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The Nevada Mineral Resources Alliance

Memorandum

Date: November 27, 2013
To: Nevada Sagebrush Ecosystem Council c/o Allen Biaggi
Subject: Required Design Features and Best Management Practices

The Nevada Mineral Resources Alliance ("Alliance") appreciates this opportunity to provide the Nevada Sagebrush Ecosystem Council ("Council") the following suggestions for Required Design Features (RDFs) and Best Management Practices ("BMPs") for the Greater Sage-Grouse.

I. Required Design Features

Sage-grouse habitat conservation measures consisting of one-size-fits-all or universally applicable Required Design Features (RDFs) are completely inappropriate because conservation measures must be tailored in response to site-specific factors. Consequently, the State Plan – and BLM's Preferred Alternative – should not include RDFs except in the broadest sense like general requirements that proposals must prevent unnecessary or undue degradation and "Avoid, Minimize and Mitigate" adverse impacts to sage-grouse habitat.

The US Fish and Wildlife Services' ("USFWS") Policy for Evaluating Conservation Efforts ("PECE") for making listing determinations is premised on the fundamental concept that conservation measures must be site-specific. Therefore, one-size-fits-all RDFs will not pass

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muster in the eyes of USFWS and will not persuade the USFWS to reach a not warranted determination.

Specific conservation measures and/or mitigation requirements are appropriate on a project-by-project basis and in consideration of site-specific conditions. For example, mineral projects on federal land administered by the Bureau of Land Management or the US Forest Service always include site-specific requirements to minimize adverse impacts and to require reclamation that is guaranteed with financial assurance provided by the project proponent. Permit conditions and bonding obligations should be considered site-specific/project-level RDFs. Both BLM and USFS surface management regulatory programs for minerals have ample authority to enforce the permit conditions and to require a reclamation bond – and to use bond monies to reclaim a site in the event of operator abandonment. Similarly, NRS 519A requires financial assurance and reclamation.

In addition, there currently is inadequate scientific data to formulate one-size-fits all, generalized requirements such as minimum distances from leks for disturbance or activities, or mandatory underground transmission lines. Baseline data for proposed projects along, with better developed scientific information about impacts of particular activities on Greater Sage-Grouse are necessary to develop appropriate project-level RDFs.

II. Best Management Practices

The State of Nevada has a detailed and extensive Best Management Practices (“BMPs”) handbook entitled, Nevada Division of Environmental Protection (NDEP) and the Nevada Division of Conservation Districts, 1994, Handbook of Best Management Practices, which was adopted by the State Environmental Commission on December 7, 1994. Although the focus of the State’s BMP Handbook is to prevent or minimize water pollution from non-point sources, many of the BMPs have positive implications for habitat protection, restoration and enhancement that benefit wildlife including Greater Sage-Grouse.

It is quite clear from the Purpose and Use statement at the beginning of the State’s BMP Manual that there is no blueprint for BMPs, which must be designed in response to site-specific conditions:

“In general, BMPs are site specific actions taken to prevent or reduce water pollution from nonpoint sources. Examples of operational BMPs include constructing water bars across roads or skid trails, spreading grass seed on exposed soil, placing jute matting or other types of temporary cover on cut or fill slopes and identifying or designating stream-side management zones. Organizational BMPs include scheduling activities to avoid wet seasons, incorporating water quality protection measures into contract provisions,

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requiring road locations on ridge lines rather than valley bottoms, reviewing project implementation documents to insure protection methods and measures are incorporated and inspecting project sites to insure protection measures are in place.”

“Effective BMPs must be based on consideration of all existing site specific conditions and must be cost effective. Factors which need to be considered include the occurrence and movement of surface and ground water, geology, soil type, climate, topography and habitat. Scheduling and timing are important, as are adequate design and application. **BMPs should be designed and developed on a site specific basis by qualified professionals.”**

“In general BMPs are not meant to be minimum standards, nor are they meant to be used as a cookbook approach in lieu of good professional management experience and judgement; however, the BMPs outlined in this manual are considered as the minimum criteria in 404 certification and mining reclamation permits, although the use of other more specific BMPs as developed by other agencies such as the Soil Conservation Service (SCS), United States Forest Service (USFS), Bureau of Land Management (BLM), EPA, and the Army Corp of Engineers can be proposed.” (emphasis added)

The BMP Manual includes chapters on agriculture (e.g., farming and ranching), forest resource management, mining, urban resource management, and waste management.

