

LIONEL SAWYER & COLLINS

ATTORNEYS AT LAW

1100 BANK OF AMERICA PLAZA

50 WEST LIBERTY STREET

RENO, NEVADA 89501

(775) 788-8666

FAX (775) 788-8682

lsc@lionelsawyer.com

www.lionelsawyer.com

August 10, 2013

MEREDITH L. MARKWELL
JENNIFER J. GAYNOR
CHRISTOPHER WALTHER
KEVIN J. HEJMANOWSKI
KETAN D. BHIRUD
ROBERT W. HERNQUIST
COURTNEY MILLER O'MARA
BRIAN H. SCHUSTERMAN
MOHAMED A. IQBAL, JR
MARK J. GARDBERG
JAMES B. GIBSON

GREG J. CARLSON
JOHN D. TENNERT
MARLA J. DAVEE
STEVEN C. ANDERSON
RYAN A. ANDERSEN
KATHERINE L. HOFFMAN
VAR LORDAHL, JR.
PHILLIP C. THOMPSON
AMY L. BAKER
JORDAN A. DAVIS
KENDAL L. DAVIS

SAMUEL S. LIONEL
GRANT SAWYER
(1918-1996)
JON R. COLLINS
(1923-1987)
RICHARD H. BRYAN
JEFFREY P. ZUCKER
PAUL R. HEJMANOWSKI
ROBERT D. FAISS
A. WILLIAM MAUPIN
DAVID N. FREDERICK
RODNEY M. JEAN
TODD TOUTON
LYNDA S. MABRY
MARK H. GOLDSTEIN
KIRBY J. SMITH
COLLEEN A. DOLAN
JENNIFER A. SMITH
DAN R. REASER
PAUL E. LARSEN
ALLEN J. WILT
LYNN S. FULSTONE
RORY J. REID
DAN C. MCGUIRE

JOHN E. DAWSON
FRED D. "PETE" GIBSON, III
CHARLES H. McCREA JR.
GREGORY E. SMITH
MALANI L. KOTCHKA
LESLIE BRYAN HART
CRAIG E. ETEM
TODD E. KENNEDY
MATTHEW E. WATSON
JOHN M. NAYLOR
WILLIAM J. McKEAN
ELIZABETH BRICKFIELD
GREGORY R. GEMIGNANI
LINDA M. BULLEN
LAURA J. THALACKER
DOREEN SPEARS HARTWELL
LAURA K. GRANIER
MAXIMILIANO D. COUVILLIER III
ERIN FLYNN
JENNIFER ROBERTS
MARK A. CLAYTON
MATTHEW R. POLICASTRO
CHRISTOPHER MATHEWS
PEARL L. GALLAGHER

OF COUNSEL
RICHARD J. MORGAN*
ELLEN WHITTEMORE
PAUL D. BANCROFT

*ADMITTED IN CA ONLY

WRITER'S DIRECT DIAL NUMBER
(775) 788-8602

LGRANIER@LIONELSAWYER.COM

Via Email and U.S. Mail

Sent via e-mail

August 10, 2013

Nevada Sagebrush Ecosystem Council
c/o Mr. Allen Biaggi

Dear Members of the Nevada Sagebrush Ecosystem Council:

Introduction

The Nevada Mineral Resources Alliance (NVMRA) very much appreciates this opportunity to provide comments to the Nevada Sagebrush Ecosystem Council ("Council") on the changes to Section 3.0, Objectives and Policies, of the 2012 Strategic Plan for Conservation of Sage-Grouse in Nevada, that the Sagebrush Ecosystem Technical Team ("SETT") recently proposed to you for your review and possible approval. NVMRA is strongly opposed to several of the proposed modifications to the 2012 Strategic Plan for Conservation of Sage-Grouse in Nevada ("2012 State Plan") and respectfully requests that the Council reject the following proposed changes:

1. The change to the 2012 State Plan that would require that "all anthropogenic disturbances" be subject to consultation with the SETT;
2. The establishment of a one-size-fits-all, required four-mile buffer zone around active leks as well as around project boundaries; and
3. The requirement to conduct a cumulative/indirect impact analysis for projects located outside of sage-grouse management areas.

