

OFFICE OF THE GOVERNOR
STATE OF MONTANA

STEVE BULLOCK
GOVERNOR



ANGELA McLEAN
LT. GOVERNOR

July 29, 2015

Jamie Connell
State Director
Bureau of Land Management
5001 Southgate Drive
Billings, Montana 59101

Dear Director Connell:

Please consider these comments as the Governor's Consistency Review of the Bureau of Land Management's (BLM) five resource management plans that cover BLM lands in Montana (Montana RMPs), as they pertain to ongoing sage grouse conservation efforts. I appreciate the opportunity to comment and look forward to working with you to help identify and resolve plan inconsistencies for the purpose of conserving sage grouse and their habitat.

I appreciate the difficult task you have before you. Creating a comprehensive plan for the management of sage grouse and sage grouse habitat is a daunting challenge for both the BLM and the State of Montana. The depth and scope of the proposed sage grouse plans in the Montana RMPs reflect the tremendous effort your agency is devoting to our common efforts to avoid the need for listing of the sage grouse as an endangered species by the U.S. Fish and Wildlife Service (USFWS). I thank you for all the hard work you are doing on this difficult issue.

Given our recent cooperative efforts with BLM and the USFWS however, I am disappointed by the many proposed differences between BLM's Montana RMPs and the Montana Sage Grouse Habitat Conservation Program. Our Montana Program very closely tracks the Wyoming State Greater Sage Grouse Core Area Strategy, which was recommended to me by the BLM in January 2013. The differences between the Wyoming and Montana state plans and the Montana RMPs reflect inconsistencies that simply do not make sense when striving for a consistent approach to sage grouse conservation across significant and interconnected working landscapes.

Background

As you know, the State of Montana has undertaken significant efforts to establish a comprehensive sage grouse conservation program. These efforts started with development and implementation of conservation strategies identified in the Management Plan and Conservation Strategies for Sage Grouse in Montana (2005). That plan was the result of work completed by the Montana Sage Grouse Working Group. Local sage grouse working groups were formed and have been operational in Glasgow, Winnett, Miles City and Dillon. Montana has a 10-year history of working on this important conservation issue.

In April 2013, I created a citizen-based sage grouse advisory council and asked them to formulate recommendations on policies and actions for a state-wide strategy to preclude listing of sage grouse under the Endangered Species Act. The BLM and USFWS attended most of the advisory council's meetings. Through these efforts the State of Montana devoted a great deal of effort in designing a management plan for the protection of sage grouse and their habitat. The result was Montana Executive Order No. 10-2014, which created the Montana Sage Grouse Oversight Team, the Montana Sage Grouse Habitat Conservation Program, and the accompanying management plan. To further emphasize Montana's progress and commitment to sage grouse conservation, we were successful in passing the Montana Sage Grouse Protection Act during the 2015 legislative session. This act ensures that critical funding and support are available for necessary sage grouse conservation efforts in the future. This commitment is more than words: in addition to funding for staff resources, there is also a revolving conservation fund with an initial balance of \$10 million from the State of Montana. Montana's Sage Grouse Conservation Program will be fully operational as a regulatory mechanism no later than January 1, 2016.

Governor's Consistency Review

1. The BLM plans are inconsistent with the Governor's "working landscapes" approach to protecting Sage Grouse.

The Montana Executive Order is intended to closely track the Wyoming State Greater Sage Grouse Core Area Strategy (Wyoming State Strategy). The Wyoming State Strategy and Montana Executive Order focus on working landscapes, where sage grouse and people coexist in a manner that not only protects sage grouse, but also protects the way of life for the people who live in sage grouse country. The success of sage grouse conservation is dependent upon implementation of conservation strategies on private and state land. In Montana private, state and federal lands exist in a checkerboard pattern where land use activities are dependent on access to all lands regardless of ownership. The Montana Executive Order is built specifically upon the premise that all lands would remain working lands sharing in common standards for sage grouse conservation. The Wyoming State Strategy has received interim approval from the

USFWS, and the BLM plans in Wyoming are generally “built upon” and “complementary to” the Wyoming Greater Sage Grouse Core Area Strategy (Wyoming GRSG Proposed LUPA/Final EIS, ES-12). It makes sense for Montana to model its program after the Wyoming State Strategy because: 1) the bulk of the Montana areas at issue are in the same management zone as critical areas in Wyoming (Management Zone 1); 2) the landscapes and threats are similar across those areas; and 3) both states maintain significant grouse populations within Management Zone 1.

The Montana Executive Order reflects and shares a common sage grouse strategy with the State of Wyoming and the Wyoming BLM. Yet the BLM in Montana has chosen a very different path. The Montana RMPs not only conflict with the Montana Executive Order and the Wyoming Strategy, but also conflict with the BLM plans just issued in Wyoming. The Montana RMPs, in certain aspects, are far more restrictive than the Montana Executive Order, and by extension, are more restrictive than the provisions contained in the Wyoming State Strategy and BLM plans.

In the Conservation Objectives Team Report (COT Report), cited by the BLM in the Montana RMPs as justification for its decisions, key Montana sage grouse populations at issue within Priority Conservation Areas (PAC) are described as being “at low risk” (Northern Montana PAC), “only potentially at risk” (Yellowstone Watershed PAC), or “at a low level of risk” (Southwest Montana PAC). Only the very small Montana area in the Powder River Basin (a shared area and population with Wyoming) and a very small population in the Belt Mountains are described as “at risk populations.” Given these predominantly low risk classifications, it makes no sense that the BLM would now assert that somehow the COT Report justifies additional restrictive measures beyond those contained in the Montana Executive Order.

A. The RMP blanket No Surface Occupancy (NSO) requirement in Priority Habitat Management Areas (PHMAs) is inconsistent with the Montana Executive Order.

