternative%20200.090512.pdf>.

process.¹⁰ Again, the Idaho Plan only applied to federally managed land because that was the focus of the planning effort,¹¹ and nearly 70% of Idaho's sage-grouse habitat is located on federally managed land.¹² The Idaho Plan aimed to allow the BLM to use its limited resources on the biggest threats to vital sage-grouse habitat.¹³ The plan also put threats in the appropriate context and provided tiered restrictions based on the quality of habitat.¹⁴

The BLM and Forest Service considered six alternatives for the Draft Environmental Impact Statement ("Draft EIS").¹⁵ In addition to the Governor's alternative, the BLM also considered a "no grazing" alternative, an environmental NGO alternative and an alternative based on BLM's National Technical Team Report.¹⁶

Instead of selecting one preferred alternative, the Draft EIS had "co-preferred alternatives," which included the Governor's alternative and the BLM sub-regional alternative.¹⁷ After the comment period ended for the Draft EIS, Governor Otter, the Idaho BLM, and Forest Service began working closely to merge the two co-preferred alternatives into a new proposed alternative for the Final EIS." While the Idaho BLM and Governor's office did work

10. *See generally id.*

11. In 2015, Governor Otter signed an executive order implementing his sage-grouse plan on state land. *See* EXEC. DEP'T. OF IDAHO, OFFICE OF THE GOVERNOR, EXEC. ORDER NO. 2015-04, ADOPTING IDAHO'S SAGE-GROUSE MANAGEMENT PLAN (2015), <https://gov.idaho.gov/mediacenter/execorders/eo15/EO%202015-04%20Sage-Grouse%20pdf.pdf>.

12. *See* Bureau of Land Mgmt., *Greater Sage-Grouse Conservation in Idaho*, BLM.GOV, <https://www.blm.gov/sites/blm.gov/files/IdahoGrSGFactSheet.pdf> (last visited Mar. 1, 2017) (24% of sage-grouse habitat is on private land and the remaining 8% is on state, local, and tribal land).

13. *See* BUREAU OF LAND MGMT. & U.S. FOREST SERV., IDAHO AND SOUTHWESTERN MONTANA GREATER SAGE-GROUSE DRAFT LAND USE PLAN AMENDMENT AND ENVIRONMENTAL IMPACT STATEMENT: VOLUME 1, at ES-4 (Oct. 2013), https://eplanning.blm.gov/epl-front-office/projects/lup/31652/45144/48651/IDMT_SG_DEIS_Volume_I.pdf.

14. *Id.*

15. *Id.* at ES-9 to -11.

16. *Id.* at ES-14 to -15.

17. *Id.*

diligently to reach a compromise, BLM's Washington D.C. office would have the final say.

B. Idaho was Stood up the Night of the Dance

The sage-grouse planning effort was becoming a model for landscape-scale collaboration between the states and federal agencies. Unfortunately, this strong collaborative effort quickly deteriorated in the fall of 2014. Acceding to pressure from the Service and upper brass at the Department of the Interior, BLM and the Forest Service began to abandon the state-based plans.

In support of these substantial changes, the federal agencies relied on several new documents as post-hoc rationalization for their changes, including a memo sent by U.S Fish and Wildlife Service Director Dan Ashe to BLM Director Neil Kornze identifying “stronghold areas” for sage-grouse.¹⁸ Internally, the memo became known colloquially as the “Ashe Memo.” Following the release of the Ashe Memo, BLM closed ranks and began drastically reworking all the state plans. And, in early 2015, the BLM and Forest Service emerged with a uniform—and substantially more restrictive—management regime across the entire ten-state planning area.¹⁹

As justification for the last-minute changes, the Department of Interior argued that consistency was necessary across the species’ range.²⁰ It became increasingly apparent that the federal agencies were going to ignore substantial portions of the state-specific conservation measures in favor of more uniform measures across the species’ range.²¹ Ultimately, the Final EIS, introduced

18. Memorandum from Dan Ashe, U.S. Fish and Wildlife Serv. Dir., to Neil Kornze Bureau of Land Mgmt. Dir., *Greater Sage-Grouse: Additional Recommendations to Refine Land Use Allocations in Highly Important Landscapes* (Oct. 27, 2014), http://www.ee-news.net/assets/2015/02/10/document_gw_01.pdf.

