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## Office of the Governor

September 4, 2015

Neil Kornze, Director  
Bureau of Land Management  
U.S. Department of the Interior  
1849 C Street NW, Rm. 5665  
Washington, D.C. 20240

Re: Consistency Review Appeal to the Director of the Bureau of Land Management

Dear Director Kornze:

I write to appeal, pursuant to 43 CFR §1610.3-2(e), the Bureau of Land Management's (BLM) decision to summarily reject Nevada's recommendations delivered July 29, 2015, regarding significant inconsistencies between the Nevada and Northeastern California Greater Sage-grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statements (LUPA/FEIS), and Nevada's state and local plans, policies and programs. I respectfully request your full consideration of this appeal.

As discussed below, the LUPA/FEIS is incompatible with Nevada's adopted Greater Sage-grouse Conservation Plan (State Plan) and provides less protection to Greater Sage-grouse (GRSG) than the State Plan. Given the BLM's stated goal of protecting GRSG, it would be inappropriate for the BLM to proceed with implementing the LUPA/FEIS without adopting the State Plan which provides for increased conservation for GRSG, complies with federal law and policies, and is supported by a vast majority of Nevadans.

The BLM's dismissal of Nevada's recommendations to resolve the inconsistencies between the LUPA/FEIS and the State Plan violates the provisions of 43 USC § 1712 (c)(9), which requires:

. . . the Secretary [of the Interior] shall . . . assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. . . . Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

The Secretary, through State Director John Ruhs' response to Nevada's recommendations, has not made a meaningful attempt to meet these standards or resolve the identified inconsistencies. Instead, the BLM relied on an unspecific response to deny several of Nevada's recommendations. For example:

The BLM respectfully declines to adopt this recommendation because it is not consistent with the purposes, policies and programs of federal laws and regulations applicable to public lands, in particular BLM's Sage-Grouse Strategy, its Special Status Species Policy, and its goal to provide regulatory certainty for the conservation of the Greater Sage-Grouse and its habitat so as to potentially reduce the need to list the species.

This response is specious in nature and nearly identical to the text used to deny the Consistency Review recommendations of other Governors across the western United States. It disregards the provisions of 43 USC § 1712 (c)(9) and 43 CFR § 1610.3-2.

Regrettably, it appears that the BLM is relying on the United States Fish and Wildlife Service (USFWS) memoranda as the basis for not supporting the State Plan. The USFWS has expressed an opinion and provided guidance based on its own information and without consultation, especially with regard to Sagebrush Focal Areas (SFA), exclusion areas and disturbance caps. Importantly, the USFWS has not issued an opinion on the State Plan. As outlined in this letter, the State Plan accomplishes the same USFWS goals through different means. Claiming that it does not accomplish those goals based on the USFWS memoranda is arbitrary and capricious.

I respectfully request that the BLM specifically identify how the State Plan is inconsistent with the purposes, policies and programs of federal laws and regulations applicable to public lands, in particular the BLM's Sage-Grouse Strategy, its Special Status Species

Policy, and its goal to provide regulatory certainty for the conservation of the GSGR and its habitat. In the alternative, I encourage the BLM to work with Nevada to resolve the inconsistencies between the LUPA/FEIS and the State Plan through this appeal.

### **Anthropogenic Disturbance Cap Will Hinder GRSG Conservation Efforts**

The BLM's denial of Nevada's recommendation regarding the anthropogenic disturbance cap states, in part:

Disturbance caps at both the BSU [Biologically Significant Unit] and the project scale are necessary to account for the amount of existing disturbance at both scales. Calculating disturbance for each additional anthropogenic disturbance placed on the landscape is particularly important at the project scale to ensure that GRSG numbers and habitat acreages remain stable or increase. Further, calculations at both of these scales are intended to encourage clustering of disturbance and discouraging development in undisturbed habitat.

This statement is inaccurate. In practice, the Disturbance Cap Protocol (DCP) in some circumstances actually provides perverse incentives that encourage the opposite of the BLM's claims.

The project-scale DCP actually *encourages* habitat fragmentation because it provides a perverse incentive to locate new disturbances in areas with little existing disturbance, which in turn increases direct and indirect effects to GRSG. The DCP is crafted in such a way that it encourages surface disturbance in locations with greater lek density—areas that are highly correlated to larger and more resilient GRSG populations. Under the DCP, greater lek density expands the project-level analysis area. Finally, the DCP also precludes the expansion of existing projects while simultaneously allowing for developing new projects elsewhere, thus discouraging the consolidation of disturbances.

Furthermore, the DCP at both the project- and BSU-scales are blind to the critical nature of limiting and high quality habitat. The DCP accounts for one acre of disturbance in general habitat as if it were the same as one acre of disturbance in high quality habitat. However, the science is clear that these disturbances are not the same. This creates less of an incentive to locate disturbances in low quality habitat, especially in areas that already have a significant amount of habitat affected by past anthropogenic disturbance.