The Montana Executive Order allows oil and gas development within core habitat, but only within specific density and disturbance limits (using the Wyoming DDCT project area evaluation). The Montana Executive Order is consistent with the Wyoming Strategy and BLM Plans. In contrast, the Montana RMPs apply the DDCT analysis to disturbances from some mineral activities, but impose a blanket NSO restriction on all new oil and gas leasing. The BLM NSO restriction in PHMAs does include a narrow exception for oil and gas leases, but the circumstances that would qualify for an exception are too narrow and as written, would rarely be used. While there is some inherent flexibility in locating surface infrastructure on most landscapes, some above-ground structures are a necessity for oil and gas exploration and production operations to take place. The Montana RMP’s NSO restriction is an unreasonable and unnecessary blanket prohibition on the leasing and development of oil and gas resources on federal lands in Montana PHMAs.

This restriction will create confusion and inefficiencies for operations conducted in Montana, and may have a major impact on the ability of the state to develop oil and gas

on its school trust lands. The federal government holds significant mineral ownership in the PHMAs in eastern Montana, and in many areas state and private ownership is interspersed with federal tracts. If oil and gas wells and infrastructure cannot be located on federal ownership in a PHMA, then in many areas, leasing and development of state and private oil and gas ownership may also not be possible, even if the proposed activity complies with the Montana Executive Order. Implementation of this restriction is in direct conflict with our stated objective to maintain a working Montana landscape and BLM's stated goal to balance conservation and development.

Request: *Remove NSO restrictions in Priority Habitat Management Areas as currently incorporated in the Draft Montana RMPs and adopt the requirements from the Montana Executive Order, which are consistent with those in Wyoming. Also include clear provisions for site-specific ground-truthing of habitat areas on a project-specific basis consistent with the Montana Executive Order, in order to allow for implementation of customized and adaptable measures at the project level to address local needs and site-specific conditions.*

B. The Sagebrush Focal Area (SFA) is inconsistent with the Montana Executive Order.

The Montana Executive Order uses habitat maps developed by Montana Department of Fish, Wildlife and Parks, and the BLM participated in their initial development. As a result, state Core Areas and BLM PHMAs largely encompass the same habitat areas. However, the SFA creates a new habitat classification, with acreage taken from what was PHMA habitat. The sagebrush focal area concept was apparently first introduced in a memo from the U.S. Fish and Wildlife Service calling for inclusion in the BLM Plans with little consideration or regard for consistency with the Montana Executive Order (Memo from Dan Ashe, Director USFWS, to Director, Bureau of Land Management and Chief, U.S. Forest Service, October 27, 2014). The current management for PHMAs and the SFA differs in two key respects: 1) the oil and gas blanket NSO is not subject to exceptions within the SFA, and 2) within the SFA the BLM proposes a blanket mineral withdrawal. The acreage placed in SFA status in Montana is substantial at approximately 980,400 acres. This represents 59% of the original 1,666,200-acre land area within PHMAs. The State and BLM's future efforts for management consistency within PHMA and Core Areas are compromised when the BLM removes 59% of a planning area PHMA and establishes a nearly 1-million-acre area with differing management requirements.

The proposed mineral withdrawal is perplexing, given that a similarly-proposed mineral withdrawal in Wyoming has been significantly scaled back because of the recognition that Wyoming has the authority to deny mining permits on federal land. Montana has the

same legal authority, but there is no recognition of this point, or associated reduction of the withdrawal, in the Montana RMPs.

The SFA classification also clouds the consideration of key landscapes with other important values and characteristics, both within and outside of the SFA. These areas include Lamere/Lambing, Phillips Black Coulee, Lower Grant Coulee, Caravan Marshhawk Hills, Gumbo Plateau, Dry Fork and Gary Coulee. Greater protections for these specific areas might be appropriate, and would best be provided by other more appropriate designations. But further consideration has been eclipsed by the breadth of the SFA designation.

Request: *Remove the SFA designation from the affected Montana RMPs and manage these lands as PHMAs. At a minimum, remove the NSO restriction from SFA-designated lands, remove or significantly scale back the mineral withdrawal, and adopt the applicable measures from the Montana Executive Order.*

If the NSO is removed and replaced with the Montana Executive Order and the mineral withdrawal is scaled back as requested above, and key lands with Wilderness Characteristics are no longer subject to the SFA, consider strengthening protections for those landscapes, such as Lower Grant Coulee, Caravan Marshhawk Hills, Gumbo Plateau, Dry Fork and Gary Coulee through other, more appropriate designations. If the SFA is completely removed, consider strengthening protections for Lamere/Lambing and Phillips Black Coulee (while protecting existing oil and gas leases).

C. The application of disturbance buffers in BLM's Montana RMPs is inconsistent with the Montana Executive Order and the Wyoming State Strategy and BLM plans.

In determining the boundaries for Core Areas, Montana used 6.2 mile buffers around the highest densities of displaying males based upon lek locations, with appropriate adjustments. Within the delineated Core Areas under the Montana Executive Order specific protections are provided for leks to protect lek activity, and key seasonal habitats to protect the critical features of these areas. When Montana's Density Disturbance Model is applied, the analysis area is determined by first employing a 4 mile buffer around the project, and then a 4 mile buffer to every lek within that area. Within this analysis area, surface disturbance is kept to 5% or less. Montana's Executive Order, and the specific requirements and restrictions contained therein, are very similar to the Wyoming State Strategy.

Referring to the USGS Report (USGS, Conservation Buffer Distance Estimates for Greater Sage Grouse – a Review, 2014) (2014 USGS Report), the Montana RMPs

reference lek buffers that are significantly and universally greater than those in the Montana Executive Order, relating to general activities, fluid minerals, power lines and communication towers, and roads. Key examples are provided below.

NSO: The Montana Executive Order establishes a 0.25 mile NSO buffer in general habitat, and a 0.6 mile NSO buffer in core habitat. This is consistent with both the Wyoming State Strategy and BLM Plans. The Montana RMPs contain a greater 0.6 mile NSO buffer in General Habitat Management Areas (GHMAs), and a blanket NSO in PHMAs. These are significant differences that will unnecessarily constrain activities in Montana.

Seasonal: The Montana Executive Order utilizes seasonal timing limitations on activities outside of lek buffers, during specific timeframes for breeding, nesting, brood rearing, and winter concentration areas. This is largely consistent with both the Wyoming State Strategy and BLM Plans. However, the Montana RMPs go beyond the timing limitation by applying a 2 mile “controlled surface use” (CSU) conservation buffer to PHMAs. This restriction prohibits surface occupancy and use year-round within 2 miles of a lek, unless the proponent prepares a plan approved by BLM to mitigate the impacts to sage grouse or their habitat.

