



STATE OF UTAH

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September 3, 2015

SEP 11 2015
Received @ 4:26 p.m.

Neil Kornze
Director
U.S. Bureau of Land Management
1849 C Street NW, Room 5665
Washington, D.C. 20240

Re: *Appeal of the Decision of the Acting State Director dated August 6, 2015
Utah State Office, BLM Governor's Consistency Review for Proposed Land Use Plan
Amendments – Greater Sage Grouse*

Dear Mr. Kornze:

The state of Utah respectfully asks you to reconsider the decision to reject our recommendations to resolve inconsistencies between the state of Utah's Conservation Plan for Greater Sage-Grouse in Utah¹ (Conservation Plan), state law and the Land Use Plan Amendment and Final Environmental Impact Statement/Proposed Plan for Greater Sage-Grouse (FEIS).² The state requests you to adopt the state's recommendations, for the reasons set forth in the Governor's Consistency Letter, and as supplemented below.

Fundamentally, the state, the Bureau of Land Management (BLM), and the U.S. Forest Service (Forest Service) are trying to achieve the same goal – conservation of the species using the best scientific and management provisions available to fashion the proper balance of interest between conservation and use of the lands and resources in a multiple-use manner. In so doing, the state and the federal agencies can provide the necessary certainty of result to be able to obviate the need to list the species under the provisions of the Endangered Species Act (ESA).

The requested Consistency Review was provided to the Acting Director of the BLM, Utah State Office, by letter dated July 29, 2015. One week later, by letter dated August 6, 2015, the Acting State Director provided a response which largely declined to accept the state's recommendations. This letter constitutes an appeal and a request for reconsideration of the

¹ See Conservation Plan for Greater Sage-Grouse in Utah, February 14, 2013, at <http://publiclands.utah.gov/wp-content/uploads/2013/08/Conservation-Plan-February-14-2013.pdf>. Accessed August 31, 2015.

² See 80 Fed. Reg. 20711

Acting State Director's decision as provided for within BLM regulation.³ This appeal is filed in a timely manner based upon the instructions contained in the August 6 letter from the Acting State Director. The state specifically incorporates by reference all the reasons given and the information contained in and attached to the Consistency Review letter of July 29, 2015 into this request for reconsideration and appeal, including all attachments to the Consistency Review.

The state specifically requests the National Director of the BLM reconsider each and every decision contained within the letter from the Acting State Director insofar as the letter rejects the state's recommendations, or makes a finding that there is no inconsistency to resolve, based upon the reasons identified in the July 29 Consistency Review, and as supplemented below. The state thereafter requests that the National Director adopt the recommendations made by the state, and contained within the previous Consistency Review and as supplemented below. These recommendations represent a reasonable balance between the state's interest and the national interest concerning the conservation of the species, the need to support a "not warranted" listing decision, and the other uses of the land.

The state of Utah appreciates the opportunity to have worked with the BLM and the Forest Service on positive, pro-active measures for the conservation of the greater sage-grouse over the past decade and a half. By working together, many on-the-ground projects designed to restore and rehabilitate habitat have been implemented, with immediate positive responses recorded for the individual populations adjacent to the projects. As a result of this and other cooperative efforts, population trends for greater sage-grouse are rising as evidenced by the recent report from WAFWA.⁴

We do have many points of agreement concerning the proposed plan amendments. We have worked together to establish a cooperative fire suppression and rehabilitation program within the sagebrush which is critical to the species. We have cooperated for many years on the planning and implementation of habitat improvement projects. We have supported efforts to study the species, and publish scientific papers with the results of the work. We have cooperated together to conduct sage-grouse management experiments over many years, such as the efforts to boost populations on Parker Mountain, Anthro Mountain, and within the Strawberry Valley. And, during this latest plan amendment process, we cooperated together to create vegetation standards which reflect local ecological conditions and triggers to warn about undue stress on individual populations.

Yet despite this tremendous cooperation, there remain significant differences in the choice of specific planning tools to accomplish the goal of conservation of the species, and

³ See 43 CFR § 1610.3-2(e).

⁴ See WAFWA Final Report, August 17, 2015, at http://www.wafwa.org/news/e_1606/News/2015/8/_WAFWA_Report_Documents_Greater_Sage-Grouse_Population_Rebound.htm. Accessed August 26, 2015.

thereby support a “not warranted” decision. These differences appear to be rooted in the perception that only the particular tools selected by the U.S. Fish and Wildlife Service (FWS) are sufficient to accomplish this purpose, though there are also numerous differences of opinion concerning BLM and Forest Service’s compliance with federal law, as outlined in the state’s Protest Letter.⁵

The primary difference in approach is based upon the scope and intensity of the restrictions imposed by the BLM and Forest Service in relation to the severity of the threat to individual populations in Utah, and in relation to the actual conditions faced by those individual populations. The state’s Conservation Plan is based upon decades of research and experimentation conducted by state agencies and Utah academics which demonstrates the fundamental isolation of the Utah populations, and the need to provide specialized management solutions based completely upon responses to this isolation.

The state of Utah believes the resulting proposed plan amendments, containing both resource allocation restriction, and new restrictions to be imposed upon previously authorized land use activities, do not provide sufficient conservation protection or lift to meet reasonable population or habitat objectives. The BLM and Forest Service have stated that their collective hope is that when these various restrictions are aggregated together, the sum of the restrictions on federal lands alone will provide enough certainty of outcome to support a “not warranted” listing decision by FWS concerning the proposal to list the species under the provisions of the ESA. While this may be the hope of the federal agencies, the state believes several provisions within the aggregate, as discussed further below, are excessive, and do not represent the proper balance of interests between conservation and the other authorized uses of the lands as required by BLM regulation. Therefore, these particular provisions within the larger set of proposed plan amendments are inconsistent with the state’s management plans for greater sage-grouse.

Legal Foundations for the Consistency Review

The rejection letter from the Acting State Director contains a discussion of the “Statutory and Regulatory Framework for Consistency Review.” This discourse focuses entirely upon the language found in the Federal Land Policy and Management Act (FLPMA), and implementing regulations of the BLM. The discussion focuses upon the portion of the regulations which allows for consistency with state plans and policies, as long as the state plans and policies “are consistent with the policies, programs and provisions of Federal laws and regulations applicable to public lands.”⁶

⁵ The state hereby reasserts all the issues contained within its Protest Letter dated June 29, 2015, and the right to seek redress for denial of those protest issues by the BLM or Forest Service, as circumstances may dictate based upon the final response to the protest. The state also hereby incorporates by reference all the reasons and information contained in the state’s Protest Letter into this request for reconsideration and appeal.

⁶ See 43 CFR § 1610.3-2(b).

The rejection letter continues by asserting that the state's plans and policies must be compared to primary federal policies, which are the BLM's Special Status Species Manual, the BLM's Instructional Memorandum (IM 2012-044),⁷ and finally, the BLM's desire to "identify and incorporate appropriate conservation measures in land use plans to conserve, enhance and/or restore GRSG habitat by reducing, eliminating or minimizing threats to the habitat." In addition, the BLM states that its standard for review of consistency is to compare the state plans and policies to the federal agencies' goal to "provide for the conservation of the GRSG and its habitat and to provide the USFWS with regulatory certainty that in turn will potentially preclude a determination that the species is warranted for listing."⁸ The state's Conservation Plan is consistent with the language and intent of each of these BLM policies and goals.