LIONEL SAWYER & COLLINS

ATTORNEYS AT LAW

August 10, 2013

Page 2

NVMRA is a group of several small- to medium- size Nevada mineral exploration and development companies that have numerous mineral exploration and development projects throughout northern and central Nevada in areas within the sagebrush ecosystem and with various seasonal components of sage-grouse habitat. For the reasons discussed below, NVMRA is concerned that the SETT's proposed changes to Section 3.0 will adversely affect NVMRA member companies, as well as other companies involved with Nevada mineral exploration and development and ultimately reduce the economic benefits to the State of Nevada associated with mineral activities.

Although NVMRA believes that the SETT's proposed changes may also harm other companies and individuals seeking to develop Nevada's public lands, our comments will focus on how the proposed changes will impact mineral exploration and development on lands with potential sage-grouse habitat.

The Proposed Changes are Inconsistent with the Division of State Land's Role and Authority as Enacted in AB461

Governor Sandoval's March 2012 Executive Order No. 2012-09 established the Greater Sage-Grouse Advisory Committee and directed the Committee to submit its recommendations for a state-wide Nevada Sage Grouse Strategy to him no later than July 31, 2012. The Advisory Committee's recommendations included appointing and funding an interdisciplinary "Sage-grouse Advisory Commission" to oversee the State's sage-grouse management and conservation activities and an inter-agency Technical Team to assist the Commission.

Governor Sandoval implemented the recommendation to create a Sage-Grouse Advisory Commission when he signed Executive Order No. 2012-19 to establish the Council. The Nevada Department of Conservation and Natural Resources announced the members of the SETT in February 2013.

During the 2013 Legislative Session, state lawmakers enacted AB 461 to fund the Council and to define the scope of the Council's authority, which is to:

"... among other duties, implement a conservation strategy for the greater sage grouse and sagebrush ecosystems and oversee the work of the Sagebrush Ecosystem Technical Team."

Section 3 of AB 461 establishes that the Administrator of the Division of State Lands ("Division") shall:

1. ... coordinate the establishment and carrying out of a program of projects to improve sagebrush ecosystems in this State.

LIONEL SAWYER & COLLINS

ATTORNEYS AT LAW

August 10, 2013

Page 3

2. In carrying out the program described in subsection 1, the Division, on behalf of the Director of the State Department of Conservation and Natural Resources, shall:

(c) Coordinate activities with federal agencies;

(d) *If requested*, consult with persons proposing to conduct activities in any area which includes any habitat of the greater sage grouse (*Centrocercus urophasianus*) to suggest measures to avoid, minimize or mitigate the effect of the activities on any sagebrush ecosystem; (emphasis added)

The Council should not approve SETT's proposed changes to the State Plan to create a mandatory and universally applicable consultation requirement because such a requirement is inconsistent with the plain language in AB 461. Specifically, Section 3 of AB 461 does not give the Division or the SETT regulatory or mandatory consultation authority over proposed projects on lands with sage-grouse habitat. The consultation provision in AB 461 reflects the recommendations in the 2012 State Plan that consultation could occur in certain situations.

The Division's and the SETT's role is to coordinate with federal agencies – not to duplicate or even replace federal regulation. NVMRA is concerned that the SETT's proposed changes to the 2012 State Plan create a mandatory consultation role for the SETT that significantly exceeds the statutory purpose, role, and authority established in AB 461. Additionally, as discussed below, NVMRA believes that the consultation requirement in SETT's proposed changes would duplicate existing federal roles and environmental evaluations and become the source of permitting delays.

NVMRA recognizes that the Council may need to refine aspects of the 2012 State Plan. However, proposed changes need to be consistent with the language and intent of the 2012 State Plan as implemented and AB 461. The advisory, coordination and facilitation roles for the Council, the Division and the SETT are clear from both the 2012 State Plan and AB 461.

The Proposed Mandatory Consultation Requirement is Inconsistent with the Advisory Committee's 2012 State Plan

Recommendation No. 4 in Section 4.2 of the 2012 State Plan establishes the following directive for the SETT:

“Foster and maintain collaborative processes with state and federal agencies to expedite permitting. Decision-making should be extended to the Technical Team such that permitting will be expedited rather than extended by an added layer of bureaucracy.”

As discussed below, NVMRA has significant concerns that the mandatory consultation requirement in the SETT's proposed changes will create an “added layer of bureaucracy” and consequently extend – not expedite – permitting. The SETT needs to revise its consultation

August 10, 2013

Page 4

recommendations to demonstrate how the SETT consultation process will result in an expedited permitting process rather than adding a layer of state bureaucracy to what is already a complex and time-consuming federal permitting process.

