



United States Department of the Interior



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In Reply Refer To:
1610 (MT930)

August 6, 2015

The Honorable Jack Dalrymple
Governor of North Dakota
Office of the Governor
600 East Boulevard Avenue
Bismarck, ND 58505-0001

Dear Governor Dalrymple:

This is in response to your letter dated July 28, 2015, which provided your consistency review of the North Dakota Proposed Resource Management Plan Amendment (PRMP Amendment). 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 hopefully 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 North Dakota PRMP Amendment 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 appreciate the time and effort our North Dakota cooperating agencies have spent working with us in development of this plan; and, we would especially like to thank the North Dakota Game and Fish (NDGF) for all their assistance with this planning effort to conserve GRSG in North Dakota.

The purpose of the GRSG plans 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. 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 different 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 and

mitigation. 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 (FLPMA) of 1976, 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 purpose, 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 Amendment and the *Management Plan and Conservation Strategies for Greater Sage-Grouse in North Dakota* have many similar key aspects (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 2012-044.) In addition, the Approved RMP Amendment 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

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)

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 the BLM 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 Proposed LUPA/FEIS.

Issue: Multiple Use Balance

Governor's Concern and/or Recommendation: RMP does not appear to achieve a balance and must include information on all types of land use. Monitoring of all land uses should occur, not just a separate process for energy and mining.

BLM Response: This issue does not identify an inconsistency between the BLM actions and State or local resource related plans, policies, or programs. This RMP Amendment is specific to Greater Sage-Grouse and based on the planning effort's narrow purpose and need to identify and incorporate conservation measures to conserve, enhance and restore GSRG habitat only addresses activities and/or programs that have the potential to impact GSRG (based on the threats in the USFWS listing and the Conservation Objective Team (COT) report). However, other programs/uses are covered in the existing North Dakota RMP (1988) and this RMP Amendment does not alter these other land use decisions. Monitoring does occur for all programs with BLM's RMPs; for instance, there is an extensive monitoring plan with this RMP Amendment in Appendix F which details the monitoring requirements for much more than oil and gas (population monitoring and habitat monitoring for all disturbance no matter what the source – natural and human caused).

Issue: Well Drilling Technology

Governor's Concern and/or Recommendation: The North Dakota plan is based on well pads per square mile rather than wells per mile – this does not account for newer technologies (i.e., horizontal drilling).

BLM Response: There is no inconsistency between the BLM actions and State or local resource related plans, policies, or programs. In southwestern North Dakota, the reasonably foreseeable development scenario (RFD) for oil and gas development used one well per pad because this has been the predominate drilling method for the area (the Red River play area) unlike the Bakken and the Three Forks play areas further north. The difference between well densities in all the alternatives is minimal because much of the PHMA is already leased and much of it is in production. Table 4-6 in the Proposed RMPA/Final EIS displays well densities among the draft alternatives and Proposed Plan Amendment.

Issue: Case-by-Case Analysis

Governor's Concern and/or Recommendation: Restrictions that are implemented need to take place on a case-by-case basis. Habitat designations are broad and need to take into account state-specific mapping data and ground-truthing. One-size-fits-all approach ignores techniques developed and effectively used by NDGF.

BLM Response: The recommendation relates to provisions of FLPMA and the National Environmental Policy Act (NEPA), and does not address any potential inconsistencies with State or local resource related plans, policies or programs. However, the BLM NEPA Handbook directs the BLM to “use the best available science to support NEPA analyses, and give greater consideration to peer-reviewed science and methodology over that which is not peer-reviewed” (BLM Handbook H-1790-1, p. 55). Under the BLM’s guidelines for implementing the Information Quality Act, the BLM applies the principle of using the “best available” data in making its decisions (BLM Information Quality Act Guidelines, February 9, 2012).

In light of the BLM’s Sage-Grouse Strategy, its Special Status Species Policy, and its goal to provide regulatory certainty for the conservation of the GRSG and its habitat to potentially reduce the need to list the species, the BLM finds it is prudent to provide the certainty that management actions will occur in the identified habitat management areas for GRSG; therefore, many aspects of this plan are not deferred to a later ‘case-by-case’ decision. Case-by-case flexibility is inconsistent with the purposes, policies, and programs of federal laws applicable to public lands noted above and, therefore, the BLM respectfully declines to adopt this recommendation.

