



United States Department of the Interior



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In Reply Refer To:
1610 (MT930)

August 6, 2015

The Honorable Dennis Daugaard
Governor of South Dakota
Office of the Governor
500 East Capitol Avenue
Pierre, SD 57501-5070

Dear Governor Daugaard:

This is in response to your letter dated July 29, 2015, which provided your consistency review of the South Dakota Proposed Resource Management Plan (PRMP). The Governor's consistency review is an important part of the BLM's land use planning process. Partnership between the State and the BLM is an integral part of successful land management. Our partnership is particularly important as we work to address the threats to Greater Sage-Grouse (GRSG) and its habitat to potentially avoid a determination by the Fish and Wildlife Service (FWS) that the species is warranted for listing under the Endangered Species Act (ESA). We greatly appreciate the time and attention of you and your staff on this important effort.

The South Dakota PRMP is part of an unprecedented and proactive partnership to conserve GRSG and its habitat by incorporating conservation measures in the land use plans. The land use plans also reflect guidance developed by the BLM to incorporate FWS feedback on the draft plans. The plans were developed in coordination with a range of stakeholders and cooperators, including state fish and wildlife agencies and Western Governors Association Sage-Grouse Task Force. We especially appreciate the time and effort the South Dakota state agencies and other cooperators have spent working so closely with the BLM in the development of this plan.

The purpose of the GRSG plans and plan amendments is to identify and incorporate conservation measures to conserve, enhance and restore GRSG habitat by reducing, minimizing, or eliminating threats to that habitat in a manner that provides sufficient regulatory certainty to the FWS to support a finding that Endangered Species protection is not warranted. The plans were developed in collaboration with state officials to reflect local ecological conditions and resource needs by incorporating many measures recommended by the State. In order to provide a high degree of certainty for regulatory mechanisms, the BLM has included some common elements across the range to address specific threats to the bird and to provide for a net conservation gain GRSG and its habitat to reduce the need to list the species under the Endangered Species Act. The plans allow for state-based variations where difference approaches or priorities were consistent with the overall conservation objectives, and can continue to provide adequate regulatory certainty.

The BLM is able to address some of the concerns outlined in your letter either through a change or a commitment to clarify our intent, particularly with regard to habitat map updates. The BLM looks forward to continued collaboration with the state. The standard for review and the specific responses to issues raised is found below.

Statutory and Regulatory Framework for Consistency Review

In considering your recommendations, we are guided by the BLM's planning regulations in 43 C.F.R. §1610.3-2. These regulations implement Section 202 (c)(9) of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. § 1712(c)(9), which states in part:

“In the development and revision of land use plans, the Secretary shall...to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located, including, but not limited to, the statewide outdoor recreation plans developed under the Act of September 3, 1964 (78 Stat. 897), as amended [16 U.S.C. 4601-4 et seq. note], and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; 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. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. 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 regulations state that RMPs and amendments to RMPs “shall be consistent with officially approved or adopted resource related plans, and the policies and programs contained therein” of State and local governments and Indian Tribes “so long as the guidance and resource management plans [of the State and local government and Tribe] are also consistent with the purposes, policies, and programs of Federal laws and regulations applicable to public lands...” 43 C.F.R. §1610.3-2(a). In the absence of such plans, RMPs and amendments shall “be consistent with officially approved and adopted resource related policies and programs” to the maximum extent possible and “so long as the guidance and resource management plans are consistent with the policies, programs, and provisions of Federal laws and regulations applicable to public lands...” 43 C.F.R. §1610.3-2(b).

The BLM PRMP and the *Sage-Grouse Management Plan for South Dakota* are complementary plans (of course the State Plan addresses items specific to the state's jurisdiction). However, the BLM has determined that some of the State's recommendations would not be consistent with the purposes, policies, and programs of federal laws applicable to public lands. Specifically, FLPMA generally requires the BLM to manage public lands for multiple-use and sustained yield, taking into account the long-term needs of future generations for renewable and non-renewable resources -- including fish and wildlife -- and to seek achievement and maintenance in perpetuity of renewable resources. 43 U.S.C. 1732(a); 1702(c), (h); 1701(a)(8). The BLM's Special Status Species Manual sets forth BLM policy with respect to FLPMA's consideration of wildlife and fish and renewable resources. In particular, the objectives of the special status species policy are: A) to conserve and/or recover ESA-listed species and the ecosystems on which they depend so that ESA protections are no longer needed for these species; and B) to initiate proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of these species under the ESA. Manual No. 6840, Section .02(A)(B). Further policy is found in BLM's IM No. 2012-044 (December 27, 2011), which initiated the "BLM National Greater Sage-Grouse Land Use Planning Strategy" and provided guidance and direction for the agency's consideration of GRSG conservation measures. The IM and the planning strategy were initiated in response to the FWS' March 2010 decision finding, in part, that existing regulatory mechanisms found in the BLM's LUPs were inadequate to protect the species. The IM states that "the BLM needs to incorporate explicit objectives and desired habitat conditions, management actions, and area-wide use restrictions into land use plans" in order to "conserve sage-grouse and its habitat and potentially avoid an ESA listing." IM No. 2012-044. In addition, the Approved RMP will be consistent with the BLM's 2004 National Sage-Grouse Habitat Conservation Strategy which calls for managing public lands in a manner that will maintain, enhance and restore sage-grouse and sagebrush habitats while continuing to provide for multiple uses of lands under BLM stewardship.