Infrastructure: The Montana Executive Order and the Wyoming State Strategy and BLM Plans apply a 1.9/2.0 mile buffer for main roads, and 0.6 mile buffer for access roads in Core/PHMAs, and a 0.25 mile buffer within General/GHMAs (subject to a 2 mile seasonal timing limitation). However, the Montana RMPs propose a 3.1 mile buffer for roads, energy-related infrastructure and other surface disturbance, applicable in both PHMAs and GHMAs.

The proposed Montana RMP buffers are based on the 2014 USGS report. But that report offers a range of acceptable options, including 2 mile buffers. The Montana RMP buffer distances do not take into account the inherent uncertainty and limitations described in the 2014 USGS report. For example, the Montana RMPs would apply a 3.1 mile buffer to wells and roads. However, the source study for a 3.1 mile well buffer found a relationship only when more than 8 active wells occurred within 3.1 miles. Likewise, the bulk of research on road impacts is based on major roads. The Montana RMPs do include the ability for the BLM to increase or decrease the applicable buffer distance, but only if “justifiable departures” are determined to be appropriate.

Request: *Revise all buffer distances in the Montana RMPs to be consistent with the Montana Executive Order and the Wyoming State Strategy. Measures that allow flexibility in the field based on situational conditions should be adopted where possible in all sage grouse conservation plans. Clarify that the 2014 USGS report is advisory, use the Montana Executive*

Order as a starting point, and clarify that the best determinations will be made in the field at the project level.

D. The application of the Density and Disturbance Calculation Tool (DDCT) in the Montana RMPs is inconsistent with the Montana Executive Order.

The Montana Executive Order applies the DDCT consistently to all minerals. However, the Montana RMPs exclude oil and gas development and gravel mining from DDCT evaluation. Instead, the Montana RMPs significantly limit oil and gas development in PHMAs by imposing NSO stipulations, and new gravel mining in PHMAs is prohibited.

Where the Montana RMPs do purport to utilize the DDCT as set forth in the Montana Executive Order, there are certain inconsistencies that must be addressed. It is my understanding the Montana BLM fully intends to utilize the DDCT in a manner that is consistent with the Montana Executive Order. If that is the case, the following issues need to be addressed and clarified:

- The Montana Executive Order contains a 5% disturbance cap, consistent with both the Wyoming State Strategy and BLM Plans. The BLM proposes a 3% anthropogenic disturbance cap for Montana RMPs, and indicates that it may adopt a 5% disturbance cap in the future. Inconsistent disturbance cap percentages will result in confusion and inconsistent results. A project involving both state and federal lands might be approved by the state, but denied by the BLM. The BLM needs to be clear as to its intentions, and its timeframe for adopting the 5% cap. It is unclear why 5% is the appropriate level for federal lands in Wyoming, but not for federal lands in Montana.
- The Montana Executive Order bases the DDCT calculation on suitable habitat, which is consistent with both the Wyoming State Strategy and BLM Plans. However, the Montana RMPs appear to calculate DDCT disturbance based on total land area within a project area, which is a significant departure. A focus on suitable habitat encourages disturbances to be located in unsuitable habitat where possible. The Montana RMP methodology could lead the BLM to deny a project where the disturbance is below the cap for suitable habitat or where no suitable habitat is being disturbed.
- The Montana BLM method of calculating percent of disturbance may be inconsistent with the Montana Executive Order. The calculation methods in the Montana RMPs do not go into sufficient detail. The Wyoming Buffalo Field Office RMP does go into additional detail, and describes additional calculations that encompass parts of the project area, depending on whether leks are part of the project area. If applied in the Montana RMPs, BLM results have the potential to be inconsistent with the Montana DDCT calculations, and lead to inconsistent management decisions for projects involving private/state and federal lands.
- The Montana Executive Order and Wyoming State Strategy apply the DDCT disturbance cap analysis at the project area level. However, under the Montana RMPs it appears that disturbance calculations would be conducted over much larger areas defined as “biologically significant units” (BSU). If the area within a BSU is determined to have a cumulative disturbance level above 3%, no federal projects

subject to the DDCT analysis could be approved in the BSU, even if the project analysis area is below the disturbance cap. This inconsistency can create conflicts for projects involving private/state and federal lands.

Request: *Amend the final Montana RMPs to adopt the DDCT analysis process that is consistent with the Montana Executive Order. This includes adopting a 5% disturbance cap based on suitable habitat within a project-area-scale boundary instead of a 3% cap analyzed at a BSU scale. These changes are necessary to apply the DDCT as intended and to make on the ground management decisions at a meaningful project area scale. At a minimum these important changes must be put in place when the Montana Program becomes fully operational as a regulatory mechanism, which will be no later than January 1, 2016.*

E. Measures pertaining to gravel mining in Montana RMPs are inconsistent with the Montana Executive Order.

In the Montana RMPs, PHMAs are closed to new gravel mining (except for “free use” or county permits). Core Areas are open for new gravel projects under the Montana Executive Order, subject to the same disturbance and density cap limitations applied to other activities. While the accommodation for Montana counties is appreciated, it is unclear why gravel mining is not evaluated consistent with other activities, through a DDCT analysis. Impacts associated with gravel mining should be addressed through the analytical framework and disturbance threshold as required by the Montana Executive Order.

Request: *Amend the Montana RMPs to allow new gravel mining consistent with the Montana Executive Order, including the 5% DDCT analysis.*

2. The Montana RMPs are inconsistent with the Governor’s “all lands all threats” approach to protecting Sage Grouse.

Through the Montana Executive Order, I adopted an “all lands all threats” approach to provide strong protections for sage grouse by applying seamless measures across state and private lands. By applying measures in this manner and by emphasizing a conservation approach that applies the greatest protections to the most sensitive areas at the project level, considerable efficiencies and conservation benefits are realized. The Montana RMPs actually increase the possibility that activities would be permitted in less than optimal locations for sage grouse. It’s not clear why we would want to limit our flexibility to choose the very best location for an activity to occur.