The Proposed Mandatory Consultation Requirement Creates an Added Layer of State Bureaucracy that is Likely to Extend Permitting Timelines

The SETT's proposed change to the 2012 State Plan to require that "all anthropogenic disturbances" be subject to consultation with the SETT creates a new review process for projects including proposed mineral exploration and development projects that would duplicate the reviews that the federal land managers (e.g., the Bureau of Land Management and the U.S. Forest Service) already require.

Both BLM and USFS have detailed and stringent surface management regulations governing mineral activities on the lands they administer. Among other things, BLM's 43 CFR 3809 regulations and the U.S. Forest Services' 36 CFR 228A regulations require protection of wildlife and special status species like the Greater Sage-grouse. For example, 43 CFR 3809.420(7) states:

"(7) Fisheries, wildlife and plant habitat. The operator shall take such action as may be needed to prevent adverse impacts to threatened or endangered species, and their habitat which may be affected by operations."

Moreover, both BLM and USFS must prepare either Environmental Assessments or Environmental Impact Statements pursuant to the National Environmental Policy Act ("NEPA") for mineral (and other) projects that constitute a significant federal action.

Plans of Operation for mineral exploration and development projects that disturb more than five acres of BLM-administered public land or that require mechanized equipment on National Forest System lands are already closely regulated and subject to a detailed environmental analysis that includes consideration of required mitigation measures. NVMRA contends that Plans of Operation should be exempt from a similar state-level analysis unless the SETT can demonstrate how its proposed consultation would not add a layer of bureaucracy or extend permitting timeframes.

The protracted federal permitting process for proposed mineral exploration and development projects creates significant delays and costs for mineral project proponents and represents a major impediment to mineral activities on Nevada's federal lands. Needless to say, NVMRA would welcome the State's involvement in this process if the State's role could shorten the permitting process. Unfortunately, as currently proposed, the SETT's mandatory consultation process does not appear to offer any potential to expedite the permitting process.

August 10, 2013

Page 5

Early-Stage Exploration Projects Can Typically Avoid Impacts to Sage-Grouse Habitat

BLM's surface management regulations at 43 CFR 3809.300-336 authorize certain early-stage mineral exploration projects that disturb fewer than five acres of BLM-administered land to proceed with a notification process called a Notice of Intent ("NOI"). Projects conducted under a NOI must comply with BLM's regulatory mandate to prevent unnecessary or undue degradation. Prior to commencing operations, project operators must also provide adequate financial assurance to guarantee reclamation. BLM's surface management regulations also stipulate that projects located in certain environmentally sensitive areas may require a Plan of Operations.

During the early stages of a mineral exploration project operators can typically avoid impacting sage-grouse leks or other important habitat areas by either:

1. Physical Avoidance: Avoiding the impact by moving proposed drill sites and roads away from a lek and associated buffer zone; and/or
2. Seasonal Avoidance: Avoid working in the area during the season in which the habitat is occupied, like maintaining a buffer zone around leks during the spring breeding season.

Generally speaking, in order to conduct exploration under a Notice in areas with active sage-grouse leks, operators have to agree to one or both restrictions to satisfy the 3809 requirement to avoid unnecessary or undue impacts and to qualify for review under the provisions of an NOI rather than the more time-consuming and expensive Plan of Operations permitting process which requires federal land management agencies to prepare a NEPA document. Thus, operators have a significant incentive to avoid impacting leks so their early-stage projects can proceed under a NOI.

It is improper and unduly burdensome to subject NOI-level early-stage mineral exploration projects to the proposed SETT consultation process. The screening criteria that BLM applies to NOIs are adequate to ensure no impacts to sage-grouse leks during the breeding season or to other sensitive habitat areas. An additional state-level consultation would be adding a layer of bureaucratic review that would delay the NOI process and would be inconsistent with the intent and directives in the 2012 State Plan and AB 461.

Indirect Effects and Cumulative Impacts

The SETT has proposed a process for evaluating indirect effects/cumulative impacts to sage-grouse habitat from projects that are located outside of but near sage-grouse habitat areas. Noise or visual impacts from projects outside of sage-grouse habitat will be deemed indirect impacts that may require mitigation even though the direct impact (i.e.; the disturbance) is located outside of the habitat area.

