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Mining Association

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Mr. Tim Rubald
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Subject: Comments to changes to the Greater Sage Grouse Plan, Section 3.0, Goals and Strategies

Dear Mr. Rubald:

At the July 30, 2013 meeting of the Sagebrush Ecosystem Council (SEC), the Sagebrush Ecosystem Technical Team (SETT) provided revisions to Section 3.0 of the State's Greater Sage Grouse Management Plan. At the referenced meeting, I (along with other SEC members) expressed concern with the revisions in terms of consistency and intent with the original plan and the current body of science. It was agreed at the meeting that SEC members would be allowed an opportunity to provide comments and input on the proposed changes.

The following is a compilation of comments collected from representatives of mining operators in the Nevada Mining Association and those in the exploration community both in and out of the NvMA, along with other business and industrial sectors. For the context of these changes, please refer to the Revised Section 3.0 as provided in your July 25, 2013 staff report.

General Comments:

The Plan was developed by the Governor's Greater Sage Grouse Advisory Committee in mid-2012 and approved by the Sagebrush Ecosystem Council in early 2013. Since that time, the Nevada Legislature passed, and Governor Sandoval signed, AB 461 of the 2013 Legislative Session. It is strongly recommended a consistency review be undertaken to ensure the revised Plan meets the mandates and intent of the new state law. This is especially important to the changes relating to mandatory consultation with the State of Nevada for projects that impact, or may potentially impact, habitat. This requirement in particular would appear to be in conflict with the language of the bill. Similarly, the referenced legislation authorizes programs on public lands and privately owned land with the consent of the landowner. How will this Plan and its revisions be implemented on federal lands given that state land use policies cannot be imposed on those lands?

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The State should be cautious of proposing overly restrictive conservation measures that BLM might adopt piecemeal to create a hodgepodge of conservation measures as its preferred alternative.

Many of the policies, objectives and strategies in the revised Section 3.0 are lacking in detail, and as such, raise concerns as to the specifics of implementation.

A definition section would be helpful to define key terms including “no net unmitigated loss of habitat”, “anthropogenic disturbances”, “Acts of Nature”, “adaptive management”, “habitat”, “proposed area of disturbance”, “Conservation Credit System”, and “design features”.

The State should clarify that, if the sage grouse is listed under the ESA, the conservation measures relevant to mining authorizations will be determined through the ESA Section 7 consultation process and any more stringent measures in the State plan or RMPs would not apply.

Establishing outcome measures (how progress is measured) should be a significant focus of the Plan and SETT. Benchmarks should be established early in the process.

Has the BLM indicated whether losses from wildfire or invasives can be excluded from the no net loss calculation without a backstop? Also, it is our understanding that the hard rock mining design features have yet to be developed (Appendix).

The Plan, as amended, imposes restrictive regulatory criteria out of proportion to the threats posed by uses of public and private lands inside and outside of sage grouse habitat. The staff report indicates there are no fiscal impacts due to these revisions. In fact, there are significant economic impacts to the SEC, the SETT, to project proponents, to the State of Nevada and to its citizens.

The State Plan should ultimately address how the avoidance, minimization and mitigation measures will be enforced if the State Plan is not the selected alternative in the BLM’s EIS.

The Plan, and associated changes, must be coordinated with the other 11 western states that have habitat to ensure consistency across political boundaries.

The revised Plan outlines a long list of duties and responsibilities of the SETT. This includes (1) habitat ground truthing, (2) the review of all projects that impact habitat, (3) the review of project purpose, need and economic feasibility, (4) consultation on project design features, (6) the consideration of project minimization/mitigation alternatives, (7) conducting “enforcement” and unannounced site visits to ensure mitigation implementation, (8) application of adaptive management, (9) development and administration of the Conservation Credit System, (10) development of a strategic action plan, (11) completion of data analysis along with the development of a website for project lists and the submittal of annual reports on costs and funding agreements. This is a sizeable workload for double or even triple the current staff resources.

The SETT's stated role is to coordinate with federal agencies and not duplicate or replace those requirements. As modified, the Plan is inconsistent with this role. This is especially important for the inspection of design features.

Contracts and permit requirements are called for, for design features on projects. How will these requirements be put into place on federal lands and for projects on private property that do not require State permits?