First, BLM cites its Special Species Status Manual in support of the objective to conserve or recover ESA-listed species, and to initiate proactive conservation measures that reduce or eliminate threats to sensitive species, and the need for listing these species. The state's Conservation Plan is designed to accomplish this objective for greater sage-grouse, and the Conservation Plan contains five explicit goals and objectives which have a record demonstrating success.⁹

Second, BLM cites its 2012-IM in support of plan amendments which "incorporate explicit objectives and desired habitat conditions, management actions and area-wide restrictions." The state's Conservation Plan is consistent with each element of the policy as it promotes specific objectives, jointly-created habitat conditions under the Watershed Restoration Initiative, reasonable area-wide restrictions on surface use, timing of use, and the like proposed by the BLM and shared management actions.

Finally, the state's Conservation Plan is consistent with the desire to provide the necessary certainty that the FWS needs in order to support a "not warranted" finding for the greater sage-grouse. The state has been actively supporting this goal from day one with the implementation of its Conservation Plan. The creation and execution of operational plans, such as the conifer reduction plan created by the state, are designed to seek certainty of conservation on private lands, as well as provide the regulatory path to positive actions designed to achieve precisely this goal.

The state provided specific and in-depth evidence supporting the success of our conservation efforts for sage-grouse. Incidentally, most of these efforts have been accomplished

⁷ Issued Dec. 27, 2011. Found at http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2012/IM_2012-044.html. Accessed August 24, 2015.

⁸ See generally letter from Acting State Director Whitlock, August 6, 2015, at p. 3-4.

⁹ BLM is a partner in the execution of some of these goals, but curiously, declines to adopt one of these goals (population stabilization) because it has no jurisdiction over the creation of the specific population numbers set by the state's goal.

in close partnership with BLM participation and support. As such, the state requests a detailed response noting exactly how our efforts, outlined in this section and detailed in the Consistency Review, are not consistent with the Special Species Status Manual, the 2012 IM, and the certainty necessary for the FWS.

Differences in the Interpretation of Consistency

The BLM's generalized discourse in the rejection letter concerning the legal standards of review for a consistency review fails to disclose the final step in the process – the standard for review of the State Director decision by the National Director of the BLM. As discussed in the state's Consistency Review¹⁰ letter, and as provided by BLM regulation, upon consideration of the Governor's statements upon appeal:

*The Director shall accept the recommendations of the Governor(s) if he/she determines that they provide for a reasonable balance between the national interest and the State's interest.*¹¹

The regulation requires the BLM's National Director to make a determination that the state's interest provides for a reasonable balance, and that the balance of interests proposed by the state between conservation and the other multiple-uses which the BLM manages is reasonable. If the best balance of interest is contained within the Governor's recommendation, the BLM has the opportunity to adopt the state's recommendations.

The state's Conservation Plan features an emphasis on resolution of the single science-based feature which affects the local populations - a diminishment of population's resilience caused by spatial limitations in the useable habitat for each population. None of the planning restrictions proposed by BLM or Forest Service can alter this fact, or provide a satisfactory proactive conservation lift for the species without resolving this issue. Therefore, the proposed plan amendments by the BLM and the Forest Service do not represent the proper balance of interest required to provide certainty in the conservation of the species.

The state's framework for conservation of the greater sage-grouse is represented by the balancing of conservation and other multiple-uses through a disturbance cap, sensible restrictions on surface use dependent upon the type of habitat, a focus on the actual threats to the species in the representative Utah ecosystems, and an aggressive mitigation program for unavoidable impacts caused by the human activities. The state's management provisions directly address the threats to the species in Utah, and provide for continuation of economic activity, and therefore represent the proper balance of interests.

¹⁰ See *An Evaluation of BLM and Forest Service Proposed Plan Amendments As Adequate, Necessary and Balanced Conservation for Greater Sage-grouse*, July 29, 2015 at p. 12.

¹¹ See 43 C.F.R. §1610.3-2(e).

The reasonable balance of interest test established in the above quoted BLM regulation provides the standard for review of the Governor's consistency review recommendations. The state's recommendations were provided in the July 29 Consistency Review letter and evaluation, and are supplemented below. These recommendations demonstrate that the reasonable balance of interests favors the state's approach to sage-grouse management over the approach of the BLM and the Forest Service. The state's approach is based upon the need to address the real, major threats to the species in Utah's ecological setting, and to provide active management of the species in order to stabilize and, hopefully, increase population trends. The state's approach also features reasonable restrictions on certain activities based upon a rational approach to the other, less the important threats to the species. The federal approach is, however, fundamentally tied to the perception that passive restrictions alone will provide for the conservation of the species. The state respectfully asks BLM and Forest Service to become active partners in these conservation efforts by adopting the state's recommendations.

State's Approach to Conservation of the Greater Sage-Grouse

The state, as well as many of the other western states within the range of the species, sponsored a year-long effort in 2012 to provide recommendations for reasonable conservation measures within the boundaries of the state. This effort was an "all-lands" approach, in that appropriate conservation measures were determined without regard to land ownership. The expectation of the members of the Working Group, which included the BLM and the Forest Service, was that the governmental entity with jurisdiction would implement the overall framework on a statewide basis by finalizing the appropriate measures on the lands within its jurisdiction. The Working Group's final recommendations, and the resulting state Conservation Plan, completely complemented and supported the recommendations of the Conservation Objective Team's Final Report, published by the FWS in March 2013.

The BLM and the Forest Service have rejected the state's overarching conservation strategy in favor of one which features an overwhelming and excessive role for restrictions on human activity on federally managed lands, and an indifference to complementary conservation activities on private and state lands. In an ironic twist, the BLM purports to reject the state's all-lands approach by reflecting that, because it only has jurisdiction over the lands it manages, it cannot make planning decisions for other lands. The state is, of course, not asking the BLM or the Forest Service to adopt provisions for other lands, but is asking BLM to adopt reasonable provisions on the lands each agency manages, while the state and local governments will work toward the complementary conservation measures on private and state lands.

The decision to reject the state's all-lands framework through the adoption of reasonable planning provisions on BLM and Forest Service lands represents the primary and fundamental inconsistency with the state's plans, laws, policies and programs, which, in this case, are embodied in the state's Conservation Plan and other related state laws. The primary points of

inconsistency are represented by an excessive weighting toward governmental restrictions including:

- failure to adopt reasonable goals and objectives for success;
- absence of certainty for the operations of the Department of Defense;
- unnecessary alterations to the normal schedule of review for grazing permits;
- elimination of surface mining for coal within the Alton Coal LBA;
- an excessive and punitive withdrawal of lands from the application of the mining law;
- rejection of the state's management authority over wildlife pursuant to the principles of federalism
- lack of certainty regarding land exchanges for state school trust lands;
- unnecessary and conflicting restrictions for areas outside of priority habitat; and
- unwarranted creation of focal areas that provide little benefit to sage-grouse.

The BLM and Forest Service plans propose many additional provisions which will add excessive and unnecessary expense and produce minimal conservation benefit. That is – the proposed solutions are out of balance with the expected conservation return. These proposed requirements, which are touted by the Departments of Interior and Agriculture as simple and innocuous, simply add to the huge and constantly increasing set of approvals required for energy and other projects. Each requirement adds costs in time and extra funds for completion of the review.