The SFA designation is an example of a provision that will limit management flexibility on the ground, with potential negative consequences for sage grouse. While the eastern-most portion of the SFA contains several sizeable blocks of BLM land, the western half of the SFA is characterized by a significant amount of interspersed state and private lands, increasing the likelihood that, in applying the Montana Executive Order to state and private lands in the area,

the options for choosing the best location for an activity will be artificially constrained, forcing a “second best” location.

In the PHMAs, the NSO requirement for fluid minerals contains an exception, but the exception is confusing and too narrow to prevent the kind of artificial constraints that can also result in a “second best” location on the ground. The language from the Miles City Plan is as follows:

“Exceptions to PHMA NSO may be granted where the action would not have direct, indirect or cumulative effects on the GRSG or its habitat or the action is proposed to be undertaken as an alternative to a similar action occurring on a nearby parcel and would provide a clear conservation gain. Exceptions based on conservation gain may only be considered in (a) PHMA of mixed ownership where federal minerals underlie less than 50% of the total surface, or (b) areas of the public lands where the proposed exceptions is an alternative to an action occurring on a nearby parcel subject to a valid federal fluid mineral lease existing of the date of the LUPA. Exceptions based on conservation gain must also include measures, such as enforceable institutional controls and buffers, sufficient to allow the BLM to conclude that such benefits will endure for the duration of the proposed action's impacts. Exceptions must be approved by AO with concurrence of State Director; AO may not grant exception without finding by state wildlife agency, USFWS and BLM find the criteria are met. (2-129, C-173).”

The second exception (that the action is proposed to be undertaken as an alternative to a similar action occurring on a nearby parcel and would provide a clear conservation gain) is problematic in its application. There are two geographic areas where the second exception can be used:

- (a) PHMA of mixed ownership where federal minerals underlie less than 50% of the total surface, or
- (b) areas of the public lands where the proposed exception is an alternative to an action occurring on a nearby parcel subject to a valid federal fluid mineral lease existing as of the date of the Land Use Planning Area (LUPA).

Exception (a) is too narrow and it will not be applicable in several PHMAs, yet the chances for a conflict between the Montana Executive Order and the Montana RMPs are high across the PHMAs. This is because of the predominance of checkerboard and interspersed ownership between private/state and BLM lands in affected areas. The practical application of this exception is improved if it is changed to focus on the project analysis area, where an actual project is being reviewed for its impacts on sage grouse, which is the primary objective of this effort. Exception (a) should be amended as follows:

“(a) A project analysis area PHMA of mixed ownership where federal minerals underlie less than 50% of the total surface, or “

In addition to the “second best location” issue, the failure to adopt an “all lands” approach will cause other challenges for seamless administration between the state and BLM. For example, the Montana RMPs include the following (or similar) split-estate management language:

“Where the federal government owns the surface, and the mineral estate is in non-federal ownership in PHMA and GHMA, apply appropriate surface use COAs, stipulations, and mineral RDFs through ROW grants or other surface management instruments, to the maximum extent permissible under existing authorities, in coordination with the mineral estate owner/lessee.”
(MSFO Table 2.5, Action 8, pg 2-76)

The intended application of this provision, even with a generic reference to “existing authorities,” exceeds the rights of a split-estate surface owner. [Western Energy Co. V. Genie Land Co., 195 Mont. 202, 208, 636 P.2d 1297, 1301 (1981)] The BLM does not have the authority to approve or disapprove a split-estate mineral owner’s actions. Where the mineral estate is state or private, state law and the Montana Executive Order are the governing authority.

If state school trust lands are encompassed by federal land, reasonable access must be granted to the state of Montana across the surrounding federal lands for all uses of that state land. For example, access would include ROWs or land use agreements for roads, pipelines and power lines, if needed for the state to develop and produce oil and gas from a surrounded state tract. Designation of sage grouse habitat for avoidance or NSO, if used to deny access and use of state school trust lands, would conflict with the BLM’s legal obligation to provide such access. The Montana RMPs should be revised to recognize the state’s right of access to landlocked state school trust land, including within avoidance and NSO areas.

Request: *Eliminate the NSO and replace it with provisions consistent with the Montana Executive Order. At a minimum, amend the exception language as suggested. Clarify split-estate authority and access to state trust lands as requested.*

3. The grazing provisions in the Montana RMPs, while not inconsistent with the Montana Executive Order, are confusing and may be impractical to implement in the field.

Clarification is needed in the tables in all Montana RMPs related to desired conditions for grass height. Of primary concern is how this suite of metrics will be used, as a weight-of-evidence decision making tool, or as independently applicable metrics. There needs to be clarification as to how perennial grass, stubble, and forb heights are addressed, and it needs to be clear that perennial grass height is not synonymous with stubble height in the pasture, or even with average residual grass height for the entire allotment. The literature currently does not support taking the

grass heights measured at successful sage grouse nest sites and extrapolating this to a grass height needed in a landscape scale management unit to provide ample sage grouse nesting habitat. Language similar to that in the Miles City and Billings/Pompeys Pillar National Monument RMPs would be appropriate: “Adequate nest cover based on ecological site potential and seasonal precipitation; 4.4-11.3 inches (11.4-29 cm)”. This is in line with current science and allows for conditions that may occur that are beyond the control of the land user.

Request: *Simplify methods for evaluating desired conditions and adopt measures consistent with those of the Montana Executive Order. Clarify language regarding perennial grass, stubble, and forb heights as requested.*

4. The RMPs need to be clear on the meaning and significance of avoidance in regard to Right-of-Ways and collocation by underground pipelines.

The Montana RMPs indicate that major Rights of Way “would avoid” GHMAs and both major and minor Rights of Way “would avoid” PHMAs. In the Montana Executive Order, collocation by pipelines with roads, transmission lines, and other linear features is recognized as a preferred approach in Core Areas, to minimize habitat fragmentation. The Montana RMPs should be amended to clarify that right of way collocation is appropriate as a preferred approach.