The Alliance suggests that the Council direct the Sagebrush Ecosystem Technical Team (“SETT”) to use the State’s BMP Manual to set the tone and direction for sage-grouse habitat conservation BMPs. Developing sage-grouse BMPs could be greatly facilitated by starting with the BMP Manual as the foundation. It would be efficient to add appropriate sage-grouse conservation measures – like site-specific re-vegetation goals to reclaim or enhance seasonal habitat, or providing appropriate mitigation for any tall structures that provide perches for predators.

Nevada Administrative Code 445A.306 defines “Best Practices” as:

“measures, methods of operation or practices which are reasonably designed to prevent, eliminate or reduce water pollution from diffuse sources and which are consistent with the best practices in the particular field under the conditions applicable. This term is intended to be equivalent to the term “best management practices” as used in federal statutes and regulations”.

The Council could consider the merits of developing a regulatory definition of BMPs applicable to sage-grouse habitat conservation that could incorporate the Avoid, Minimize, Mitigate

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principle established in the July 2012 State Plan, and that would emphasize the need to design such BMPs to respond to site-specific conditions. A regulatory definition for sage-grouse habitat conservation BMPs could be an effective way to implement the State Plan.

A definition would also provide USFWS with assurances that the State of Nevada has the ability to implement and enforce its sage-grouse conservation plan. Persuading USFWS that the State of Nevada has the necessary tools (regulatory, financial, etc.) to implement and enforce the State Plan will be two key considerations when USFWS evaluates the State Plan pursuant to PECE. A regulatory definition for Sage-Grouse habitat conservation BMPs could also be helpful in satisfying the “adequate regulatory measures” criterion in Section 4(a)(1) of the Endangered Species Act.

III. BLM Manual 6840

The Council may wish to consider incorporating BLM Manual 6840, “Special Status Species Management, December 20008” by reference and singling out the following elements of Manual 6840 as being consistent with the State Plan¹:

- Objectives. The objectives of the BLM special status species policy are:
 - A. To conserve and/or recover ESA-listed species and the ecosystems on which they depend so that ESA protections are no longer needed for these species.
 - B. To initiate proactive conservation measures that reduce or eliminate threats to Bureau sensitive species² to minimize the likelihood of and need for listing of these species under the ESA. (PDF Page 3)
- Section 6 (Cooperation with States). This section authorizes the Secretary to cooperate to the maximum extent practicable with States, including entering into management agreements and cooperative agreements for the conservation of threatened and endangered species. The BLM should implement this section through a State level memorandum of understanding by providing technical assistance to, and coordinating with, State agencies responsible for the conservation of endangered and threatened species. (PDF Page 12)

¹ BLM Manual 6840 does not have page numbers. The page numbers listed herein refer to the PDF page number.

² BLM manages the Greater sage-grouse as a Bureau sensitive species.

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- Reasonable and Prudent Alternatives. If the FWS and/or NMFS conclude that an action is likely to jeopardize the continued existence of a listed species or is likely to result in the destruction or adverse modification of designated critical habitat, it will prepare a biological opinion that identifies any reasonable and prudent alternatives needed to avoid jeopardy or destruction or adverse modification of critical habitat. **Reasonable and prudent alternatives are those that can be implemented in a manner consistent with the intended purpose of the action, can be implemented consistent with the scope of the action agency's legal authority and jurisdiction, are economically and technologically feasible,** and would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of designated critical habitat. (PDF Page 22, bold emphasis added).

Maximum Allowable Disturbance thresholds are inconsistent and incompatible with BLM's definition of "Reasonable and Prudent Alternatives". A Maximum Allowable Disturbance threshold may frustrate or even make impossible some proposed projects. Thus the "intended purpose" cannot be realized.

The Alliance appreciates the opportunity to provide input to the Council and looks forward to providing any further information that may be helpful in the Council's continuing work on this important issue.