BLM explained the review steps that the proposed (supposedly innocuous) conditions would require, and they are extensive. While these provisions are technically required in only certain geographic areas, these areas are already fully slated for development. As set forth in the state's Consistency Review, the conditions also consist of requirements found in several separate places in the overall plan, and the requirements are themselves internally inconsistent. The result will be a move to the lowest common planning and review denominator in the field office. The requirements will not be applied in just one area, and not in another, as envisioned, but will undoubtedly be applied uniformly, further adding to cost and frustration. Add already existing frustration over several plant species, and ferrets, and prairie dogs, and tribal issues, and industry may simply move elsewhere.

Discrepancy with the State's Conservation Plan General Objectives

BLM has identified a number of general objectives for the management of greater sage-grouse. The state has recommended that these goal and objectives be modified to allow for specific metrics which demonstrate success in Utah. BLM Objective GRSG – 1 proposes to establish priority habitat for each Western Association of Fish and Wildlife Agencies (WAFWA) Management Zone sufficient to stabilize individual populations. Unfortunately, the loosely

created WAFWA system partitions Utah into four different management zones for convenience, rather than based upon accurate representations of ecological condition.

Utah's successful conservation and mitigation plans are not tied to the larger and locally irrelevant WAFWA Zones. Utah has been promoting successful habitat improvement projects through the Watershed Restoration Initiative and the Utah Partners for Conservation and Development for many, many years. These partnerships among the state, the BLM, the Forest Service, and many others are fully established and producing results. Meeting BLM Objective GRSG – 1, the stabilization of individual populations, is best tied to continuation of these existing tools, not the creation of new committees tied to issues in neighboring areas.

Utah's mitigation requirements are very specific to each population. Solutions for issues affecting the Utah individual populations will be driven by cooperation among the parties, not by reference to the WAFWA Zones. See, for example, the discussion about the Sheeprocks SGMA contained in the state's Consistency Review.¹² Locally driven mitigation plans are essential to meet the conservation needs of the populations in Utah.

The state provided BLM with an implementation plan for conifer removal in each of the SGMAs in Utah. This 15-year plan is designed to focus on the areas which, when the projects are completed, will provide useable habitat, connectivity corridors, and protection from fire (fuel based fire breaks). The conifer removal plan is based upon the work of Chambers, *et.al.*, (2014), and uses the very process identified in the FEIS, Attachment 2 to Appendix K, Fire and Invasives Assessment Tool, to produce the detail within the plan. The 15- year implementation plan is designed to promote conifer removal projects on all lands, irrespective of ownership, and should be adopted by the BLM and Forest Service as soon as possible on the lands managed by each. Frankly, if the BLM were to engage in the process referenced in the FEIS, Attachment 2 to Appendix K, Fire and Invasives Assessment Tool, at the conclusion the BLM will find the very results the state has offered. In fact, the state's conifer reduction plan was offered to the BLM folks working on the Fire and Invasives Assessment Team, who found the plan to be accurate and properly predictive.

The state recommends the BLM and Forest Service establish a preference for the Utah-based mitigation program, which meets the requirements listed within Appendix K, instead of establishing entirely new systems, teams or protocols. Utilizing the existing state program ensures that regional and state resources are used consistently and strategically at the landscape scale, allows for available funding to be invested in conservation instead of redundant planning, and reduces uncertainty and costs for industry, private landowners and other implementers of the mitigation projects. This unprecedented state effort should be leveraged rather than replaced with additional processes at the regional scale that may not be able to match the specific state plan,

¹² See *An Evaluation of BLM and Forest Service Proposed Plan Amendments As Adequate, Necessary and Balanced Conservation for Greater Sage-grouse*, July 29, 2015 at p. 6.

and potentially take funding away from already prioritized treatment areas that could create immediate uplift for the greater sage-grouse.

Specifically, the state recommends the BLM adopt the path for assessing and implementing mitigation, habitat improvement and habitat enhancement projects represented by the state's Conservation Plan, and eliminate the proposal to create mitigation committees based on the geographic extent of the WAFWA Zones. The state's recommendation asks the BLM to adopt the habitat improvement and enhancement objectives found within Section 2.0 of the state's Conservation Plan, adopt the state's conifer reduction plan created as part of the implementation of the Conservation Plan, and emphasize existing systems and processes, such as the WRI, rather than creating new and unnecessary committees based upon the non-responsive WAFWA Management Zone concepts.

The state appreciates that the BLM will have to authorize any on-the-ground work through all normal processes, including NEPA, and that the initiation of projects is dependent upon budget. However, adoption of the state's conifer removal goals for the SGMAs, for example, moves conservation of the species in the right direction, and provides the necessary regulatory certainty (an enforceable plan) in relation to two of the major threats in Utah – wildfire and conifer encroachment. In addition, adoption of these goals creates the necessary certainty of effect by removing excess fuel. Together, these provisions add a great deal to the resilience of those populations.

The state understands the BLM has attempted to generally support habitat projects through a vague and unprioritized list of project acreage for each BLM identified Population Area. However, this list, aspirational in nature, fails to provide the specifics necessary to move forward. The state recommends the BLM replace the acreage figures found in the chart on page 2-16 of the FEIS for the Box Elder, Bald Hills, Carbon, Hamlin Valley, Ibapah, Panguitch, Parker Mountain, Rich, Sheeprocks, Strawberry Valley, and Uintah SGMAs (Population Areas in the chart) with the appropriate Encroachment, Tier I Opportunity and Tier II Opportunity figures found in the state's proactive pinyon/juniper habitat restoration plan.¹³ The state also recommends that Management Action MA-VEG-2 and MA-VEG-4 be replaced with the objectives and acreage figures and locations set forth in the state's conifer removal plan.

Adoption of the state's recommendation provides measurable and specific goals for habitat enhancement and improvement projects for the localized ecological conditions in Utah. This, in turn, provides measurable and consistent mitigation goals for the varied populations within Utah. The necessary review and implementation committees are in place, and are operating on all cylinders. The BLM and Forest Service proposal to create new committees and review processes based upon the extension of Nevada, Idaho, Wyoming and Colorado habitat

¹³ A copy of the pinyon/juniper plan was attached to the state's Consistency Review as Attachment 1.

conditions into Utah, through the clunky WAFWA Management Zone concept is counterproductive to essential conservation work in Utah.

The proper balance of interests favors focusing on Utah populations, and the existing network of habitat improvement and mitigation, rather than the creation of new committees and the associated waste of funding resources.

Resolution for Conservation Activities for the Department of Defense

The state recommends that the BLM and Forest Service adopt planning provisions within the proposed plan amendments which provide equivalent protections for the activities of the Department of Defense as those found in the state's Conservation Plan. The state added appropriate Defense Department language to its Conservation Plan in order to assure the proper balance of interest between the management of BLM and Forest Service lands, and the needs of the Defense Department in Utah.