19. BUREAU OF LAND MGMT., RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN AMENDMENTS FOR THE GREAT BASIN REGION 1-18, 1-20 (Sept. 2015), https://www.blm.gov/style/medialib/blm/wo/Communications_Directorate/public_affairs/sage-grouse_planning/documents.Par.44118.File.dat/GB%20ROD.pdf [hereinafter BLM ROD].

20. *Id.* at 1-9.

21. BUREAU OF LAND MGMT. & U.S. FOREST SERV., IDAHO AND SOUTHWESTERN MONTANA GREATER SAGE-GROUSE PROPOSED LAND USE PLAN AMENDMENT AND FINAL

in May 2015, included a proposed withdrawal of 10 million acres from hard rock mineral entry, 3.8 million of which were in Idaho.²² The plan also introduced Sagebrush Focal Areas (“SFAs”) which added a fourth zone to Idaho’s original plan.²³ This meant that federal livestock grazing leases within the SFAs would be first priority for renewal and under greater scrutiny. The SFAs also included a prohibition on infrastructure development related to oil and gas.²⁴

Governor Otter submitted comments to the Final EIS, as well as Protest Points and a Consistency Review after the Final EIS was published.²⁵ The Federal Land Policy and Management Act provides a unique opportunity for Governors to reconcile any state or local plans with federal land use plans.²⁶ The Governor completed his nearly 100-page Consistency Review in July 2015.²⁷ Two weeks later, the BLM sent nearly identical denial letters to every Governor who filed a consistency review.²⁸ The Governor subsequently appealed the denial of his Consistency Review and, eight days later, was again denied.²⁹ Shortly thereafter, the BLM and

ENVIRONMENTAL IMPACT STATEMENT: VOLUME 1, at ES-2 (June 2015), https://eplanning.blm.gov/epl-front-office/projects/lup/31652/58666/63729/ID_swMT_GRSF_FEIS_vI.pdf.

22. BLM ROD, *supra* at 19, at 1-18, 1-20.

23. *Id.* at 1-15, 1-20.

24. *Id.* at 1-16.

25. Letter from C.L. “Butch” Otter, Gov. of Idaho, to Tim Murphy, State Dir. of Bureau of Land Mgmt. and Nora Rasure, Regional Forester of U.S. Forest Serv., *Governor C.L. “Butch” Otter’s Consistency Review of the Idaho and Southwestern Montana Greater Sage-Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement 7* (July 28, 2015) [hereinafter *Consistency Review*], <https://www.blm.gov/sites/blm.gov/files/ID%20Governor%20Consist.pdf>.

26. *See* 43 U.S.C. § 1712 (2012).

27. *Consistency Review*, *supra* note 25, at 1.

28. *See generally* Letter from Timothy Murphy, State Dir. of Bureau of Land Mgmt., to C.L. “Butch” Otter, Gov. of Idaho (Aug. 6, 2015), <https://www.blm.gov/sites/blm.gov/files/BLM%20ID%20Response%20to%20Consist.pdf> (Idaho Bureau of Land Management’s response to Governor Otter’s Consistency Review and letter dated July 28, 2015; see *supra* note 25).

29. Letter from Steve Ellis, Deputy Dir. of Bureau of Land Mgmt. and Leslie Weldon, Deputy Chief of U.S. Forest Serv., to C.L. “Butch” Otter, Gov. of Idaho (Sept. 16, 2015),

Forest Service signed their Records of Decision, officially adopting the sage-grouse plans.³⁰ Within days, the Service published its finding that the sage-grouse no longer warranted a listing under the ESA.³¹

