



File Code: 1010

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J.J. Goicoechea
Chair
Sagebrush Ecosystem Council
State of Nevada
201 South Roop Street, Suite 101
Carson City, Nevada 89701

Dear Dr. Goicoechea,

As follow-up to the discussion during the Public Hearing for the Adoption of Proposed Temporary Mitigation Regulations conducted at the Sagebrush Ecosystem Council meeting on March 19, 2019, the Forest Service would like to share the following assessment of how the State of Nevada's proposed regulation concerning compensatory mitigation for impacts to greater sage grouse habitat is likely to affect administration of private development activities on National Forest System (NFS) land.

Under 16 U.S.C. 480, State regulation of persons under State law is not affected by the existence of a national forest, except to the extent that there is a direct conflict with federal law. Therefore, the proposed greater sage grouse regulation is likely to apply to private development activities on NFS land.

In addition, the Forest Service proposes retaining its requirement for compensatory mitigation to net conservation gain for residual impacts from anthropogenic disturbances in priority and general habitat management areas in the final environmental impact statement/draft record of decision to amend the greater sage grouse plan for Nevada, which the agency anticipates releasing for a 60-day objection period in May 2019.

We have identified several differences between the compensatory mitigation requirements in the Forest Service greater sage grouse plan and the State's proposed temporary regulations:

- 1) The Forest Service plan requires compensatory mitigation for residual impacts only in Priority Habitat Management Areas (PHMA) and General Habitat Management Areas (GHMA), with the intent of disincentivizing anthropogenic disturbance in these habitat types. The State's proposed regulations would require compensatory mitigation in Other Habitat Management Areas (OHMA), in addition to PHMA and GHMA.
- 2) The State's proposed regulations require locatable minerals projects to achieve net conservation gain. The Forest Service plan requires mitigation for locatable minerals plans of operation to the extent consistent with the General Mining Act of 1872.
- 3) The State's proposed regulations exempt minerals projects that are less than 5 acres from the compensatory mitigation requirements. The Forest Service plan does not exempt minerals projects that are less than 5 acres from requirements to avoid or minimize impacts and conduct compensatory mitigation for residual impacts.
- 4) The State's proposed regulations exempt certain projects from compliance, including projects needed for public health and safety. The Forest Service plan has an exemption to



allow certain projects that relate to health and safety to proceed in PHMA and GHMA. However, these projects would still need to achieve a net conservation gain standard.

In the National Environmental Policy Act analysis for authorization of private development activities on NFS lands, the Forest Service would be required to evaluate consistency of the proposal with applicable State regulations. In addition, the Forest Service intends to require compliance with those regulations as a component of compliance with applicable state law, and will incorporate such compliance as a term and condition of its authorization for private development activities on NFS lands in Nevada when appropriate.

In cases where the Forest Service requires more restrictive measures for operations on NFS land than would be required by the State (#s 3 and 4 above), the Forest Service requirements would govern. Where State regulations are more restrictive than Forest Service regulations (#s 1 and 2 above), they are likely to govern, but may be subject to challenge by the proponent, who may claim that the regulation constitutes a taking, or interferes with a federal program.

The Forest Service has an existing Memorandum of Understanding with the State of Nevada regarding the Conservation Credit System. Upon adoption of the regulation by the State of Nevada and signing of record of decision for the Forest Service plan amendment for Nevada, we can review this MOU to determine if revisions are necessary to clarify the process to ensure that projects align with both state regulations and the forest plan.

We would be glad to discuss the expected interplay between the proposed State regulations and Forest Service regulations further at your convenience.

Sincerely,



WAD
WILLIAM A. DUNKELBERGER
Forest Supervisor

Attachment 1: Relevant USFS Authorities Pertaining to Anthropogenic Disturbance.

Type of Anthropogenic Activity	Authority	Text from Authority
Special Use Authorizations	36 CFR § 251.54 (d)	<p>(4)...a proponent must provide a project description, including maps and appropriate resource information, in sufficient detail to enable the <u>authorized officer</u> to determine the feasibility of a proposed project or activity, any benefits to be provided to the public, the safety of the proposal, the <u>lands</u> to be occupied or used, the terms and conditions to be included, and the proposal's compliance with applicable laws, regulations, and orders. (5)<i>Additional information.</i> The <u>authorized officer</u> may require any other information and data necessary to determine feasibility of a project or activity proposed; compliance with applicable laws, regulations, and orders; compliance with <u>requirements</u> for associated clearances, certificates, permits, or licenses; and suitable terms and conditions to be included in the authorization.</p>
	36 CFR §251.56 (a)	<p>(1) Each special use authorization must contain ...(i) Terms and conditions which will...(D) Require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance if those standards are more stringent than applicable Federal standards.</p> <p>(2) Authorizations for use of National Forest System lands may be conditioned to require State, county, or other Federal agency licenses, permits, certificates, or other approval documents ...</p>
	36 CFR §251.64 (a)	<p>In making such renewal, the authorized officer may modify the terms, conditions, and special stipulations to reflect any new requirements imposed by current Federal and State land use plans, laws, regulations or other management decisions.</p>
Oil and Gas Resources	36 CFR §228.112 (c)	<p>Nothing in this subpart shall be construed to relieve an operator from complying with applicable Federal and State laws or regulations</p>

Type of Anthropogenic Activity	Authority	Text from Authority
Locatable Minerals	36 CFR §228.8	<p>All operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest surface resources, including the following requirements:</p> <p><i>(e) Fisheries and Wildlife Habitat.</i> In addition to compliance with water quality and solid waste disposal standards required by this section, operator shall take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations.</p> <p><i>(h)</i> Certification or other approval issued by State agencies or other Federal agencies of compliance with laws and regulations relating to mining operations will be accepted as compliance with similar or parallel requirements of these regulations.</p>
	40 CFR §1506.2 (d)	<p>To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.</p>