In accordance with FLPMA's direction to manage the public lands pursuant to principles of multiple use and sustained yield and the policy direction set forth in IM No. 2012-044 and the BLM's 2004 National Sage-Grouse Habitat Conservation Strategy, in addition to the BLM's Special Status Species Manual, the BLM's purpose for this planning effort is to identify and incorporate appropriate conservation measures in LUPs to conserve, enhance and/or restore GRSG habitat by reducing, eliminating, or minimizing threats to that habitat. The goal of the BLM's GRSG conservation strategy rangewide is to provide for the conservation of the GRSG and its habitat and to provide the FWS with regulatory certainty that in turn will potentially preclude a determination that the species is warranted for listing.¹ To the extent a particular recommendation is inconsistent with that goal or the policies identified above, the BLM has respectfully declined to adopt it. See 43 U.S.C. 1712(a)(9); 43 U.S.C. 1610.3-2.

To ensure that we have fully responded to your concerns, the issues you identified in your consistency review are listed below, and are followed by the BLM's response. Please note that

¹ Notably, the chairs of the Sage Grouse Task Force recognized this goal in 2011 by making a commitment to develop an action plan that "prescribes near-term conservation measures, that when added to the body of past and current efforts would ensure a viable sage-grouse population in the West and preclude the listing of the species." (Mead, Hickenlooper, and Pool Letter, June 2011)

the BLM generally only responded to issues that you identified as being inconsistent with your State's plan, and also responded to issues of disagreement your letter raised with portions of the PRMP/FEIS.

Issue: Not Consistent with South Dakota Codified Law (SDCL) 45-9-1

Governor's Concern and/or Recommendation: SDCL 45-9-1 directs for the development of oil and gas resources of the state. Approximately 30 percent of South Dakota's existing natural gas patch is comprised of federal property within Priority Habitat Management Areas (PHMAs). The Draft EIS has waivers, exceptions, and modifications to the NSO provisions in PHMAs; however, the PRMP only has exceptions. Unless the RMP includes reasonable WEMs, future development will be greatly curtailed, creating significant economic impacts at the local and state level; the no "direct, indirect, or cumulative effects on GRSG or its habitat" is an ominous standard. Also, the Reasonable Foreseeable Development (RFD) figures are outdated and not based on accurate production field boundaries and, therefore, are not appropriate in assessing the economic and social impacts of the sage-grouse protections.

BLM Response: The BLM respectfully declines to adopt the recommendations offered to address these concerns because they are not consistent with the purposes, policies, and programs of federal laws and regulations applicable to public lands for the following reasons. The BLM's legal obligation is to consider all resources and provide for the orderly development of resources in balance with protecting resources. Regarding the NSO stipulation and the discussion about waivers and modifications in PHMAs, the BLM has determined that the State's recommendations would not be consistent with the BLM's Sage-Grouse Strategy, Special Status Species Policy, and the need to provide regulatory certainty for the conservation of the GRSG and its habitat so as to potentially reduce the need to list the species.

The FEIS describes the impacts on mineral development in areas designated as PHMAs. It is important to note that these areas were established based on coordination between BLM and South Dakota Game, Fish and Parks. We carefully considered the potential impacts during the RMP planning and NEPA processes and evaluated various alternatives ranging from closed to NSO in PHMAs. Based on that analysis, we determined that allowing limited exceptions and no modifications and waivers in PHMA would best balance the protection of GRSG habitat and the need for regulatory certainty with regards to the development of oil and gas resources.

Your concern regarding the direct, indirect, or cumulative standard does not identify an inconsistency with State or local resource related plans, policies, or programs.