Request: *Clarify that in regard to underground pipelines, collocation with roads, transmission lines, and other linear features is recognized as a preferred approach in Core Areas, to minimize habitat fragmentation.*

Conclusion

The success of sage grouse conservation in Montana is critically dependent upon implementation of conservation strategies on federal, state and private lands in a manner that provides for working landscapes where people and sage grouse can coexist. Traditional land uses and the pattern of land ownership mandate this approach. Montana has made proactive attempts to maintain working landscapes while providing important protections to sage grouse through comprehensive measures contained in the Montana Executive Order. However, in the Montana RMPs BLM has unnecessarily raised the bar and clouded the effectiveness of our ongoing cooperative conservation efforts. Further, the Montana RMPs contain very little commitment to making on the ground determinations and practical application of important conservation measures.

The significant differences between the Montana RMPs and the Montana Executive Order all work against our “working landscapes” goal in Montana. Given these important considerations we ask that our requests pertaining to these differences as outlined in this letter all be addressed no later than January 1, 2016.

I appreciate the Montana BLM's stated commitment in the Montana RMPs to move to an "all lands" approach in the future, but believe it is too vague:

"If the BLM finds that the State of Montana is implementing a GRSG Habitat Conservation Program that is effectively conserving the GRSG, the BLM will review the management goals and objectives to determine if they are being met and whether amendment of the BLM Proposed Plan is appropriate to achieve consistent and effective conservation and GRSG management across all lands regardless of ownership."
Executive Summary (ES-12).

The language lacks sufficient specificity as to the mechanisms and timing that would be necessary to ensure that appropriate amendments would occur. Given that:

- Montana has been undertaking active sage grouse conservation efforts during the last 10 years providing strong evidence for our commitment;
- almost all of the Montana areas at issue are in the same management zone as critical areas in Wyoming (Management Zone 1);
- the landscapes and threats are similar across those areas;
- the two states manage bird populations within Management Zone 1;
- the Montana Executive Order is virtually identical to the Wyoming Core Area Strategy;
- the Wyoming Strategy has received an interim approval from the U.S. Fish and Wildlife Service; and,
- the BLM plans in Wyoming have largely adopted the Wyoming Strategy.

There appears to be no logical reason that the BLM field offices in Montana should not move to adopt the Montana Executive Order. Again, this should be accomplished at a bare minimum when the Montana Program becomes fully operational as a regulatory mechanism, which will be no later than January 1, 2016.

I would again like to express my appreciation for the tremendous effort your agency is devoting to our common efforts to avoid the need for a sage grouse listing by the USFWS. I very much appreciate the opportunity to comment and I look forward to working with you in the future to resolve plan inconsistencies for the purpose of conserving sage grouse and their habitat in Montana. Thank you for your thoughtful consideration.

Sincerely,



STEVE BULLOCK
Governor



United States Department of the Interior



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In Reply Refer To:
1610 (MT930)

August 6, 2015

The Honorable Steve Bullock
Governor of Montana
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P.O. Box 200801
Helena, MT 59620-0801

Dear Governor Bullock:

This is in response to your letter dated July 29, 2015, which provided your consistency review of the Miles City, Billings, HiLine, Dillon, and Lewistown Proposed Resource Management Plans and Amendments (PRMPs). 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 conserve the species and, 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 Miles City, Billings, HiLine, Idaho and Southwestern Montana (this amends the Dillon RMP), and Lewistown PRMPs are part of an unprecedented and proactive partnership to conserve Greater Sage-Grouse and its habitat by incorporating measures to address specific threats to the species' survival in the land use plans. The plans build upon the foundation for sage-grouse conservation that the BLM and the State of Montana have developed together through cooperative research projects and previous sage-grouse planning efforts. The plans also reflect guidance developed by the BLM to incorporate FWS feedback on the draft plans. The PRMPs 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.

The purpose of the GRSG portion of the 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 that will hopefully support a finding that Endangered Species Act 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 to 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 objectives, habitat map updates, and BLM's commitment to consider future adjustments in coordination with the State of Montana and its GRSG Habitat Conservation Program. The BLM looks forward to continued collaboration with the state in the coming weeks to finalize that language. 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, the BLM is guided by the 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).

We applaud the efforts the State has made in developing a strategy for the conservation of GRSG. The BLM has incorporated significant portions of the State plan into the Miles City, Billings, HiLine, Idaho and Southwestern Montana (this amends the Dillon RMP), and Lewistown PRMPs, including the adoption of the Core Area and General Habitat boundaries as Priority Habitat Management and General Habitat Management Areas as a basis for subsequent management decisions in our land use plans. The BLM’s Greater Sage-Grouse Conservation Strategy allows for state-based variations where different approaches or priorities were consistent with the overall GRSG conservation objective. 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 RMPs 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.

State of Montana's Recommendations and the BLM's Responses

Issue: General Consistency of management actions within MZ 1

Governor's Concern: The Montana Executive Order² is intended to closely track the Wyoming State Greater Sage-Grouse Core Area Strategy (Wyoming State Strategy). The Wyoming State Strategy and Montana Executive Order focus on working landscapes, where sage-grouse and people coexist in a manner that not only protects sage-grouse, but also protects the way of life for the people who live in sage-grouse country. The success of sage-grouse conservation is dependent upon implementation of conservation strategies on private and state land. In Montana, private, state and federal lands exist in a checkerboard pattern where land use activities are dependent on access to all lands regardless of ownership. The Montana Executive Order is built specifically upon the premise that all lands would remain working lands sharing in common standards for sage-grouse conservation. The Wyoming State Strategy has received interim approval from the USFWS, and the BLM plans in Wyoming are generally "built upon" and "complementary to" the Wyoming Greater Sage-Grouse Core Area Strategy (Wyoming GRSG Proposed LUPA/Final EIS, ES-12). It makes sense for Montana to model its program after the Wyoming State Strategy because: 1) the bulk of the Montana areas at issue are in the same management zone as critical areas in Wyoming (Management Zone 1); 2) the landscapes and threats are similar across those areas; and 3) both states maintain significant grouse populations within Management Zone 1.

