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July 31, 2024

Nevada Sagebrush Ecosystem Council
201 S Roop St
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RE: SEC Discussion of Disturbance Cap in BLM's Greater Sage-grouse Draft RMPA

Lithium Nevada Corporation (LNC) is grateful for the opportunity to briefly comment on the disturbance cap proposed in the Bureau of Land Management's (BLM's) 2024 draft resource management plan amendment (RMPA) for greater sage-grouse (GRSG) habitat conservation, in connection with the Sagebrush Ecosystem Council's (SEC's) July 31, 2024, meeting. We appreciate the SEC's work to clarify the State's position on the question of disturbance caps. We are concerned that, if BLM and the SEC do not properly coordinate the disturbance cap proposed in the draft RMPA with Nevada's preexisting Conservation Credit System (CCS) and no net loss framework, the proposed disturbance cap might raise questions regarding or conflicts with expanding critical minerals operations that serve the national interest.

As we have previously stated in comments on the draft RMPA submitted to the BLM, we are generally concerned that the disturbance cap is inconsistent with the Nevada State Greater Sage-grouse Conservation Plan (the State Plan), which does not set a disturbance cap.

We have some concerns that the draft RMPA may not contemplate cap exemptions for future mine expansions and the related but necessary infrastructure to support them as well as unforeseen but nevertheless necessary infrastructure to support already-permitted mineral operations. This is evident in two notable differences between the disturbance cap set by the 2015 Nevada land use plan amendment (LUPA) for GRSG habitat conservation and that proposed by the 2024 draft RMPA.

In the 2015 Nevada LUPA, it was clear that the disturbance cap did not apply to locatable mineral projects and BLM permitted exceptions to the 3% cap if, among other possibilities, (1) the project would result in net conservation of GRSG habitat at the biologically significant unit (BSU) level, or (2) the project incorporated compensatory mitigation—with specific mention of the CCS which LNC is currently participating. The 2024 draft RMPA omits these exceptions. In their place, it includes project-scale exceptions from the disturbance cap (1) where the project will improve the condition of GRSG habitat within the proposed project area, or (2) where, before any disturbance occurs, the project accomplishes compensatory mitigation in the same HAF fine scale unit.[1] This might diminish the efficacy of the CCS, which—after avoidance and minimization possibilities are exhausted—permits mitigation to offset adverse impacts on GRSG habitat but does not include

[1] The draft RMPA states that "[c]onsideration may be given to providing compensatory mitigation in adjacent fine-scale HAF areas if doing so will more effectively provide the offsetting benefit," but this conditional statement suggests that most mitigation will be required with in the same HAF fine scale unit. BLM, 2024 GRSG DEIS/RMPA at 2-38. Moreover, the draft RMPA does not permit exceptions to the disturbance cap on the HAF fine scale.

a specifically required measure of improved habitat condition, does not require mitigation before disturbance occurs, and calculates no net loss of GRSG habitat on a statewide basis. CCS has succeeded in conserving GRSG habitat while upholding rights granted under the General Mining Law[2] and adhering to multiple-use principles,[3] and BLM has recognized the State's position that the CCS is an "pro-active solution that provides net conservation benefits for the greater sage-grouse, while balancing the need for continued human activities vital to the Nevada economy and way of life."[4]

Second, the draft RMPA states that BLM will "[a]pply the disturbance cap to the extent consistent with applicable law (such as the Mining Law of 1872) and valid existing rights."[5] The 2015 Nevada LUPA made the same statement, but added language noting that "[a]lthough locatable mine sites are included in the degradation calculation, mining activities under the 1872 mining law may not be subject to the 3% disturbance cap."[6] This was understood to clarify that disturbance associated with infrastructure reasonably incident to mining would be exempt from the disturbance cap. Consistent with the General Mining Law and multiple-use principles, the Sagebrush Ecosystem Technical Team (SETT) presentation prepared for the July 31 meeting interprets the draft RMPA to mean that "mine footprints count as part of the cap calculations but cannot be stopped if the cap is reached."[7] But the SETT's presentation does not touch on infrastructure reasonably incident to mineral exploration, development, and processing.

The holder of a mining claim has the right to use the claim for mining and "uses reasonably incident thereto."[8] And mining claims located after 1955 are subject to "a right of the United States to manage surface resources . . . so long as [the government] do[es] not endanger or materially interfere with prospecting, mining, or processing."[9] Assuming that the draft RMPA's disturbance cap will be included in the final RMPA, the SEC should at least clarify (1) the State's position that the CCS remains the State-sanctioned mitigation program in Nevada; (2) the State's position that the CCS/no net loss framework is consistent with the disturbance cap exceptions listed in the draft RMPA; (3) the State's plan to coordinate BLM's proposed disturbance cap with the CCS; (4)

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[2] *See* 30 U.S.C. § 22 ("all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase"); *United States v. Shumway*, 199 F.3d 1093, 1100 (9th Cir. 1999) ("The Supreme Court has established that a mining 'claim' is not a claim in the ordinary sense of the word—a mere assertion of a right—but rather is a property interest, which is itself real property in every sense, and not merely an assertion of a right to property."); *see also* 43 U.S.C. § 1701(h) ("All actions by the Secretary concerned under [FLPMA] shall be subject to valid existing rights.").

[3] 43 U.S.C. § 1701 (management of BLM land is "on the basis of multiple use and sustained yield unless otherwise specified by law"); Nevada EO 2012-19 (Nevada policy is to "[c]onserve [GRSG] and its habitat while maintaining predictable and multiple uses of private, state and public lands").

[4] BLM, 2015 Nevada/California LUPA Appendix N at N-1.

[5] BLM, 2024 GRSG DEIS/RMPA at 2-39.

[6] *See* BLM, 2015 Nevada/California LUPA at E-2.

[7] Nevada Sagebrush Ecosystem Program, *BLM Greater Sage-Grouse Draft Resource Management Plan Amendment and Environmental Impact Statement Disturbance Caps Discussion*, at 7 (Jul. 31, 2024).

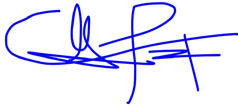
[8] 30 U.S.C. § 612(a), (b).

[9] *United States v. Shumway*, 199 F.3d 1093, 1101 (9th Cir. 1999).

BLM's and the State's plans to develop and publish guidance on how BLM's framework relates to the CCS; and (5) the State's position, consistent with federal law, that mine footprint *and also* disturbance associated with infrastructure reasonably incident to mineral exploration, development, and processing is exempt from the disturbance cap.

We are grateful for the SEC's attention to this important matter.

Sincerely,



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