LIONEL SAWYER & COLLINS

ATTORNEYS AT LAW

August 10, 2013

Page 6

The NEPA process requires federal agencies to evaluate and disclose indirect effects and cumulative impacts from proposed projects in areas designated as Cumulative Effects Study Areas (“CESAs”). The State of Nevada does not have a state environmental analysis law that is modeled after NEPA. Consequently, there does not appear to be any authority in Nevada state laws or regulations authorizing or requiring a cumulative effects/indirect impacts analysis. Additionally, AB 461 was not intended to create an indirect effects/cumulative impacts analysis process or add further layers of bureaucracy. For this reason, the Council should not add a cumulative effects/indirect impact analysis requirement to the 2012 State Plan.

The Proposed One-Size-Fits-All Four-Mile Buffer Zone Mitigation Evaluation Methodology is Not Best Available Science

First, NVMRA questions the premise upon which the SETT has recommended mandatory consultation for all projects proposed in sage-grouse habitat areas. We recognize Dr. Coates’ ongoing efforts to refine the habitat maps for Nevada. However, there are several maps that SETT should use in the interim for the purpose of determining whether consultation is appropriate. These maps include the BLM/US Forest Service preliminary habitat map, which is based on the NV Department of Wildlife’s maps. The federal agencies will be using this map in developing the Draft Environmental Impact Statement. Additionally, the Advisory Council developed a Sage-grouse Management Area map in 2012 (see Figure 1 in the 2012 State Plan).

The SETT should rely on these existing maps to determine when a proposed project may affect more than five percent per 640 acres of habitat and trigger the need for consultation as originally recommended in the 2012 State Plan. The concept that the SETT or the Council cannot know when a project might impact more than five percent per 640 acres of a habitat area is flawed and should be rejected.

Section 7 of AB 461 states that the Council shall:

“(a) Consider the best science available in its determinations regarding and conservation of the greater sage grouse (*Centrocercus urophasianus*) and sagebrush ecosystems in this State”;

NVMRA questions the scientific basis for the SETT’s proposed change to establish four-mile buffer zones around both active leks and project boundaries that would be used to evaluate potential impacts and required mitigation. Our question is based in part on one of the findings in the recently published United States Geological Survey (USGS) baseline report on the sage-grouse, entitled “*Summary of Science, Activities, Programs, and Policies that Influence the Rangeland Conservation of Greater Sage-grouse (Centrocercus urophasianus)*”(Open File Report 2013-1098, hereafter “USGS Report”).

LIONEL SAWYER & COLLINS

ATTORNEYS AT LAW

August 10, 2013

Page 7

The USGS Report, which was commissioned by BLM, documents and summarizes several decades of work on sage-grouse populations, sagebrush as habitat, sagebrush community and ecosystem functions, and conservation and regulatory actions. Of specific relevance to the issue of appropriate buffer zones, the USGS Report indicates that habitat fragmentation “generally begins to have significant effects on wildlife when *suitable* habitat becomes less than 30 to 50 percent of the landscape” (Page 26). This range is significantly different than the threshold stated in the National Technical Team (“NTT”) Report, which asserts that 70% of the landscape must be *suitable* habitat in order for the sage-grouse to persist.

This lack of agreement among wildlife biologists regarding the impact of various levels of habitat fragmentation or disturbance calls into question whether buffer zones are necessary in all situations. It also suggests that a uniform, one-size-fits-all buffer zone is inappropriate. Although the NTT Report discusses a four-mile buffer, this discussion is specific to oil and gas development in priority habitat areas; it does not apply to anthropogenic disturbance in general habitat areas. Moreover, the NTT Report states that a four-mile buffer zone around leks would be impractical in many situations:

“A 4-mile NSO likely would not be practical given most leases are not large enough to accommodate a buffer of this size, and lek spacing within priority habitats is such that lek-based buffers may overlap and preclude all development.” (NTT Report, Page 21).

Similarly, the US Fish and Wildlife’s August 2012 report entitled “Sage-Grouse Conservation Team Objectives” explicitly rejects the concept of one-size-fits-all conservation measures, stating instead that appropriate conservation strategies must be based on site-specific conditions,

NVMRA thus opposes the proposed SETT buffer zone concept and buffer-zone evaluation methodology and suggests the Council reject these proposed change. NVMRA requests that the Council adopt a project- and site-specific approach to evaluating the need for and size of buffer zones, which will ultimately provide a more precise evaluation of the relative importance and suitability of habitat to sage-grouse, and thus achieve better protection to the species.