Idaho joined the planning process as a partner and fellow land manager. However, after the Department of Interior closed ranks in 2014, the State of Idaho was treated as a mere interested party. Instead of carefully considering the Governor's Consistency Review, the BLM spurned Idaho's attempts to work collaboratively in favor of meeting an arbitrary court deadline. In the eyes of the state of Idaho, the BLM's and Forest Service's actions violated procedural requirements and imposed restrictions that exceed their statutory authority. In addition, the new management actions will have devastating impacts on Idaho's economy. As a result, the Governor filed a lawsuit in September 2015 challenging the federal sage-grouse plans.³²

III. THE SAGE-GROUSE PLANS AVERTED AN ESA LISTING; SHOULDN'T WE CELEBRATE? NOT SO FAST.

It seems counterintuitive that so many western states would challenge the federal sage-grouse plans when the plans did in fact avert a listing under the ESA. However, the BLM and Forest Service rejected years of collaboration in the final planning stages and created a final plan that in many ways mirrors the stringent restrictions under the ESA.³³ The states were invited to develop their own plans, and in the days leading up to the final plans, the state

https://gov.idaho.gov/ourgov/sage_pdf/Protest%20Response%20Letter%20to%20ID_signed.pdf (National Bureau of Land Management's appeal response to Governor Otter letter, dated June 29, 2015).

30. See generally BLM ROD, *supra* note 19.

31. Notice of Proposed Withdrawal, 80 Fed. Reg. 57,635 (Sept. 24, 2015).

32. See generally *Otter v. Salazar*, 718 F. Supp. 2d 62 (D.D.C. 2010).

33. Compare 16 U.S.C. § 1533(3)(A) (2012) (requirement for Secretary of the Interior to designate critical habitat for listed species), with BLM ROD, *supra* note 19, at 1-9 (designation sage grouse habitat strongholds).

plans were abandoned (or gutted) in favor of the current approach.³⁴ Several western states feel spurned by the process and, for some, this confirms the notion that the federal officials back in Washington D.C. know what is best for those of us out west.

Not only did the federal land management agencies fail to honor their promise to incorporate the state-based plans, they did so with very little explanation. In Idaho, the BLM and Forest Service stated that additional protections in key habitats are “essential to the conservation and persistence of the species.”³⁵ Yet, to date, there has not been substantive analysis in Idaho showing the incremental benefit to sage-grouse due to these additional protections.³⁶

Additionally, and on a more practical level, these federal plans have serious implications for those who depend on access to, and use of, our public lands. Sage-grouse occupies 48 million acres of federal land in the west — 60% of the bird’s overall habitat. In states like Nevada, Idaho and Utah, this is significant because more than half of the land within these states are federally managed.³⁷ Similar to the concerns the logging industry had with the impact of the spotted owl listing, many western states worry sage-grouse restrictions on federal lands could have significant effects. The affected states are also concerned these sage-grouse plans will have a spillover effect onto state and private lands, and unnecessarily inhibit access and development of natural resources.³⁸ This includes energy development, mineral extraction and cattle grazing.

A. The Adoption of Sagebrush Focal Areas

The federal agencies’ adoption of SFAs represents the most drastic change from the draft plans to the final sage-grouse plans. As stated previously, the adoption of SFAs created a fourth habitat

34. BLM ROD, *supra* note 19, at 2-1.

35. *Id.* at 2-2.

36. *Id.* at 1-18, 1-20.

37. Idaho (62%), Nevada (85%), Utah (65%), Wyoming (48%).

38. *See generally* W. Expl. LLC v. United States DOI, No. 3:15-cv-00491-MMD-VPC, 2016 WL 355122 (D. Nev. Nov. 16, 2015); Herbert v. Jewell, No. 2:16-CV-00101 (D. Utah Feb. 4, 2016); Otter v. Salazar, No. 15-1566 (D.D.C. filed Sept. 2015).

zone in Idaho with even more stringent conservation actions.³⁹ In Idaho, SFAs constitute approximately 3.8 million acres (out of the 10 million acres across the range) and include prohibitions on oil and gas development and hard rock mining, as well as a new prioritization scheme for livestock grazing.⁴⁰ Yet, in Idaho and other Great Basin states, the threats associated with the above actions are secondary and do not compare to the primary threats of wild-fire and invasive plants.⁴¹ Furthermore, the SFAs are layered on top of priority/core habitat, which are already severely restricted and in some instances totally prohibit any sort of development.⁴²