We are greatly concerned about the requirement to conduct cumulative/indirect impact analysis for projects located **outside** of sage grouse management areas.

Exploration projects on public lands are governed by existing surface management regulations under 43 CFR 3809.300 through 336. Many small-scale (less than five acre) projects are allowed to proceed with the Notice of Intent (NOI) or basic plans of operation that provide for seasonal or physical avoidance. The development of the State Plan was clear in recognizing these existing criteria for activities on public lands. It is improper and unduly burdensome to subject NOI-level activities to the proposed SETT consultation process.

It is still unclear what constitutes a Sage Grouse Management Area in the context of the Plan and its revisions. Is it defined as the maps derived from the Governor's Advisory Committee and the input from the Local Area Working Groups?

The revisions to Section 3.0 are substantive and significant. The State Plan must be modified throughout for consistency with these changes.

Specific Comments:

Page 5 of 14 - Introduction (3.0) bullet 2 – Insert the word “timely” before implementation in the first sentence.

Page 5 of 14 - Introduction (3.0) bullet 3 - This suggests policies would be based upon monitored outcomes. Would this be a consensus based approach with landowners and leases or based solely on agency (state and federal) discretion?

Page 5 of 14, Section 3.1.1 – It is unclear if the “Unmitigated Loss” discussion is intend to be a definition of the term or is it being defined as the State's objective? Clarifying language would be helpful.

Page 5 of 14, Section 3.1.2, Avoid – At the beginning of the sentence eliminating conflict is not really the objective. The reduction of impacts to sage grouse habitat is the objective. Additionally, how would the need for mitigation be determined for Potential Habitat? What would be the purpose of an on-site evaluation and who would ultimately make the determination as to the need for mitigation?

Page 5 of 14, Section 3.1.2, Avoid – Avoidance in mining operations is typically not possible. Most often the impact will have to occur in the location of the mineral resource. In other words, the SETT must recognize that, for certain types of projects, the affected sage grouse habitat and the project's purpose and need cannot be separated and thus avoidance is inherently impossible. For a mining project on public lands the requirement for a demonstration of economic feasibility is in conflict with federal laws including mining laws and valid existing rights. Similarly, mineral exploration projects have a small and short-lived disturbance and the avoidance standards proposed are extreme and questionable to the benefit of the species and its habitat.

Page 6 of 14, Section 3.1.2, paragraph after Avoid – At the end of the paragraph the word “confirm” should be changed to “confirm or modify” to not suggest a predetermined outcome.

Page 6 of 14, Section 3.1.2, Avoid discussion – The mining industry must have clear and defined methodologies for determining habitat presence and absence. It must also have assurances that state and federal agencies will adhere to and recognize properly conducted habitat determinations and incorporate those findings into project permits and statewide maps. Previous, properly conducted habitat determination must be recognized. The Plan should provide for **all** reliable ground truthing methods and not necessarily just the Stiver method.

Page 7 of 14, Section 3.1.2, Avoid discussion, paragraph 1 – This would appear to switch the decision of project economic viability from the project proponent to the SETT or federal agency through an implied consultation process. What is the definition of project economic feasibility? This is of great concern and in contradiction to the original intent of the Plan. This policy decision should be discussed openly by the Council for inclusion as a Plan modification.

Page 7 of 14, Section 3.1.2, Minimize discussion – In the first sentence “avoid” should be “avoidable. This section implies a mandatory SETT consultation process to determinate minimization actions. The Council, from a policy perspective, has not discussed this requirement and it is unclear the roles and authorities of the SETT in these instances. Costs for relocating infrastructure and the consultation process itself could be significant. Similarly, as previously noted, the SETT will not have the resources to conduct on the ground habitat evaluations in all situations. As an alternative of the SETT, how will the “designee” be determined? Will the SETT have a list of acceptable consultants? How will the qualifications of the consultants be determined? What is the liability to the SETT if an improper determination is made? Finally, it would appear that this criterion eliminates the ability of a project proponent to choose his or her own habitat consultant. This is of great concern. What is the course of action if the required DFs cannot be mutually agreed upon by the SETT and the project proponent? Will there be an arbitrator or mediation panel? What if there are no DFs that can be determined for the site? The development and implementation of DFs must be done carefully to ensure increased disturbance do not occur elsewhere in or out of sage grouse habitat. Please note seasonal use limitations may work for some activities (I.e. some exploration activities) but are unworkable for actual mining operations. Finally, the language of this section implies the SETT will be a land-use regulatory entity with inspection and enforcement powers.