The Defense Department provides a major contribution to the state's economy and that of the local communities near the bases and other facilities. For example, a 2004 study of the economic effects of the closure of Hill Air Force Base was completed as part of the response to the then-pending activities of the Base Realignment and Closure reviews. The study found that the closure of HAFB would result in long-term effects to the state's economy, including the loss of 41,700 jobs, an annual decline in earnings of \$2.5 billion and an annual decline in personal income of \$2.65 billion. The study described the long-term impacts as the loss of the equivalent of one to three years of economic growth in robust economic times.¹⁴

Since the time of the study, the state's economy has weathered the Great Recession, and Hill AFB has taken on new and vital work, including the servicing of the new strike force fighter plane, as well as the continuing importance of the Utah Test and Training Range (UTTR). In order to assure the continuation of these activities, and at the specific request of the local defense department facilities, the state's Conservation Plan specifically provides:

Lands and airspace owned, managed or controlled by the Department of Defense, or its various services or directorates are near or over SGMAs. Operations on these lands or within this airspace shall not be affected by the implementation of this Plan, unless strong and credible evidence directly linking such operations to a loss of habitat or bird populations is presented at one of the annual SGMA review meetings. Such evidence shall be reviewed by the parties to the implementation of the plan for possible adjustments to the SGMAs or implementation of the Plan.

¹⁴ See *Economic, Demographic and Fiscal Impacts of Closing Hill Air Force Base: A Statewide and Regional Analysis*, Bureau of Economic and Business Research, University of Utah, April 2004, at p. 2.

In other words, the activities of the Defense Department may continue. Subsequently, if it is demonstrated that the activities are causing an effect upon the species, adaptive management solutions derived through careful review at that time can be implemented. A planning provision for BLM and Forest Service which is the functional equivalent to the state's is required irrespective of any other planning authorities the Defense Department may have pursuant to planning for land-based activities under the ESA. These types of provisions are precisely what the state, BLM, and Forest Service planning processes are designed to accomplish for activities on lands under its management. Unfortunately, neither the BLM nor Forest Service proposed plan amendments address this issue. Therefore, the state made the reasonable request that the BLM and Forest Service adopt the state's language, or something equivalent. (The state also protested the lack of compliance with federal law related to the Defense Department in its letter of protest dated June 29, 2015. Those issues are separate from the issues presented in the Consistency Review.)

The rationale provided by the BLM for its denial of the state's recommendation is not responsive. BLM's rationale cites both its lack of authority over aircraft movement, and its efforts to coordinate with the Department of Defense during the preparation of the proposed plan amendments. Neither of these two points is relevant. The state did not ask the BLM or the Forest Service to alter the aircraft activities within the UTTR, or on the ground upon lands managed by the Defense Department near or within sage-grouse habitat. The state recommended and asked the BLM and the Forest Service to adopt language similar to the state's specifically to provide governance over the BLM and Forest Service review of proposed activities upon the lands underneath the UTTR airspace, and near the Defense Department facilities.

BLM's rationale for declining to accept the state's recommendations references the Consultation and Coordination section of the FEIS (Chapter 6). However, this section discloses only that the BLM and the Department of Defense exchanged information related to aircraft overflights, lek locations, cheatgrass control, and the locations and replacement of radar towers. The exchange of this type of information is important, but does not constitute proposed plan amendment language which provides certainty about military operations.

The state again respectfully recommends and requests the BLM and the Forest Service (within the portion of the Sawtooth National Forest in Utah) to adopt language which provides certainty concerning actual and demonstrated causal effects of Defense Department activities upon all other activities proposed for or authorized upon BLM and Forest Service lands within or near the UTTR. The state recommends the BLM and Forest Service achieve this certainty through adoption of the language found in Section 3.7.5 of the state's Conservation Plan, or equivalent language. The state recommends that this language be incorporated as a new Objective GRSG-6 in the FEIS.

The state's Conservation Plan is based upon the foundation that grazing of livestock on the public lands, in and of itself, does not have a negative effect upon sage-grouse habitat or individual populations, and may in fact, be used as an effective tool to enhance habitat and help stabilize or increase population trends. The state's Conservation Plan provides that if localized effects upon sage-grouse are determined to be caused by improper grazing practices over a study of sufficient duration, an adjustment to best management practices may be warranted. Appendix 2 to the state's Conservation Plan provides the scientific background for the grazing provisions of the Conservation Plan, and provides best management practices to that end.

The state appreciates the cooperation demonstrated already by the BLM to modify the proposed plan amendments related to grazing within priority habitat. BLM's response to the recommendations in the Consistency Review identifies Management Actions MA-GRA-2, 4 and 6 as the prioritization scheme for the review of grazing allotments. The BLM describes this prioritization scheme as "essential," in order to address the "localized threat to GRSG habitats" posed by "improper range management."¹⁵ The BLM also indicates that the prioritization of the proposed elevated review of this improper range management is necessary because of the importance of this habitat to greater sage-grouse, "not because the BLM views grazing as an inconsistent use or elevated threat" in priority habitat.

The state requests the National Director review the decision of the Acting State Director, and, in light of the BLM's position on *improper* grazing as a purely localized concern, the state recommends a further adjustments to the provisions of the proposed plan amendments to reflect enhanced consistency with the state's Conservation Plan.

The state recommends the following adjustment to the wording of Management Action MA-GRA-1 to read as follows (additions in bold):

PHMA and GHMA¹⁶ would be available for livestock grazing, **as livestock grazing, in conjunction with grazing on adjacent private and state lands can benefit to the health of the range.** Active animal unit months (AUMs) for livestock grazing would be 329,521 on BLM lands. Make adjustments to permitted AUMs, including upward adjustments in line with a review of allotments pursuant to MA-GRA-6, consistent with regulation ~~and the remaining grazing direction.~~ **at the time of normal review of the allotment. Make adjustments to annual levels of actual livestock use consistent with regulation and the direction identified in Management Actions MA-GRA-2 through 18¹⁷**

¹⁵ See letter from Acting Director Whitlock, August 6, 2015, at p. 9.

¹⁶ As discussed elsewhere, the state recommends that adjustments be made to the concept of GHMA. Retention of the GHMA language in this and other Management Actions is dependent upon the resolution of that recommendation.

¹⁷ This list would be reduced to 17, based upon the state's recommendation to eliminate MA-GRA-5.

where localized range conditions or habitat objectives which do not meet Land Health Standards, as determined by an ecological range study, or similar work, are directly tied to livestock grazing through a study of sufficient duration. ~~Make adjustments to permitted use and annual adjustments to levels of livestock use consistent with regulation and the direction identified below where livestock grazing is identified as a causal factor to not meeting standards or habitat objectives.~~

Adjust the wording of MA_GRA-2 as follows:

The BLM will prioritize (1) the review of grazing permits/leases, in particular to determine if modification is necessary prior to renewal, and (2) ~~the processing of grazing permits/leases in SFA first followed by PHMA outside of the SFA. In setting workload priorities, precedence will be given to existing permits/leases in these areas not meeting Land Health Standards, with focus on those containing riparian areas, including wet meadows.~~ **according to the greatest need as determined by an evaluation of current ecological base conditions. Current ecological base conditions will be determined by current information concerning localized range conditions which do not meet Utah Range Health standards, or similar, and which have been determined by a study of sufficient length to be caused by livestock grazing. The review of current ecological base conditions will be prioritized within PHMA, and further prioritized for areas involving mesic and riparian areas within PHMA.** The BLM may use other criteria for prioritization to respond to urgent natural resource concerns (ex., fire) and legal obligations.