Based on comments received from the State of South Dakota, the BLM did review the Reasonable Foreseeable Development Scenario for Oil and Gas Activities on Bureau managed lands in the South Dakota Study Area (RFD; BLM, 2009). The report was reviewed by the Wyoming Reservoir Management Group, which included BLM technical experts in the fields of petroleum engineering and geology. In addition to reviewing information provided by the State of South Dakota, the reviewers considered additional data on drilling that has occurred in the first 4 years and 10 months of the analysis period for the 2009 RFD.

The review of 2009 RFD and the information provided by the State of South Dakota determined that the current drilling rate does not support the projections offered by the State of South

Dakota. Additionally, the reviewers determined that the 2009 RFD adequately accounted for variables such as increased gas prices. While the RFD is not able to accurately predict the exact locations of future wells, the reviewers determined that in aggregate, it still provides the best available information with regard to overall potential development.

Thus, the BLM respectfully declines to adopt this recommendation because it either did not identify an inconsistency, or 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.

Issue: BLM Does Not Clearly State Actions for Secretarial Order 3336

Governor's Concern and/or Recommendation: The PRMP did not identify how the BLM would follow Secretarial Order 3336 for protecting sage-grouse habitat from wildfire. Existing fire resources may be spread too thin to adequately suppress fires on BLM land in core areas outside of Harding County. The BLM needs to increase staffing levels in South Dakota, and especially provide for suppression activities in Butte County.

BLM Response: This concern/recommendation does not identify an inconsistency with a state or local plan, policy, or program and is thus not properly the subject of the consistency review under 43 C.F.R. 1619.3-2. Moreover, while the PRMP has many action items identified for fire and fuels management in the South Dakota Field Office, land use plans do not get into the specifics of staffing and funding each program. After a Record of Decision is signed, the field office will develop a detailed implementation plan which will prioritize implementation of the RMP decisions as well as focus and support future funding and staffing requests.

The BLM is committed to working with the State of South Dakota and local agencies on protecting sage-grouse habitat from wildfire. The South Dakota Field Office will continue to work closely with local Volunteer Fire Departments, the State, and other Federal agencies to ensure that fire suppression is effectively carried out on BLM administered land in South Dakota. We have added language that you recommended in the Approved RMP explaining that the Miles City Field Office also provides suppression for the Forest Service lands in Harding County. The BLM Eastern Montana/Dakotas District will consider establishing a fire engine and crew in South Dakota if needed and funding increases to a level that can be supported over the long term; again, this would be addressed during the implementation stage.

Issue: Concern Regarding Future Collaboration

Governor's Concern and/or Recommendation: South Dakota would like to continue collaboration with the BLM to use the most up-to-date sage-grouse data, and the concern is that future BLM plans may not have this same level of collaboration. For instance, the State's core area is subject to change as additional data are acquired (e.g., a 2-year research project beginning in 2015 may provide data useful in refining core areas).

BLM Response: This issue does not identify an inconsistency between the BLM actions and State or local resource related plans, policies, or programs. However, BLM is committed to continuing to work with the State of South Dakota during the implementation of the RMP.

As new information becomes available about GRSG habitat, the BLM, in coordination with the state wildlife agency and FWS, and based on best available scientific information, may revise the GRSG habitat management area maps and associated management decisions through plan maintenance or plan amendment, as appropriate and depending on the level of change. The BLM is committed to taking any changes in habitat maps into consideration when it makes future decisions in the planning area (e.g., where criteria for NSO exceptions may be met, determining appropriate RDFs/BMPs).

However, in order to change the allocations and other management decisions associated with the current habitat maps, the BLM must make a determination, under BLM planning regulations and implementing guidance, as to what procedure is required to implement that change. The BLM cannot make that judgment until it is presented with the facts of a particular mapping change and it cannot modify its regulations governing that determination as part of this planning process.

Please note that you have the opportunity to appeal this response to the Director of the BLM pursuant to 43 CFR 1610.3-2(e). Such an appeal must be filed within 30 days of your receipt of this letter, by September 8, 2015. Please submit appeals to:

BLM Washington Office
Attention: Director of the BLM
1849 C Street NW, Rm. 5665
Washington DC 20240

Thank you for your thorough, comprehensive and thoughtful consistency review. I also appreciate the hard work your staff and the various state agencies and local governments have contributed to the consistency review and BLM's Sage-Grouse Planning Strategy. I look forward to continuing a productive and collaborative working relationship as we move forward.

If you or your staff has any questions, please contact Ruth Miller at (406) 896-5023.

Sincerely,



Jamie E. Connell
State Director