The Priority Habitat Management Areas (PHMAs) and General Habitat Management Areas (GHMA) were mapped by NDGF and BLM in cooperation. The areas were based on information from NDGF. As new information becomes available about GRSG habitat, the BLM, in coordination with NDGF 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.

Issue: Net Conservation Gain violates FLPMA

Governor’s Concern and/or Recommendation: The BLM should remove the requirement that mitigation produce ‘a net conservation gain’. This was not addressed in the DEIS and violates FLPMA. BLM may only condition land uses to avoid ‘unnecessary or undue degradation’ to the public lands - 43 U.S.C. 1732(b).

BLM Response: The net conservation gain strategy is in response to the overall landscape-scale goal which is to enhance, conserve, and restore GRSG and its habitat. This goal is also consistent with 2006 Western Association of Fish and Wildlife Agencies Greater Sage-Grouse Comprehensive Strategy’s objective to maintain and increase where possible the present distribution and abundance of GRSG.

Consistent with the PRMP Amendment’s goal, the intent of the North Dakota RMP Amendment/EIS is to provide a net conservation gain to the species. To do so, consistent with valid existing rights and applicable law, in authorizing third party actions that result in habitat loss and degradation, the BLM will require and ensure mitigation that provides a net conservation gain to the species including accounting for any uncertainty associated with the effectiveness of such mitigation. This will be achieved by avoiding, minimizing, and compensating for impacts by applying beneficial mitigation actions.

This standard is consistent with the recommendation included in the Greater Sage-Grouse Range-wide Mitigation Framework: Version 1.0 published by the FWS in September 2014,

which states that mitigation “be strategically designed to result in net overall positive outcomes for sage-grouse.” It is also consistent with BLM Manual 6840 – Special Status Species Management, Section .02B, which states “to initiate proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of the need for listing of these species under the ESA.”

Mitigation will follow the regulations from the White House Council on Environmental Quality (CEQ) (40 CFR 1508.20; e.g., avoid, minimize, and compensate), hereafter referred to as the mitigation hierarchy.

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

Issue: Tall Structures

Governor’s Concern and/or Recommendation: Tall structures are not defined and open to interpretation; potential concerns about oil and gas equipment near wells.

BLM Response: The BLM respectfully declines to adopt this recommendation because there is no identified inconsistency between the BLM PRMP Amendment and State or local resource related plans, policies, or programs. The specific wording for tall structures in the PRMP Amendment (which would apply to Conditions of Approval (COAs) for existing leases) is: “Placement of other high profile structures, exceeding 10 feet in height, would be eliminated, designed or sited in a manner which does not impact GRSG.” Appendix B also contains a design feature for tall structures that would apply to new leases, and it states: “restrict the construction of tall facilities and fences to the minimum number and amount needed.” The language of both of these (COAs and RDFs) does not suggest that structures cannot be built that are needed for the development of valid existing rights; however, it may require additional design and/or mitigation to not impact sage-grouse.

Issue: Public Opportunity to Comment on New Features

Governor’s Concern: BLM has not afforded the public a meaningful opportunity to comment on new additions to Proposed RMP Amendment. Various stakeholders reported BLM did not acknowledge a portion of the public comments or say why they did not warrant further response.

BLM Response: The BLM respectfully declines to adopt this recommendation because there is no identified inconsistency between the BLM actions and State or local resource related plans, policies, or programs. The BLM provided full opportunity for public comment and involvement in accordance with applicable law and regulations, including the BLM’s planning regulations. Please refer to Chapter 6 of the Proposed LUPA/FEIS, which fully describes the consultation and coordination process that was undertaken as part of this planning effort.

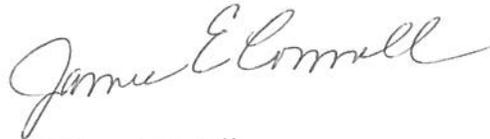
Please note that you have the opportunity to appeal this response to the Director of the BLM pursuant to 43 CFR 1610.3-2(e). Such an appeal must be filed within 30 days of your receipt of this letter, by September 8, 2015. Please submit appeals to:

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

Thank you for your continued interest and participation in the North Dakota Greater Sage-Grouse planning effort. We look forward to meeting with you regarding your concerns and our responses.

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

Sincerely,

A handwritten signature in cursive script that reads "Jamie E. Connell". The signature is written in black ink and is positioned above the printed name and title.

Jamie E. Connell
State Director