Adjust the wording of MA-GRA-3 to read as follows:

In PHMA, consult, cooperate and collaborate with other land owners and management agencies (e.g., private and **state lands SITLA**) to develop plans which provide for landscape level approaches to habitat improvement. Manage unfenced private and SITLA **state** lands within a grazing allotment that are under exchange of use agreements or percent public land use as a single unit **which promotes improvement or maintenance of the Utah Range Health Standards.** **Review the concepts provided in MA-GRA-6 as part of the establishment of the management for these areas.**

Eliminate MA-GRA-5 as duplicative of language and concepts contained in MA-GRA- 1 through 4.

Adjust the wording of MA-GRA6 to read as follows:

In PHMA, implement management actions (e.g., allotment management plans, term permit renewals, or other agreements) necessary to meet land health standards to conserve, enhance or restore GRSG habitat through specific objectives (Objective GRSG-3). ~~If an effective grazing system that meets specific GRSG habitat objectives is not already in place,~~ **In order to maintain or improve compliance with land health standards, and to improve the operation of livestock upon the lands,** consider singly, or in combination, changes based upon the following:

- Rotation systems (e.g., rest rotation, deferred rotation)
- Season or timing of use
- Distribution of use
- Intensity of use (e.g., objectives for utilization)
- Type of livestock (e.g., cattle, sheep, horses, and goats), ~~unless such a change conflicts with other species management~~
- Class of livestock (e.g., yearlings vs. Cow-calf pairs)
- Duration of grazing use and rest periods
- Stocking rates

The NEPA documentation for renewals and modifications of livestock grazing permits/leases that include lands within PHMA will include specific management thresholds based upon the Table within Objective GRSG-3, Land Health Standards. ~~(43 CFR 4180.2) and ecological site potential, and one or more defined responses that will allow the authorizing officer to make adjustments to livestock grazing that have already been subjected to NEPA analysis.~~ **for areas determined to not be in compliance with those land health standards due to improper livestock operations as demonstrated by a study of sufficient length.** Adjustments to meet seasonal GRSG habitat requirements could include those items identified in the list above.

Adjust the language of Management Action MA-GRA-10 to read as follows:

In PHMA, ~~limit authorization~~ **consider adjusting proposals** of new water developments to projects that would have a neutral effect or be beneficial to GRSG habitat ~~(such as by shifting livestock use away from critical areas).~~ **subject to the determination of the state water engineer.** New developments that divert surface water ~~must be designed~~ **should strive** to maintain riparian or wet meadow vegetation and hydrology to meet GRSG needs, **subject to valid, existing rights under the jurisdiction of the state water engineer and the Governor's Executive Order implementing the state's Conservation Plan.**

Adjust the language of Management Action MA-GRA-11 to read as follows:

In PHMA, evaluate existing water developments (springs, seeps, etc and their associated pipelines) to determine if modifications ~~are necessary~~ **might be helpful** to maintain or improve riparian areas, **mesic areas**, and **other** GRSG habitat. ~~Propose Make modifications where necessary, considering impacts on other water uses when such considerations are neutral or beneficial to GRSG.~~ **to the water right owner for possible submission to the state water engineer for approval.**

Adjust the language of Management Action MA-GRA-18 to read as follows:

At the time a permittee or lessee voluntarily relinquishes a permit or lease, the BLM will consider, **in conjunction with the state**, whether the public lands where the permitted use was authorized should remain available for livestock grazing or ~~be used for other resource management objectives, such as reserve common allotments~~ **allocated to other livestock grazing mechanisms such as reserve common allotments, or to support other GRSG habitat protection needs, such as occasional grazing** within a firebreak. **In no event shall a sale of other transfer between one owner of the permit or lease, and another, by any legal mechanism or court order, be considered a voluntary relinquishment for purposes of this section.**

Resolution of the Alton Coal Lease-by-Application Review

The state of Utah is supportive of the proposal to lease and mine the coal found within the Alton Coal Lease-by-Application (LBA) Tract near Alton, Utah, in an environmentally responsible manner. In general, Utah's coal mining industry supports over \$173 million in labor income for almost 3000 workers. The coal industry accounts for about \$887 million in economic activity in Utah. Utah is committed to pursuing a compliance plan that maintains the viability of its coal-fired power plants as part of its response to the proposed Clean Power Plant requirements. According to the Energy Information Administration, foreign demand for coal will continue to grow over the next fifty years, providing additional market opportunities for coal from the Alton mine expansion.

In-state demand for coal from the Alton Coal mine is projected to continue for well over a decade. This project will provide high-paying jobs to support hundreds of rural families, deliver power to almost a half a million people, and enhance the tax base of the local community. Coal provides the necessary base load power supply for life enhancing technology and superior healthcare, education, housing and public transportation. Coal provides the foundation of the electrical system that has enabled the widespread availability of computer technology and life-changing consumer goods and services.

The current mine, on private lands, is an important employer in the region, and has been operating according to a Habitat Mitigation Plan (2009) (HMP) in order to minimize the effects of mining on greater sage-grouse and other species. Implementation of the HMP is demonstrating positive results. The current permit is leading to the very mitigation activities required to enhance the greater sage-grouse population in the area by eliminating the spatial limitations on the population. If Alton's mining activities are extended onto the federal lands, or if another company should prevail at auction, the operators would be required to obtain a permit from the Utah Division of Oil Gas & Mining, and air permits from the Utah Department of Environmental Quality, and the current mining mitigation requirements would continue.

The situation, in fact, demonstrates that properly conducted mining, in conjunction with habitat improvement and habitat expansion projects, can successfully coexist with sage-grouse, by providing opportunities for the existing population to move as the mine plan proceeds. For this reason, as the state has explained to the BLM in several previous letters related to greater sage-grouse and the review of the Alton LBA proposal, the state excluded the LBA Tract from direct compliance with its Conservation Plan by deferring review of the project and management of the tract to the then-ongoing NEPA review. The NEPA review is proceeding apace, with a Supplemental EIS out for public review, with comments currently due by September 10, 2015.

BLM's approval of the Alton Coal LBA, and the subsequent offering of the resources at public auction, is essential not only for the continuation of mining from the existing mine onto the BLM land, but also for the continuation of mining onto private lands beyond the BLM lands. The state believes the decision to lease the property should be made as part of the pending review of the LBA, and the information provided by the NEPA documentation related to the review. Reliance upon the currently pending Alton Coal LBA review process provides consistency with the state's Conservation Plan.

For these reasons, the state recommended that the BLM retain the general habitat designation for the Alton LBA tract. The purpose of this request was to allow the flexibility to determine the best course of action for the area within the on-going NEPA review. However, the Acting State Director rejected the state's recommendation concerning the area encompassed by the Alton LBA, citing three specific factors. The first factor is the existence of the BLM's Sage-Grouse Policy. The second factor is the existence of the BLM's Special Status Species Policy. The third and final factor is the need for "regulatory certainty so as to potentially reduce the need to list the species" under the provisions of the ESA. In addition, the Acting State Director's letter states specifically that "the Alton LBA could be required to conform to the decisions contained"¹⁸ in the proposed plan amendments.

The first two factors are BLM policies which promote the conservation of species and the maintenance of important habitat. The portions of these policies cited in support of the Acting

¹⁸ See Letter from Acting State Director Whitlock, August 6, 2015, at p. 13.

Director's decision are important statements of principle, but are not relevant to the state's recommendation. For example, the BLM cites the portions which require a careful consideration of protection for breeding, brood rearing and winter habitat. The state certainly agrees with these principles, and has incorporated their vision into its Conservation Plan.