Page 7 of 14, Section 3.1.2, Mitigate discussion - In the first sentence “avoid” should be “avoidable. The Plan must address SETT decision making to ensure actions are consistent, predictable and timely. An alternative may be to develop a well-defined trigger for disturbance and SETT involvement. GIS should be able to inform the process and take the place of hands-on work by the SETT.

Page 7 of 14, Section 3.1.2, Mitigate discussion – This section should also include the management of habitat on private lands within or outside of SGMA’s in accordance with a SEC approved conservation agreements as a mitigation option to offset negative impacts caused by anthropogenic disturbance. No mention is made of a hierarchy of mitigation be it onsite, offsite, in-kind, habitat type, etc. For mining it is important that mitigation credit be given for the reclamation, restoration and creation of sagebrush habitat. The credit system process must recognize state and federal reclamation requirements and new habitat is counted toward the no net mitigated loss of habitat objective. Finally mitigation ratios should be based on how a project itself impacts habitat, not what others have done. One model for this approach is “increasing block pricing” for water. The more water one uses the more one pays for that water.

Page 8 of 14, Maximum Allowable Disturbance – Do the impacts of fire constitute disturbance in this context? If so, the proponent of a project will suffer the economic consequences of an “act of God” be it on public or private lands, or both. The Density Disturbance Calculation Tool (DDCT) has yet to be developed. This section does not contain enough information to analyze how this tool will function or how it will relate, if at all, to the successes and failures of the Wyoming DDCT. Furthermore, the disturbance criteria as written are problematic and difficult to administer. A specific project size threshold may be more user friendly and appropriate. Approved project permits and authorizations from federal and state agencies (i.e. BLM NOI’s, Plans of Operations, rights-of-way, drilling plans, etc.) must not be subject to additional DDCT or other examinations beyond what has already been stipulated in the projects’ approvals.

Page 8 of 14, Paragraph 4 – The four-mile buffer is problematic and excessive. While it is recognized that this is intended to be an evaluation zone for lek impacts, it is a new, unexpected criteria in this plan revision. Please provide more detail (including specific scientific references) on the derivation of this evaluation zone and more detail on its purpose and use. Please note that this value is inconsistent with similar criteria in other states and state plans. Clarifying language must also be provided to ensure these criteria cannot be misinterpreted as an exclusion zone or other unintended restrictions.

Page 8 of 14, Paragraph 6 – Given that most wildland fires in Nevada are on public lands, how will this Plan and the State of Nevada ensure federal land managers prepare a comprehensive management plan to address habitat restoration?

Page 8 of 14, Paragraph 7 – This section would penalize project proponents whose project areas have been impacted by “acts of God” such as wildfire or long past anthropogenic damage. One should always keep in mind that wildfire and invasive species are the greatest threat to sage grouse habitat in Nevada. The Plan revisions seek to regulate and control other land uses and impacts out of proportion of their

threat to habitat. The SETT and Council must take this perspective into account when addressing the lesser threats and the associated social and economic impacts. In any case the credit system should consider a weighted system for cumulative damage verses habitat quality.

Page 9 of 14, Exemption – An inconsistency arises where livestock grazing is exempt from the mitigation policy based upon “avoid” and “minimize” while mining, with its highly regulated activities at both the state and federal levels, must undergo extensive impact and mitigation analysis.

Finally, given the many uncertainties how the SETT’s proposal would be implemented, species listing may provide more regulatory certainty with defined limitations, specific timelines and well-defined processes.

Thank you for your consideration of these comments.

If questions or comments arise please feel free to contact me.

Sincerely,



Allen Biaggi
Nevada Mining Association

cc: Tim Crowley, President, Nevada Mining Association
Matt Zietlow, Chairman, NvMA Environmental Committee
Dennis Bryan, Chairman, NvMA Exploration Committee
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