Finally, the DCP uses an imprecise method to measure the indirect effects of disturbance. The BSU-scale DCP uses a specific 3% cap based on an average value derived from a study across seven states with differing ecosystems, threats and opportunities. At the project-scale, the DCP uses a specific four-mile buffer to define the analysis area, despite

the fact that the science is clear that different types of disturbance have different effects on sage-grouse.

These findings are based on both the published methodologies, as well as recent BLM DCP trainings, where it has become increasingly clear that the DCP will not achieve GRSG conservation and is likely to work against that goal.

I again urge the BLM to reconsider the DCP and instead use the Nevada Conservation Credit System (CCS) or equivalent methodology to assess the effects of anthropogenic disturbance in GRSG habitat. The DCP, as currently written, is inconsistent with the State Plan, numerous local plans, multiple-use mandates, and best available science. If the DCP must remain, the approach of the project-scale calculation must be eliminated entirely, or at the very least, significantly revised. The BSU-scale analysis should exist only as a temporary backstop until implementation of the CCS is shown to be effective.

### **Sagebrush Focal Areas Are Scientifically, Functionally And Administratively Flawed**

The BLM's response to Nevada's recommendation does not address the concerns raised on the points of public notification and participation, consultation with the State, utilization of best available science, improper prioritization of management actions, and unnecessary impacts to economic activity. The BLM's response notes that several memoranda were distributed among federal agencies, and that the states were generally made aware of the plans for SFAs through a November conference call, a January meeting, and the May 2015 administrative draft proposed LUPA. To be clear, "notification" and "review" are not the same as consultation and coordination. They are also not the collaboration which Nevada was promised by two Secretaries of the Interior.

The response also neglects to note that Nevada attempted to provide feedback and expert input on these concepts throughout the process—feedback that was summarily rejected by the USFWS and the BLM. Because of the USFWS' unwillingness to consider science from the states, and the BLM's improper deference to the USFWS' judgment on an unlisted species, the SFAs continue to be in direct conflict with Nevada's peer-reviewed habitat modeling and mapping, and the majority of the State Plan.

For example, the response states that the USFWS' "Greater Sage-Grouse: Additional Recommendations to Refine Land Use Allocations in Highly Important Landscapes" memorandum sent October 27, 2014, to the BLM ". . . identified areas that represent recognized 'strongholds' for GRSG that have been noted and referenced as having the highest densities of GRSG and other criteria important for the persistence of the species." In fact, because the "strongholds" identified in that memorandum and subsequent work products were developed solely by federal agencies and without honoring any input or accepted recommendations from the people or agencies of Nevada, they do not:

- represent the highest densities of GRSG throughout Nevada
- account for indirect effects
- reflect the nature of limiting habitat in Nevada
- reflect the actual threats posed to GRSG as recognized in the Conservation Objectives Team (COT) report
- incorporate the assessment of breeding bird densities (Doherty et al. 2010)
- incorporate concepts of resistance and resilience (Chambers et al. 2014)
- incorporate ecological site descriptions or state-and-transition-modeling
- honor the principles of common-pool resource management (Ostrom 1990, 2010, etc.)

Although administrative deficiencies are of serious concern, the lack of state and local involvement in developing the SFAs present very real challenges for GRSG conservation. Should the SFAs move forward, these areas are likely to become the sole focus of conservation and restoration actions in the Great Basin, in turn taking away limited resources from areas that may be of more importance to GRSG regionally. Because the SFAs do not actually represent the “best of the best” and do not respect the nature of limiting habitat and the other concepts identified above, the SFAs could in fact be implemented to the detriment of GRSG outside of the SFAs.

Again, Nevada raised these concerns in the Consistency Review and the BLM’s response was silent on these points.

Nevada continues to acknowledge that the USFWS has expressed a need for additional certainty. We believe that we can obtain the same or greater level of certainty through a temporary moratorium of mineral leasing on areas of habitat that truly reflect “the best of the best.” Nevada again respectfully requests that the BLM work with our conservation and wildlife staff to identify these areas and craft a science-based and defensible strategy that will still provide for adequate conservation for GRSG and certainty for the USFWS.

As for Nevada’s recommendation regarding limiting the timing of any withdrawal, the Department of the Interior has communicated the Secretary’s intentions to segregate leasable mineral rights from all lands within SFAs approximately concurrent with the issuance of the LUPA/FEIS Record of Decision. The Secretary would then undertake additional analysis of up to two years to determine which lands should be fully withdrawn from mineral leasing. This two-year period is ill-advised and unacceptable. It would present immediate and irreparable harm to Nevada, as the segregation would create a de facto withdrawal and have an immediate chilling effect on investment in the region to the detriment of local, state and national interests.