Regarding the third point, the BLM asserts the proposed plan amendments are necessary in order "to potentially reduce the need to list the species." Elsewhere within the proposed plan amendments, identical language is used to support the proposed withdrawal of vast amounts of land from the application of the federal mining law, and thereby eliminate mining and mineral exploration in those areas. The proposed language concerning general coal leasing within the FEIS¹⁹ has the same effect, and is an overbroad and excessive response to the management of greater sage-grouse within the Alton LBA. In fact, use of this particular language here is misleading and irrelevant, unless the actual intent of the BLM is to deny mining within the Alton LBA. The proposed plan amendments (MA-MIN-6)²⁰ specifically provide that:

- Land designated as priority habitat are "essential" habitat pursuant to the 'suitability' criteria identified within BLM regulation, and
- BLM may consider leasing coal resources using underground mining techniques, and
- If the above criteria (specifically, a restriction to underground mining techniques alone) cannot be met, the resource may **NOT** be leased. (emphasis added)

Through the detailed work which has produced both a draft and supplemental EIS concerning the Alton Coal LBA leasing proposal, BLM fully understands that most of the proposal to mine the Alton LBA involves continuation of the current surface mining operations onto the BLM lands. *Yet the proposed plan amendments provide no path for consideration of surface mining.* Therefore, if the proposed plan amendments are adopted, and the Kanab RMP is amended as proposed, surface mining is prohibited within the Kanab Field Office Resource Area, despite the entire NEPA process underway to review the Alton LBA proposal in detail. Not only is this inconsistent with the state's Conservation Plan, which generally defers to the BLM's NEPA process concerning the Alton LBA, but it certainly violates NEPA itself, as the proposed language is pre-decisional with respect to the LBA review process.

Scientific Research Related to Space Limited Populations

The best available sage-grouse science provides additional assistance with respect to the Alton LBA proposal, and the possible surface mining of the area. The state's SGMA boundaries, including the Panguitch SGMA, represent the best available science regarding suitable sage-grouse habitat. However, the populations within the Panguitch SGMA are, like many of Utah's populations, space-limited. The recent scientific research, which was referenced by the BLM in

¹⁹ See generally FEIS, Management Actions MA-MIN-5, 6, 7, 8, 9 and 10, at page 2-34.

²⁰ See FEIS at p. 2-34.

the letter rejecting the state's recommendation, simply brings into focus the current use of the area in the space-limited configuration. The data referenced by the BLM does not adopt the increase in useable habitat vision of the state's Conservation Plan. BLM's ultimate decision for the area needs to reflect not only this research, but also research demonstrating the success of habitat improvement and enhancement projects.

Basic scientific research conducted in Utah demonstrates that the Utah sage-grouse populations that inhabit larger, more contiguous sagebrush areas tend to move greater distances from leks to nests, nest to brood-rearing areas, and brood-rearing areas to winter areas, and the like. This research demonstrates that space-limited populations can be stabilized, and population trends increased, by providing more useable habitat within the population's life-cycle area.²¹

Research has been conducted on possible mitigation for the effects of surface coal mining upon resident sage-grouse populations as far back as the 1970s. In final papers reporting on two Montana coal mine based studies,²² new birds were successfully induced to move to alternate lek locations as the original location was disturbed by mining. Locally, Frey et al. (2013) demonstrated immediate sage-grouse use and habitat quality improvement within areas of conifer removal. Sandford et al. (2015) demonstrated the specific response of a female sage-grouse immediately nesting in an active conifer removal project. These observations suggest that, as the conifer encroachment in the immediate area of the Alton-Sink Valley lek is removed, birds will expand into this habitat. Conifer expansion has been identified as a major species conservation threat in this SGMA, as well as all around the state. The BLM and the state have cooperated on a large number of such projects in the Panguitch SGMA, particularly to the south of Alton within the Grand Staircase Escalante National Monument, so the state and the BLM are currently thoroughly addressing the threat.

Although the actual lek site is selected by males, the general area where lek sites are located affords females with suitable nesting, and brood-rearing habitat. The fact that managers can create and enhance breeding habitat suggests that lek site locations will move. Males may move between leks and in some case entire leks will move to more suitable habitat. Eng et al. (1979) demonstrated the potential plasticity of sage-grouse males to relocate to new leks sites within suitable habitat. This appears to have occurred in the Alton-Sink Valley area. Recently, the lek on private property moved from the mine site to a nearby ridge, and the males counted on the lek have remained stable from 2012-2015. The low counts from 2007-2010 and the zero

²¹ This fact is the basis, of course, of the operation of any disturbance cap calculation. The creation of more useable habitat equals more space under the cap for other activities.

²² See Eng, R.L. E. J. Pitcher, S. J. Scott, and R. J. Green., 1979, *Minimizing the effect of surface coal mining on sage-grouse population by a directed shift in breeding activities*. Pp. 464-468 in *The Mitigation Symposium: A National Workshop on Mitigating Losses of Fish and Wildlife Habitat*. USFS General Technical Report RM-65. Rocky Mountain Forest and Range Experiment Station, USDA, Fort Collins, CO, USA. See also Tate, J, *Response of Sage Grouse to Artificially Created Display Ground*, Id at p. 459 - 463.

count in 2011, may reflect more on the inability of the biologists to locate the lek, than the status of the population as a whole. This type of movement data must be considered as just much as the flight movement data cited by BLM, and the decision to adopt or reject the state's recommendation for the Alton LBA must reflect all this data, not just the portion favored by BLM.

Recommendation for the Alton LBA

The basis of the state's Conservation Plan is to increase the habitat base to mitigate the potential consequences of development in site specific areas, such as that around an active mine. The individual birds in the Alton-Sink Valley area have responded to this management approach proving that the state's Conservation Plan is working. Instead of adopting this approach, BLM is focusing on a small patch of existing habitat in one particular area. BLM's conservation focus should be on continuing to increase the habitat base within in the entire Panguitch SGMA. This SGMA has the potential for over 140,000 acres of conifer reduction to eliminate encroachment into sagebrush habitats. Based on the state's research, once an area is treated and the conifer removed, the birds will respond accordingly.

Additionally, as part of the state's longstanding commitment to sage-grouse conservation, in conjunction with the Utah Division of Wildlife Resources (UDWR) and the Color Country Adaptive Management Sage-grouse Local Working Group (CCARM) the state will identify and implement management strategies to mitigate species conservation threats. CCARM (2013) recently identified increased predation and wildfire and vegetation management as a "Very High" conservation threat. The risk level for these threats to the population has escalated since the first conservation plan was published in 2008 (CCARM 2008). The state recommends that BLM's conservation focus must include measures to address these threats by implementing habitat treatments which increase available habitat space through conifer removal, reduce fire risks through fuel breaks, enhance breeding and brood-rearing habitats through the creation of mesic areas, and entering into cooperative agreements with the UDWR and USDA Wildlife Services to implement a comprehensive predation management program to benefit sage-grouse. Once these programs are in place, the state recommends the BLM enter into a cooperative agreement with the UDWR and CCARM to evaluate the potential for the translocation of sage-grouse into the area to augment the existing population.