The inclusion of SFAs in Idaho was a direct affront to Idaho's plan, which placed the threats to sage-grouse in their appropriate context. In addition to the primary threats, the Idaho Plan included substantive measures to alleviate the impacts to sage-grouse habitat from secondary threats. For example, in Idaho's core habitat for sage-grouse "[i]nfrastructure development . . . is prohibited, except if conducted pursuant to a valid existing right, incremental upgrade and/or capacity increase."⁴³ Unless an exemption is granted, this prohibition would cover new infrastructure associated with energy development in core habitat areas; yet, without analysis, the federal agencies arbitrarily determined that more was needed—via the SFAs—to ensure long-term conservation of sage-grouse.

B. Livestock Grazing on Public Lands: A Secondary Threat, but a

39. See *supra* Section II.B.

40. BLM ROD, *supra* note 19, at 2-2.

41. See U.S. FISH AND WILDLIFE SERVICES, GREATER SAGE-GROUSE (CENTROCERCUS UROPHASIANUS) CONSERVATION OBJECTIVES: FINAL REPORT 11 (Feb. 2013) <https://www.fws.gov/greatersagegrouse/documents/COT-Report-with-Dear-Interested-Reader-Letter.pdf>; 12-Month Findings for Petitions to List the Greater Sage-Grouse, 75 Fed. Reg. 13,910, 13,954, 13,957 (proposed Mar. 23, 2010) (to be codified at 50 C.F.R. pt. 86); BLM ROD, *supra* note 19, at 1-3.

42. BLM ROD, *supra* note 19, at 1-3.

43. EXEC. DEPT. OF IDAHO, *supra* note 11, at 3.

Primary Target

In addition to the prohibitions related to energy and mineral development, livestock grazing permit renewals would first be prioritized to those areas located within the SFAs. As stated in Governor Otter's Consistency Review, "[t]he inclusion of numerous last-minute conservation actions and prioritizations schemes related to livestock grazing represents one of the most dramatic shifts"⁴⁴ During the entire planning process, *improper* livestock grazing was determined to be a secondary threat to sage-grouse across its range, beginning with the 2010 "warranted but precluded" finding.⁴⁵ In that finding, the Service determined that the current permit renewal process provides an adequate regulatory framework to deal with threats from livestock grazing.⁴⁶ And, oddly enough, even in their final rule, which includes more stringent requirements for livestock grazing, the federal agencies recognize that only the threat from *improper* grazing may negatively affect sage-grouse habitat.⁴⁷

Keeping the threat in the proper context, the Idaho Plan emphasized the use of existing federal regulatory mechanisms to address instances where improper livestock grazing was a causal factor to the decline of sage-grouse habitat or population; an approach with which the federal agencies concurred.⁴⁸ Every federal grazing permit holder knows there are enforceable habitat objectives they must meet, or show progress toward meeting, to be in compliance with the law. In Idaho, permittees must abide by the Idaho Rangeland Health Standards that set specific habitat objectives. Those objectives include conserving, or improving, riparian and upland habitat, which sage-grouse depend upon during various lifecycles.⁴⁹ Despite these pre-existing regulatory tools at their disposal,

44. *Consistence Review*, *supra* note 25.

45. 12-Month Findings for Petitions to List the Greater Sage-Grouse, 75 Fed. Reg. at 13910.

46. *Id.*

47. BLM ROD, *supra* note 19, at 1-18, 1-20.

48. EXEC. DEPT. OF IDAHO, *supra* note 11, at 14–20.

49. See BUREAU OF LAND MGMT., IDAHO STANDARDS FOR RANGELAND HEALTH AND GUIDELINES FOR LIVESTOCK GRAZING MANAGEMENT FINAL (Aug. 1997), <https://www.blm.gov/style/medialib/blm/id/publications.Par.91993.File.dat/SGFinal.pdf>.

the agencies were compelled to expend limited resources on imposing additional grazing measures within the sage-grouse plans.⁵⁰ As with the other secondary threats, it is puzzling why the federal agencies included additional proscriptions when sufficient regulatory protections already exist.