Additionally, NVMRA suggests that the Council and the SETT closely examine the habitat fragmentation threshold discrepancy between the NTT Report and the USGS Report in evaluating the impact that habitat fragmentation has on survival of the Greater Sage-grouse. We believe this discrepancy has significant implications for the Nevada State Plan because it implies that direct impacts to sage-grouse habitat due to fragmentation may not always result in adverse impacts to the species. In other words, surface disturbances in sage-grouse habitat due to anthropogenic activities do not always reach a threshold that adversely affects the suitability of the habitat. Consequently, avoiding and mitigating all impacts to habitat may not be necessary in order to meet the State’s Not Net Loss of Habitat objective. Unfortunately, the SETT’s proposed changes to the 2012 State Plan appear to equate any surface disturbance to a direct loss of *suitable* habitat without any consideration of the habitat fragmentation threshold question, or the

LIONEL SAWYER & COLLINS

ATTORNEYS AT LAW

August 10, 2013

Page 8

relative importance of the habitat to sage-grouse -- not all potential habitats are *suitable*, or even potentially suitable

BLM and USFS are Unlikely to Delegate Mitigation Decision-Making Authority to the SETT without a Formal Agreement

Although the SETT may be able to be the lead consultation agency and decision-maker for mitigation requirement for unavoidable impacts to sage-grouse habitat on private lands (in a manner consistent with private property rights), it appears the federal land management agencies will for the foreseeable future probably insist upon retaining authority over public and National Forest System lands. At some point in the future, it may be possible for the State, BLM, and USFS to enter into a formal arrangement, like a Memorandum of Understanding (MOU), that would outline the various consultation responsibilities of each entity and potentially give the SETT a role in the consultation process on federal land.

Such an MOU could perhaps be modeled after the 2008 MOU between NDEP, BLM, and the USFS governing financial assurance requirements for reclaiming public and private lands disturbed by mineral exploration and development. However, because NEPA and BLM's and USFS' surface management regulations do not authorize delegating preparation of NEPA documents or regulating surface mining to the states, it seems unlikely that either agency could completely rely on the SETT or another Nevada state agency to determine the required mitigation for projects on federal land.

Once again, the MOU governing reclamation and financial assurance for mineral projects may be instructive. Although NDEP, BLM, and NDEP jointly operate the reclamation financial assurance program, BLM and USFS maintain the lead (i.e., hold the financial assurance instrument) for projects on BLM-administered and National Forest System lands respectively. NDEP can only hold the bond for projects solely on private land.

Conclusions

NVMRA applauds the Council and SETT for its efforts to refine the 2012 State Plan with the objective of avoiding a listing of the Greater Sage-grouse as a federally listed threatened or endangered species. However, we believe that the SETT's proposed changes are inconsistent with the intent of the 2012 State Plan and the authority accorded to the Council, the Division of State Lands, and the SETT in AB 461.

Based on NVMRA's involvement with the sage-grouse issue in several other western states, we are aware that other states are experiencing some frustrations in getting BLM and the US Fish and Wildlife Service to accept their State Plans. For example, US Fish and Wildlife officials have approved the Idaho State Plan as meeting the criteria for an Interim Management Plan pursuant to BLM Instruction Memorandum IM 2012-043, but BLM has withheld its approval.

LIONEL SAWYER & COLLINS

ATTORNEYS AT LAW

August 10, 2013

Page 9

We understand that US Fish and Wildlife Director, Dan Ashe, recently stated that his agency will not approve any other state plans as Interim Management Plans.

Because the position of BLM and US Fish and Wildlife Service appears to be in a state of flux, NVMRA urges the Council to adhere to and implement the recommendations and philosophies in the 2012 State Plan. It seems unwise at this point in the process to make substantive changes to the 2012 State Plan given the technical differences between the NTT Report, the COT Report, and the USGS Report, and the seemingly fluid nature of the federal agencies' decision-making process.

Thank you for this opportunity to provide these comments. We remain committed to working with the Council on this critically important issue to our State.

Very truly yours,

/s/

Laura K. Granier, Esq.

/s/

Debra Struhsacker
Executive Director

LKG:jes

cc: Client