Unfortunately, the data referenced in the Acting State Director's August 6 decision is only a portion of the picture. The state agrees that protecting the southernmost population in the range of the species is important. However, the state's Conservation Plan also recognizes that the proposed mining activities are not a major threat to the population. The population is already limited by several factors, including the severe encroachment of conifers to the north, which encroachment was properly recognized in the recent research. The mitigation activities required as part of the mining plan for the current operation are demonstrating success in changing the habits of the existing population. In fact, it appears that the individuals have now moved lek

activities to a new site on a ridge nearby. In addition, birds have been observed on newly treated lands to the south in the GSENM, a federally protected area.

The state requests the BLM reconsider its decision, insofar as the lands within the Alton Coal LBA are concerned, and accept the state's recommendation that the lands within the LBA not be designated as priority. Instead the state recommends that the BLM place the lands into a "research zone" designation, or "other habitat" designation if necessary, and continue to review the LBA proposal within the NEPA process already underway. Adoption of the state's recommendation will continue the positive trend of fostering basic research as reasonable human activities continue. Adoption of the state's recommendation will clear a path for review of the proposed leasing in a more appropriate forum, and will allow the merits of the state's Conservation Plan to be employed for the conservation of the species at the time of mine permitting, per the recent Governor's Executive Order.

Failure to Recognize and Support State Authority Concerning Management of Wildlife

The State of Utah finds BLM's proposed review process for exemptions from the general stipulation requiring No Surface Occupancy (NSO) for fluid mineral operations within priority habitat to be inconsistent with state law.²³ BLM's proposed review process would require a unanimous vote of BLM, the state, and FWS, essentially giving FWS an unconditional veto over the state's sage-grouse management decisions.²⁴ This proposal is an unconstitutional infringement of the state's authority over a currently unlisted species, a violation of the core principles of federalism, and an unlawful delegation of BLM's authority to a different federal agency.²⁵

The state has the constitutional authority to manage the greater sage-grouse inside the state as long as the species is not listed, authority that is reiterated in Utah law.²⁶ BLM's proposal, giving the state only one of three votes in determining NSO exemptions in the species' critical habitat, is both contrary to federal law and inconsistent with state law. Congress has not given any authority to FWS to make habitat decisions for the species while it is unlisted, and for FWS to receive such authority is inconsistent with state wildlife law. The BLM's proposal is inconsistent with the state law and plans concerning greater sage-grouse, since the state has management authority over greater sage-grouse and has implemented the state's Conservation

²³ See FBIS, at p. 2-36.

²⁴ *Id.*

²⁵ For greater detail, see Protest of Proposed BLM and Forest Service Plan Amendments, Greater Sage-Grouse, State of Utah, dated June 29, 2015.

²⁶ See Utah Code § 23-13-3.

Plan and the Governor's Executive Order implementing the Plan.²⁷ The BLM's proposal should be rewritten so that it is consistent with Utah law.

In addition, BLM is bound by presidential Executive Order to follow fundamental principles of federalism, allowing states to develop unique solutions and engage in cooperative efforts with individuals and local governments in order to solve state-specific problems.²⁸ Federal agencies should be "deferential" to a state when taking actions that affect that state's policymaking discretion, using "the greatest caution" to not usurp the state's authority.²⁹ Pursuant to the provisions of the Executive Order, the BLM should defer to the state in the process of reviewing exemptions from NSO stipulations, due to the principle of federalism that the state is best uniquely suited to find a solution for a Utah-specific issue. Using "the greatest caution" on this matter will lead the BLM to amend its proposal so that FWS is not allowed to exercise authority it does not independently possess.

Finally, the BLM does not have the legal authority to unilaterally give another federal agency, the FWS, the authority to cast a deciding vote in habitat decisions for the greater sage-grouse. BLM has a duty to manage BLM land, and a large body of federal case law prevents BLM from delegating its duties to other federal agencies without clear congressional authorization. Specifically, courts have found that federal agencies may not sub-delegate decision-making authority to non-subordinate parties absent a clear showing of congressional authorization to do so, even if the agency may seek advice from outside entities.³⁰ Agencies may seek advice and recommendations from outside parties, but delegation of authority beyond the agency is impermissible.³¹ Specifically related to sage-grouse, the D.C. Circuit found that a comment by the FWS that a proposed natural gas drilling project could cause "irreversible" losses of sage-grouse habitat did not impose a duty on the BLM to prepare an FEIS to determine whether the project would cause sage-grouse to be listed under the ESA.³² Congress has not delegated authority to FWS to manage the non-listed species, either on federal or private land, and for BLM to give a veto power over NSO exemptions is a delegation of authority contrary to the federal case law stated above.

The state recommends the reasonable balance of interest requires the proposed plan amendments concerning the committee to review exemptions from NSO stipulations must be rewritten to become consistent with state wildlife law, and with case law concerning BLM authority.

²⁷ Governor's Executive Order EO/2015/002: Implementing the Utah Conservation Plan for Greater Sage-Grouse, dated February 25, 2015, available at <http://www.rules.utah.gov/execdocus/2015/ExecDoc156045.htm>.

²⁸ See Executive Order 13232, President William J. Clinton, August 4, 1999, 64 Fed. Reg. 43255.

²⁹ *Id.* at Sec 2(j).

³⁰ See *U.S. Telecom Ass'n v. FCC*, 359 F. 3d 554, 567, 78 (D.C. Cir. 2004).

³¹ *Fund for Animals v. Kempthorne*, 538 F.3d 124, 132-33 (2d Cir. 2008).

³² *Theodore Roosevelt Conservation Partnership v. Salazar*, 605 F. Supp. 2d 263, 275 (D.C. Cir. 2009).

Inconsistency with State Law School Trust Land Obligations

The state requests the National Director reconsider the decision of the Acting State Director related to land tenure adjustments involving lands owned and managed by the School and Institutional Trust Lands Administration. As stated in the Consistency Review, the United States has special responsibilities, as grantor of the trust lands, not to unreasonably interfere with or devalue the granted lands through restrictions on use or access. The state made two specific recommendations for adjustments to language, as follows (additions made in bold):

Adjust the language of MA-LAR-9 to read

Lands classified as PHMA and GHMA for GRSG will be retained in federal management unless (1) the agency can demonstrate that disposal or exchange of the lands will provide a net conservation gain to the GRSG; or (2) the agency can demonstrate that the disposal of the lands will have no direct or indirect adverse impact on conservation of the GRSG; or **(3) with respect to state trust land exchanges and selections, there will be no significant adverse impact on conservation of the GRSG, and scenic, wildlife, cultural resource, recreation or wilderness values will be enhanced.**

Adjust the language of standard GRSG-LR-LOA-ST-033 to read:

In PHMA, do not approve land ownership adjustment that would result in a net loss or degradation of GRSG habitat. Exceptions include **(1)** when there is mixed ownership and adjustments would allow for additional or more contiguous federal ownership patterns that support improved GRSG population trends or habitats; or **(2) where state trust land exchanges or selections do not have a significant adverse effect on PHMA or SFA, and other scenic, wildlife, cultural resource, recreation or wilderness values would be enhanced by the adjustment.**

The state again recommends the BLM adopt these recommended changes in order to provide clarity to the process of review of proposed land tenure adjustments (land exchanges). This adjustment in language is essential based upon discussions with BLM personnel, who have informed the state land current land tenure adjustment discussions would essentially end, should the proposed plan amendments be finalized.