BLM Response: The BLM has incorporated portions of the State Plan into the Miles City, Billings, HiLine, Idaho and Southwestern Montana (this amends the Dillon RMP), and Lewistown PRMPs, including the adoption of the Core Area and General Habitat boundaries as Priority Habitat Management and General Habitat Management Areas as a basis for subsequent management decisions in our land use plans. Although the national planning effort allows for state-based variations where different approaches or priorities were consistent with the overall conservation objectives, the Montana GRSG Program is currently not operational as you noted in your letter, which limits the BLM's ability to completely incorporate Montana's GRSG strategy

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)

²The State of Montana's plan, which has not yet been adopted or become operational, is not an officially-approved plan, policy or program triggering the consistency provisions of FLPMA and its implementing regulations. See 43 U.S.C. 1712(c)(9); 43 C.F.R. 1610.3-2(e). Nevertheless, the BLM has fully reviewed the State's recommendations and, although it is not required to respond, does so in the interest of cooperation and appreciation for the State's review.

and still provide for regulatory certainty sufficient to allow the FWS to determine that the species is not warranted for listing as threatened or endangered under the Endangered Species Act.

However, the BLM plans do acknowledge the state's progress and, in regards to the disturbance cap, the PRMPs state that once

“...the BLM determines that the State of Montana has adopted a GRSG Habitat Conservation Program that contains comparable components to those found in the State of Wyoming's Core Area Strategy including an all lands approach for calculating anthropogenic disturbances, a clear methodology for measuring the density of operations, and a fully operational Density Disturbance Calculation Tool, the 3% disturbance cap will be converted to a 5% cap for all sources of habitat alteration within a project analysis area.”

Due to the fact that this management action was analyzed in the NEPA analysis and is explicitly stated as a management action in the PRMPs, there is no subsequent analysis necessary for the BLM to conduct in order to make the switch to the State's disturbance cap and calculation methodology automatically, once the strategy is implemented and fully operational.

Further, if the BLM finds that implementation of the Montana GRSG Habitat Conservation Program is effective in meeting management goals and objectives for GRSG conservation, the BLM commits to consider adjustments to the BLM plans to achieve our shared goal of consistent and effective GRSG management and conservation across all lands regardless of ownership.

For the reasons noted above, the BLM respectfully declines to conform the Miles City, Billings, HiLine, Dillon, and Lewistown plans in their entirety to Montana's GRSG strategy because it would be inconsistent 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. However, the BLM will further emphasize its commitment to consider adjustments in the ROD and approved plans, consistent with the purposes, policies, and programs of federal laws and regulations applicable to public lands and this planning strategy.

Issue: NSO stipulations for fluid mineral leases in PHMA

Governor's Concern: The RMP blanket No Surface Occupancy (NSO) requirement in Priority Habitat Management Areas (PHMAs) is inconsistent with the Montana Executive Order. The Montana Executive Order allows oil and gas development within core habitat, but only within specific density and disturbance limits (using the Wyoming DDCT project area evaluation). The Montana Executive Order is consistent with the Wyoming Strategy and BLM Plans. In contrast, the Montana RMPs apply the DDCT analysis to disturbances from some mineral activities, but impose a blanket NSO restriction on all new oil and gas leasing. The BLM NSO restriction in PHMAs does include a narrow exception for oil and gas leases, but the circumstances that would qualify for an exception are too narrow and as written, would rarely be used. While there is some inherent flexibility in locating surface infrastructure on most landscapes, some aboveground structures are a necessity for oil and gas exploration and production operations to take place. The Montana RMP's NSO restriction is an unreasonable and unnecessary blanket

prohibition on the leasing and development of oil and gas resources on federal lands in Montana PHMAs.

In the PHMAs, the NSO requirement for fluid minerals contains an exception, but the exception is confusing and too narrow to prevent the kind of artificial constraints that can also result in a “second best” location on the ground.

The second exception (that the action is proposed to be undertaken as an alternative to a similar action occurring on a nearby parcel and would provide a clear conservation gain) is problematic in its application. There are two geographic areas where the second exception can be used:

(a) PHMA of mixed ownership where federal minerals underlie less than 50 percent of the total surface, or

(b) areas of the public lands where the proposed exception is an alternative to an action occurring on a nearby parcel subject to a valid federal fluid mineral lease existing as of the date of the Land Use Planning Area (LUPA).

Exception (a) is too narrow and it will not be applicable in several PHMAs, yet the chances for a conflict between the Montana Executive Order and the Montana RMPs are high across the PHMAs. This is because of the predominance of checkerboard and interspersed ownership between private/state and BLM lands in affected areas. The practical application of this exception is improved if it is changed to focus on the project analysis area, where an actual project is being reviewed for its impacts on sage-grouse, which is the primary objective of this effort.

BLM Response: As described in the beginning of this letter, the BLM adopted components of the State’s plan for the Montana PRMPs. However, through evaluation of the draft EIS documents and in conferring with the FWS, the BLM determined that measures that provided additional regulatory certainty were necessary to meet the conservation objectives for the plan. In light of the 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 manage fluid minerals and associated Waivers, Exceptions and Modifications as presented in the PRMP. However, if the BLM finds that implementation of the Montana GRSG Habitat Conservation Program, including the fluid mineral direction, is effective in meeting management goals and objectives for GRSG conservation, the BLM, in coordination with the State of Montana and FWS, and based on best available scientific information, may revise the management decisions and associated GRSG habitat management area maps through plan maintenance or plan amendment, as appropriate to achieve our shared goal of consistent and effective GRSG management and conservation across all lands regardless of ownership.

The BLM reaffirms its commitment that when it finds that implementation of the Montana GRSG Habitat Conservation Program is effective in meeting management goals and objectives for GRSG conservation, the BLM commits to consider adjustments to the BLM plans to achieve our shared goal of consistent and effective GRSG management and conservation across all lands regardless of ownership. However, at this time, the BLM respectfully declines to adopt this recommendation for changes to the NSO stipulation and the associated Waivers, Exceptions, and Modifications because it is not consistent with the purposes, policies, and programs of federal

laws and regulations applicable to public lands, in particular BLM's Sage-Grouse Strategy, its Special Status Species Policy, and its goal to provide regulatory certainty for the conservation of the Greater Sage-Grouse and its habitat so as to potentially reduce the need to list the species.