## **Nevada Conservation Credit System Assures Net Conservation Gain**

The CCS is a rigorous, scientifically-based mitigation program that achieves consistent net conservation gain and a single method for determining mitigation across the entire Sage-grouse Management Area, covering approximately 48,627,000 acres in Nevada. More importantly, the CCS strategically recognizes the importance of protecting and enhancing limiting sage-grouse habitat such as late brood rearing habitat. This is critical to conservation in Nevada due to our unique topography, ecology and natural threats.

The CCS incorporates the latest science, methods and concepts in order to help identify conservation actions in GRSG habitat. The CCS is truly a standard-bearer for compensatory mitigation programs of this scale and scope. It transparently and explicitly incorporates landscape-, local- and site-scale habitat characteristics—both natural and anthropogenic—that influence GRSG habitat selection, survival and reproduction. It also considers habitat suitability, space use and limiting seasonal habitat at the landscape-scale, based on the cutting edge, peer-reviewed work of the United States Geological Survey (USGS). Importantly, the CCS considers both direct and indirect effects of anthropogenic disturbances, and incorporates pre-project habitat function and avoided risk in calculating net conservation gain or loss. Any activity undertaken through the CCS is also rigorously verified and accounted for through the State-authorized program, and Nevada also requires reserve credit accounts and financial assurances as insurance for unforeseen circumstances or natural loss of habitat. The CCS is the *only* program to incorporate all of these (and more) concepts in one functional package.

Nevada appreciates the BLM's clarification that the BLM intends to consult with Nevada's Sagebrush Ecosystem Technical Team (SETT) and the BLM's statement of support for the implementation of the CCS. I must reiterate, however, Nevada's request that the BLM use the CCS as the "bar" for determining net conservation gain. The BLM should honor pre-existing conservation agreements, such as the Bank Enabling Agreement. However, the CCS should be used to assess or used as a standard for all future evaluation of net conservation gain in Nevada. This is essential to the success of our conservation efforts, and will ensure that there are transparent and rigorous compensatory mitigation standards in Nevada.

The BLM's response also notes that a Western Association of Fish and Wildlife Agency (WAFWA) Management Zone Greater Sage-grouse Conservation Team will develop a WAFWA Management Zone Regional Mitigation Strategy. I respectfully request that you clarify that any such team will be led by the appropriate federal agencies and Nevada.

Nevada supports the consideration and development of regional mitigation strategies as well as the utilization of WAFWA Management Zones, but it must be clear that WAFWA itself has no legal or administrative authority to speak on behalf of Nevada. This would

not preclude WAFWA from participation. Instead, it would leave decisions around membership of the regional mitigation team lead to joint agreement between federal agencies and Nevada.

### **LUPA/FEIS Must Incorporate New Science And Data**

Nevada is equally concerned with providing regulatory certainty to the USFWS to prevent the listing of GRSG. Using best available science will provide that certainty. Unfortunately, the BLM declined Nevada's recommendation that the BLM adopt the most recent version of the State of Nevada Management Categories map, which represents best available science.

The modeling and mapping methods as outlined in Coates et al. 2014 incorporate the best available science and have been mutually agreed upon and developed by the SETT, Nevada Department of Wildlife, USFWS, BLM, United States Forest Service, the University of Nevada and USGS. We are not suggesting changes be made to that methodology without a plan amendment. Instead, Nevada recommends that the BLM adopt new versions of that map as the habitat changes over time and new data is collected, using the agreed-upon and rigorous scientific methods.

Nevada respectfully requests that the BLM commit to adopting new versions of the habitat categorization maps as new data become available, using the approved methods. If the BLM denies this request and insists on a plan amendment to incorporate new science, the BLM will constantly be relying on outdated information instead of using our best and brightest minds and technology to help focus our efforts where we can best conserve GRSG.

### **Nevada Still Stands Ready**

I trust that the BLM will give each of these recommendations thorough consideration. You will see that the State Plan *does* comply with the purposes, policies and programs of federal laws and regulations applicable to public lands, in particular BLM's Sage-Grouse Strategy, its Special Status Species Policy, and its goal to provide regulatory certainty for the conservation of GRSG and its habitat, and that these recommendations provide for a reasonable balance between the national and state interests. Nevada remains committed to resolving these major concerns with the BLM so that together we can implement a conservation strategy that will preclude the need to list GRSG.

Should you have any questions or need clarification, please do not hesitate to contact Tony Wasley, Director of the Nevada Department of Wildlife; Leo Drozdoff, Director of the Nevada Department of Conservation and Natural Resources; Jim Barbee, Director of the Nevada Department of Agriculture; or Cory Hunt, a member of my staff.

Sincere regards,



BRIAN SANDOVAL  
Governor

Cc:

- The Honorable Secretary of Interior Sally Jewell
- The Honorable Secretary of Agriculture Tom Vilsack
- U.S. Forest Service Chief Tom Tidwell
- Nevada Congressional Delegation
- Nevada Sagebrush Ecosystem Program
- Western Governors Association
- BLM Nevada State Director John Ruhs