Inconsistency with the State's Conservation Plan Management of Habitat Outside of Designated Priority Areas

The state requests the National Director reconsider the rejection of the state's recommendation for the management of various types and qualities of habitat outside the state's

SGMAs, and outside the BLM's proposed priority habitat. The BLM describes this proposed management as providing "additional flexibility" over priority habitat, and that this flexibility is based upon the "lower conservation values" in these areas. Again, the BLM asserts that this particular management is required by the BLM's Special Status Species Policy, its various incarnations of Sage-Grouse Strategies, and, again, by the need to "provide regulatory certainty" to the FWS.

The state's recommendation to eliminate this unnecessary habitat designation is based upon the incontrovertible set of facts presented by the authorized human activities already in play in many of these areas proposed for general habitat, or General Habitat Management Areas (GHMAs), and based upon scientific research which demonstrates the limited spatial extent of habitat supporting the populations within these areas. The intent of the BLM, to manage the areas but at a lesser standard, again, aspires to great heights, but breaks apart on the shoals of reality.

BLM's proposed provisions for GHMA might make sense if the gain for conservation of the species were large enough. However, the scientific literature is full of studies concerning the effects of energy development upon the species, and the BLM and Forest Service are proposing energy development caps as part of the proposed plan amendments in order to minimize the effect of energy upon the species. Many of the areas proposed for general habitat in eastern Utah are already developed beyond the maximum level set by any proposed cap, so the effects of development are already present and influencing the populations. Therefore, the cost of the proposed restrictions yields no commensurate conservation gain. In addition, the proposed plan amendments themselves are internally inconsistent, as referenced in the state's Consistency Review.

Yet, in spite of the internal inconsistencies and the external stressors causing reduced resilience of the resident populations, the BLM and the Forest Service are proposing to add layers of review to an already cumbersome review processes for the specific activities that have already been authorized. According to the provisions of the rejection letter, these layers of additional review, within areas slated for full development and already containing sage-grouse protection measures, will "provide certainty" to support an FWS not warranted listing decision. At its core, this proposal makes no rational sense at all.

In contrast, the state recommends that the final management provisions relate directly to the monitored response of the populations to the authorized activities in the region. This is a simple design-build philosophy that responds to actual need, and provides a backstop for population decline, if such should occur. The design-build philosophy recognizes the space limitations on the populations caused by the human activities, and provides a real-time response. This is consistent with the flexibility found within the FWS' COT Report, employs the teachings of the best available science, and utilizes best management practices and the best required design features.

The state's recommendation was to adopt the provisions of Alternative A in the areas delineated as general habitat by the BLM and Forest Service. Of particular interest to the state in this regard are the activities already authorized for energy work in the counties of Uintah, Duchesne, Carbon, eastern Emery, northern Grand, and Kane County near the town of Alton. Therefore, the state recommends the creation and implementation of an Eastern Utah Cooperative Conservation Research Zone. The habitat in this zone would be managed for research purposes, in order to further determine the effects of human activities upon sage-grouse populations.

The Research Zone would be composed of generalized state-mapped habitat areas within the counties of Uintah, Duchesne, Carbon, Emery, Grand and a small portion of Kane near Alton, which areas are not proposed for designation as priority habitat within the proposed plan amendments. The habitat would be labeled Research Zone habitat. BLM and Forest Service will re-designate the habitat in Uintah, Duchesne, Carbon, Emery and Grand Counties, and Kane County within the Alton LBA, currently labeled "General" habitat on map 2-6, as "Research Zone" habitat. BLM and Forest Service will manage the "Research Zone" habitat in these areas according to the provisions of existing RMPs and existing RODs for projects, and according to the final ROD for the Alton Coal LBA project. No additional requirements will be added, except for compensatory mitigation. Required Design Features will be adjusted or excluded in a categorical manner based upon agreed standards of science-based effects to populations used to support restrictions in priority habitat.

In this Research Zone, the state, BLM and Forest Service will monitor the populations of sage-grouse, and meet as often as needed to discuss population trends and challenges. The state will sponsor research on the populations in the area, in order to further understand the effects of development upon the species. In addition, the state will augment the Research Zone populations as needed from Diamond Mountain in order to maintain the eastern Utah populations. The Diamond Mountain populations are genetically close to the eastern Utah populations. In addition, Objective MIN-1 would be modified to remove the reference to GHMA.

The state's recommendation provides for a reasonable balance of interests, and focuses conservation of the species in the proposed Research Zones upon activities which can positively affect conservation of the species, and upon further scientific research. If population trends decline over time, the population will be stabilized. This provides the certainty the FWS needs to assure survival of the population, without all of the endless reviews contemplated by the proposed plan amendments.

**Resolution of an Inconsistency with State SGMAs
The Elimination of Sagebrush Focal Areas**

The state respectfully asks that the National Director reconsider the creation of Sagebrush Focal Areas (SFAs), and further to reconsider the recommendation to withdraw these areas from the application of the federal mining law, make these areas the focal point for a review of grazing, and eliminate the possibility of a waiver or exemption from the general principle of no surface occupancy for fluid mineral operations in these areas. The state again incorporates by reference the reasons and information provided in the July 29 Consistency Review in support of this request.

The creation of SFAs is unnecessary, and an unwarranted solution to a problem which does not exist. The creation of these areas is directly inconsistent with the state's Conservation Plan, which provides protection for 94% of the birds in Utah within eleven SGMAs. The PACs contained in the COT Report are based upon the state's SGMAs. Yet the BLM and the Forest Service are ignoring the state's all-lands approach in favor of the creation of no-activity zones which fundamentally do absolutely nothing to resolve the actual threats to the species in Utah, or the region.

The creation of these areas, in addition to the violations of NEPA mentioned in the state's Protest Letter, also violates the process necessary to create Areas of Critical Environmental Concern (ACECs) pursuant to FLPMA and BLM regulations, and Zoological Zones pursuant to NFMA and Forest Service regulations. The creation of these areas also violates the restrictions of the ability of the BLM or the Forest Service to create wilderness without the approval of Congress. The Acting Director's rejection letter indicates that claims such as this, that is, violations of federal law, are not an appropriate topic for a Consistency Review, because the claim does not allege an inconsistency with state law, a state plan, or state policies.

The creation of the SFAs is inconsistent with the state's Conservation Plan, and the violation of federal law aids and abets this inconsistency. The inconsistency of the SFAs is a product of its toxic processes. Therefore, the process is inconsistent with the state's Conservation Plan, other state law such as the constitutional duty of the state to manage wildlife, and the state's position within a healthy system of federalism and federal/state relations.

The state specifically recommends the BLM and the Forest Service manage all the areas identified for inclusion in the new and unnecessary concept of SFAs be designated as priority habitat instead, and be included within the proposed Priority Habitat Management Areas. This will achieve consistency with the state's Conservation Plan and state law, and restore balance to state/federal relations in the management of the public lands.


Conclusion

The state appreciates the opportunity to file this Request for Reconsideration and Appeal concerning the rejection of the recommendations made by the state concerning the proposed plan amendments for the benefit of the greater sage-grouse. The state has provided rationale and

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information related to each and every inconsistency between the proposed plan amendments and the state's conservation and state law. Additionally, the state has provided recommendations to resolve these inconsistencies, and demonstrated why the state's recommendation provides the proper balance of interest between the conservation of sage-grouse and the other uses of the public lands. We respectfully request you adopt the state's recommendations as provided for by the above BLM regulation.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary R. Herbert". The signature is written in a cursive style with a long horizontal stroke at the end.

Gary R. Herbert
Governor