Issue: Sagebrush Focal Areas (SFAs)

Governor's Concern: The Montana Executive Order uses habitat maps developed by Montana Department of Fish, Wildlife and Parks, and the BLM participated in their initial development. As a result, state Core Areas and BLM PHMAs largely encompass the same habitat areas. However, the SFA creates a new habitat classification, with acreage taken from what was PHMA habitat. The sagebrush focal area concept was apparently first introduced in a memo from the U.S. Fish and Wildlife Service calling for inclusion in the BLM Plans with little consideration or regard for consistency with the Montana Executive Order (Memo from Dan Ashe, Director USFWS, to Director, Bureau of Land Management and Chief, U.S. Forest Service, October 27, 2014). The current management for PHMAs and the SFA differs in two key respects: 1) the oil and gas blanket NSO is not subject to exceptions within the SFA, and 2) within the SFA the BLM proposes a blanket mineral withdrawal. The acreage placed in SFA status in Montana is substantial at approximately 980,400 acres. This represents 59 percent of the original 1,666,200-acre land area within PHMAs. The State and BLM's future efforts for management consistency within PHMA and Core Areas are compromised when the BLM removes 59 percent of a planning area PHMA and establishes a nearly 1-million-acre area with differing management requirements.

The proposed mineral withdrawal is perplexing, given that a similarly-proposed mineral withdrawal in Wyoming has been significantly scaled back because of the recognition that Wyoming has the authority to deny mining permits on federal land. Montana has the same legal authority, but there is no recognition of this point, or associated reduction of the withdrawal, in the Montana RMPs.

The SFA classification also clouds the consideration of key landscapes with other important values and characteristics, both within and outside of the SFA. These areas include Lamere/Lambing, Phillips Black Coulee, Lower Grant Coulee, Caravan Marshhawk Hills, Gumbo Plateau, Dry Fork and Gary Coulee. Greater protections for these specific areas might be appropriate, and would best be provided by other more appropriate designations. But further consideration has been eclipsed by the breadth of the SFA designation.

BLM Response: As you noted, on October 27, 2014, the USFWS provided the BLM a memorandum titled "Greater Sage-Grouse: Additional Recommendations to Refine Land Use Allocations in Highly Important Landscapes." The memorandum and associated maps provided by the USFWS identified areas that represent recognized "strongholds" for GRSG that have been noted and referenced as having the highest densities of GRSG and other criteria important for the persistence of the species. To ensure that these areas received the highest level of protection possible, and consistent with the recommendations by the National Technical Team and Conservation Objectives Team, the PRMP identifies a subset of the "strongholds" as "Sagebrush Focal Areas" (SFAs). The PRMP applied the following additional conservation measures in SFAs, all of which were analyzed in the draft EIS: recommending these areas for withdrawal from the Mining Law of 1872, subject to valid existing rights, and applying a no surface occupancy (NSO) stipulation, without waiver, exception, or modification, for fluid mineral leasing.

In November 2014, the states were notified, through a conference call, of this additional recommendation for stronghold conservation by the FWS and, on January 20, 2015, the BLM presented BLM's draft proposed management for these SFAs to the 11 state agencies in attendance at the Sage-Grouse Task Force meeting. In addition, the State, as a cooperating agency, was provided with the opportunity to review the administrative draft proposed plan in early May 2015, where these conservation measures for SFAs were outlined.

In light of the 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 manage SFAs as presented in the PRMP.

In addition, the Secretary has stated that through the separate withdrawal process to implement the BLM plan recommendations – which will be public and transparent – she will work closely with the states and the public at large to consider information on mineral potential as well as the importance of these areas as sagebrush habitat in making the decision as to what lands will be withdrawn. If implemented, the Secretary can consider the protections offered by the Montana strategy during that process.

The BLM reaffirms its commitment to revisit this concern in coordination with the State of Montana once the Montana GRSG Habitat Conservation Program is implemented and demonstrating efficiencies in meeting management goals and objectives for GRSG conservation.

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

Issue: The application of disturbance buffers in BLM's Montana RMPs is inconsistent with the Montana Executive Order and the Wyoming State Strategy and BLM plans.

Governor's Concern: In determining the boundaries for Core Areas, Montana used 6.2 mile buffers around the highest densities of displaying males based upon lek locations, with appropriate adjustments. Within the delineated Core Areas under the Montana Executive Order, specific protections are provided for leks to protect lek activity, and key seasonal habitats to protect the critical features of these areas. When Montana's Density Disturbance Model is applied, the analysis area is determined by first employing a 4 mile buffer around the project, and then a 4 mile buffer to every lek within that area. Within this analysis area, surface disturbance is kept to 5 percent or less. Montana's Executive Order, and the specific requirements and restrictions contained therein, are very similar to the Wyoming State Strategy.

Referring to the USGS Report (USGS, Conservation Buffer Distance Estimates for Greater Sage-Grouse – a Review, 2014) (2014 USGS Report), the Montana RMPs reference lek buffers that are significantly and universally greater than those in the Montana Executive Order, relating to general activities, fluid minerals, power lines and communication towers, and roads.

BLM Response: The recommendation to revise all buffer distances in the Montana RMPs does not identify an inconsistency with State or local resource related plans, policies, or programs

since the buffer distances will be determined during project level authorizations for consistency with GRSG conservation objectives reflecting local ecological conditions.

Specifically, the PRMP's direction on USGS buffer recommendations will be applied to project implementation level authorizations and are not allocations. When considering projects in PHMA and GHMA within the range of distances referenced in the USGS report, it is the BLM's intent to consider local data and regulations, including those identified in the State's plan as appropriate. The BLM will consider justifiable adjustments to decrease or increase distances from the USGS Report based on other local data, best available science, landscape features, and other existing protections.

Moreover, even if there is an identified, inconsistency with state or local resource-related plans, policies, or programs, 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 Greater Sage-Grouse and its habitat so as to potentially reduce the need to list the species, the BLM finds it is prudent to include buffers to protect leks as presented in the PRMP and that adoption of this recommendation would be inconsistent with purposes, policies, and programs of federal laws and regulations applicable to public lands.