IV. HISTORY REPEATS ITSELF

Governor Otter believes in the value of collaboration and that the people working on an issue at the local level likely have the most workable solutions. However, the sage-grouse planning effort is an all-too-common example of local collaboration eroding and resulting in marching orders from Washington, D.C. officials. Another example involves state and local collaboration with the U.S. Fish and Wildlife Service to conserve Slickspot Peppergrass (a plant endemic to southeast Idaho).⁵¹ Governor Otter worked with grazing permittees and the Service to develop a Candidate Conservation Agreement, where the permittees voluntarily agreed to take conservation actions on the federal allotments in order to conserve the plant.⁵² Unfortunately, the Service determined that while these commitments were vital to protecting the plant, they did not provide enough certainty to avoid listing Slickspot Peppergrass as threatened under the ESA.⁵³

A few years later, the state of Idaho collaborated with local BLM officials to work on a fast tracked transmission line project called Gateway West. After developing a plan that satisfied the local BLM office and the Governor, BLM's Washington's office changed course and selected a new plan which required building new infrastructure on private land, instead of co-locating near existing power lines on federal land.⁵⁴ The BLM released the final

50. BLM ROD, *supra* note 19, at 2-2.

51. Idaho Governor's Office of Species Conservation, *Slickspot Peppergrass*, SPECIES CONSERVATION, <https://species.idaho.gov/list/slickspot.html> (last visited Feb. 1, 2017).

52. *Id.*

53. Endangered and Threatened Wildlife and Plants; Threatened Status for *Lepidium Papilliferum* (Slickspot Peppergrass) Throughout its Range; Final Rule, 81 Fed. Reg. 55,057 (Aug. 17, 2016).

54. See generally Idaho Governor's Office of Energy and Minerals Resources, *Transmission Line Projects*, ENERGY AND MINERALS RESOURCES (last visited Feb. 1, 2017),

plan for the Gateway West project January 19, 2017 just one day after Governor Otter submitted his final appeal to his Consistency Review denial.⁵⁵

The sage-grouse planning effort followed a similar trajectory as Slickspot Peppergrass and Gateway West. After years of strong collaboration with local BLM and Forest Service officials, the upper brass at the federal agencies in Washington, D.C. closed ranks and shut the state of Idaho out of the planning process. The result was a plan for sage-grouse that not only violated NEPA and BLM's multiple-use mandate, but, more importantly, created a further divide between the states and the federal agencies.

V. HERE'S TO HOPING...

States, counties and communities need to be empowered to have a voice in federal land management decisions that have a direct effect on their economies and way of life. Federal laws, regulations, and guidance have either directly or indirectly eroded the collaborative process to the point where it is often a box-checking exercise. Even in the instances where the local federal agencies make a sincere effort to work collaboratively, such as with sage-grouse planning, the final decision makers in Washington D.C. can undermine years of hard work with the stroke of a pen. Moving forward, states and localities need to be an equal partner in the federal planning process. And the state of Idaho will continue to pursue avenues to affect meaningful changes to the state-federal relationship.

<https://oemr.idaho.gov/energy-infrastructure/transmission/>; see also, letter from C.L. "Butch" Otter, Gov. of Idaho, to Jim Stobaugh, Project Manager for Bureau of Land Mgmt., *State of Idaho Comments: on the Draft Supplemental Environmental Impact State and Draft Land Use Plan Amendments for Segments 8 and 9 of the Gateway West 500-kV Transmission Line Project* (June 8, 2016), https://oemr.idaho.gov/wp-content/uploads/2016/06/2016_Gateway_DSEIS_comments.pdf.

55. BUREAU OF LAND MGMT., RECORD OF DECISION: GATEWAY WEST TRANSMISSION PROJECT AND RESOURCE MANAGEMENT PLAN AMENDMENTS SEGMENTS 8 AND 9 (Jan. 19, 2016), https://eplanning.blm.gov/epl-front-office/projects/nepa/39829/95570/115576/GWW_Segments_8_and_9_FINAL_ROD_without_appendices.pdf.