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EMS TRANSMISSION 02/06/2009
Instruction Memorandum No. NV-2009-030
Expires: 9/30/2010

To: District Managers, Nevada
From: Acting State Director, Nevada
Subject: Supplemental Authorities to Consider in National Environmental Policy Act (NEPA) Documents.

Program Area: National Environmental Policy Act (NEPA) and Land Use Planning

Purpose: This purpose of this Instruction Memorandum is to clarify how supplemental authorities outlined in BLM Handbook H-1790-1 should be considered in BLM Nevada NEPA documents.

Outcome: Statewide consistency in applying supplemental authorities to BLM Nevada NEPA analyses and supporting conclusions.

Background: The revised NEPA Handbook H-1790-1 (January 2008) removed the standard list of "Critical Elements of the Human Environment" to be considered in all NEPA analyses (H-1790-1 Appendix 5, October 1988). The standard critical element list is now replaced with "Supplemental Authorities To Be Considered" (H-1790-1 Appendix 1, January 2008).

The supplemental authorities provided in Appendix 1 are an incomplete list based on the prior Critical Element list and omit important authorities previously identified, such as Executive Order 13112 on Invasive Species. Appendix 1 also includes authorities that do not necessarily require mandatory consideration under NEPA, such as the Healthy Forest Restoration Act of 2003, which outlines how the NEPA process will be conducted for specific types of projects related to fuels reduction and forest health improvement. As a result, there have been questions raised over what supplemental authorities apply to BLM Nevada NEPA documents and how they should be used.

In addition, the new guidance states: “There is no need to make negative declarations regarding resources described in supplemental authorities that are not relevant to your proposal at hand” (H-1790-1, Section 6.4.1 p. 41). The BLM Handbook, however, does not specifically prohibit providing negative declarations in BLM NEPA documents. Through experience in managing appeals and litigation, BLM as an agency has often found it useful to include negative declarations in its NEPA documents to validate the “hard look” standard the courts require and to provide documentation of compliance with the intent of the relevant statute, regulation, or executive order.

In some cases, negative declarations are required as the result of other written guidance, for example, Environmental Justice (EJ). In this case, the Council on Environmental Quality’s (CEQ) Environmental Justice Guidance under the National Environmental Policy Act (1997) and similar guidance from the EPA (1998) specifically provide for mandatory consideration of EJ as a critical element. These requirements include discussion of EJ issues in the record of decision as well as documenting no issues or concerns as a negative declaration in the decision document. These policy considerations are not superseded by the revised NEPA handbook. Thus, the guidance in H-1790-1 Section 6.4.1 to not make negative declarations needs to be considered in context with other agency requirements.

Policy/Action: On October 15, 2008, the Department of The Interior published its regulations (43 CFR 46) on Implementation of the National Environmental Policy Act of 1969. Under part 46.310 Contents of an Environmental Assessment, paragraph (f) states: “Bureaus may choose to provide additional detail and depth of analysis as appropriate in those environmental assessments prepared under paragraph 46.300 (b)”. Paragraph (g) states: “An environmental assessment must contain objective analyses that support conclusions concerning environmental impacts”.

In order to maintain a high standard of defensibility of BLM Nevada NEPA documents and to clarify whether or not a certain supplemental authority was considered in an analysis, BLM Nevada will continue to follow the practice and policy to provide negative declarations as necessary and appropriate to support its analytic conclusions in compliance with 43 CFR 46.310(f) and (g). The use of the Nevada Supplemental Authority List (Attachment 1) as a screening tool for inclusion in NEPA documents is encouraged to ensure all relevant authorities identified therein are appropriately screened and documented for the NEPA analysis. Since the list is somewhat dynamic and subject to change based on Congressional, Administrative or agency action, preparers of NEPA documents are encouraged to identify other relevant supplemental authorities through scoping and consultation with the Nevada State Office for appropriateness to address in a particular NEPA analysis. Attachment 2 contains a recommended sample EA screening format for inclusion into District EA documents.

Timeframe: Effective immediately.

Budget Impact: None

Manual/Handbook Sections Affected: Clarifies H-1790-1 Section 6.4.1 and Appendix 1.

Coordination: This IM has been coordinated with the Division of Natural Resources, Lands and Planning and Nevada District Offices.

Contact: If there are any questions regarding this guidance, please do not hesitate to contact Brian C. Amme, Nevada State Office Planning and Environmental Coordinator at (775) 861-6645, or via email at Brian_Amme@blm.gov

Signed By:
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2 attachments

- 1 – Nevada Supplemental Authority List (2pp)
- 1 – Sample EA format (2pp)