Issue: The application of the Density and Disturbance Calculation Tool (DDCT) in the Montana RMPs is inconsistent with the Montana Executive Order.

Governor's Concern: The Montana Executive Order applies the DDCT consistently to all minerals. However, the Montana RMPs exclude oil and gas development and gravel mining from DDCT evaluation. Instead, the Montana RMPs significantly limit oil and gas development in PHMAs by imposing NSO stipulations, and new gravel mining in PHMAs is prohibited.

Where the Montana RMPs do purport to utilize the DDCT as set forth in the Montana Executive Order, there are certain inconsistencies that must be addressed. It is my understanding the Montana BLM fully intends to utilize the DDCT in a manner that is consistent with the Montana Executive Order. If that is the case, the following issues need to be addressed and clarified:

- The Montana Executive Order contains a 5 percent disturbance cap, consistent with both the Wyoming State Strategy and BLM Plans. The BLM proposes a 3 percent anthropogenic disturbance cap for Montana RMPs, and indicates that it may adopt a 5 percent disturbance cap in the future. Inconsistent disturbance cap percentages will result in confusion and inconsistent results. A project involving both state and federal lands might be approved by the state, but denied by the BLM. The BLM needs to be clear as to its intentions, and its timeframe for adopting the 5 percent cap. It is unclear why 5 percent is the appropriate level for federal lands in Wyoming, but not for federal lands in Montana.
- The Montana Executive Order bases the DDCT calculation on suitable habitat, which is consistent with both the Wyoming State Strategy and BLM Plans. However, the Montana RMPs appear to calculate DDCT disturbance based on total land area within a project area, which is a significant departure. A focus on suitable habitat encourages disturbances to be located in unsuitable habitat where possible. The Montana RMP methodology could lead the BLM to deny a project where the disturbance is below the cap for suitable habitat or where no suitable habitat is being disturbed.

- The Montana BLM method of calculating percent of disturbance may be inconsistent with the Montana Executive Order. The calculation methods in the Montana RMPs do not go into sufficient detail. The Wyoming Buffalo Field Office RMP does go into additional detail, and describes additional calculations that encompass parts of the project area, depending on whether leks are part of the project area. If applied in the Montana RMPs, BLM results have the potential to be inconsistent with the Montana DDCT calculations, and lead to inconsistent management decisions for projects involving private/state and federal lands.
- The Montana Executive Order and Wyoming State Strategy apply the DDCT disturbance cap analysis at the project area level. However, under the Montana RMPs, it appears that disturbance calculations would be conducted over much larger areas defined as “biologically significant units” (BSU). If the area within a BSU is determined to have a cumulative disturbance level above 3 percent, no federal projects subject to the DDCT analysis could be approved in the BSU, even if the project analysis area is below the disturbance cap. This inconsistency can create conflicts for projects involving private/state and federal lands.

BLM Response: The issues identified do not identify an inconsistency between the BLM actions and State or local resource related plans, policies, or programs. The BLM has committed to two levels of disturbance monitoring in our plans consistent with most BLM plans across the range of the sage-grouse. The first level is the project level monitoring, which is consistent with the Density and Disturbance Calculation Tool proposed for Montana. The language in the Montana PRMPs states that:

“If the 3 percent anthropogenic disturbance cap is exceeded on lands (regardless of land ownership) or if anthropogenic disturbance and habitat loss associated with conversion to agricultural tillage or fire exceed 5 percent within a project analysis area in PHMAs, then no further discrete anthropogenic disturbances (subject to applicable laws and regulations, such as the 1872 Mining Law, valid existing rights, etc.) will be permitted by BLM within PHMA in a project analysis area until the disturbance has been reduced to less than the cap.”

Our plans further state that:

“If the BLM determines that the State of Montana has adopted a GRSG Habitat Conservation Program that contains comparable components to those found in the State of Wyoming’s Core Area Strategy, including an all lands approach for calculating anthropogenic disturbances, a clear methodology for measuring the density of operations, and a fully operational Density Disturbance Calculation Tool, the 3 percent disturbance cap will be converted to a 5 percent cap for all sources of habitat alteration within a project analysis area.”

Thus, as noted in your letter, at a minimum, these changes will be put in place when the Montana Program becomes fully operational as a regulatory mechanism. The difference between the percent disturbance cap currently in place will become moot at that point. The methodology for calculating disturbance will also be consistent with that employed by the state.

The other level of disturbance monitoring is the Biologically Significant Unit level, which is defined as all of the PHMA areas within a population. This disturbance cap level is 3 percent and the management action states that:

“If the 3 percent anthropogenic disturbance cap is exceeded on lands (regardless of land ownership) within GRSG PHMAs in any given Biologically Significant Unit, then no further discrete anthropogenic disturbances (subject to applicable laws and regulations, such as the 1872 hard rock mining law, valid existing rights, etc.) would be permitted by BLM within GRSG PHMAs in any given Biologically Significant Unit until the disturbance has been reduced to less than the cap.”

Please see the disturbance cap appendices in the plans to see how this disturbance is calculated. The BLM reaffirms its commitment to revisit this concern in coordination with the State of Montana once the Montana GRSG Habitat Conservation Program is implemented and demonstrating efficiencies in meeting management goals and objectives for GRSG conservation.

Issue: Measures pertaining to gravel mining in Montana RMPs are inconsistent with the Montana Executive Order

Governor’s Concern: In the Montana RMPs, PHMAs are closed to new gravel mining (except for “free use” or county permits). Core Areas are open for new gravel projects under the Montana Executive Order, subject to the same disturbance and density cap limitations applied to other activities. While the accommodation for Montana counties is appreciated, it is unclear why gravel mining is not evaluated consistent with other activities, through a DDCT analysis. Impacts associated with gravel mining should be addressed through the analytical framework and disturbance threshold as required by the Montana Executive Order.

BLM Response: In light of the 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 manage saleable minerals as presented in the PRMPs. This exception to free use permits is included because of the importance of these materials to local communities and their limited disturbance which will be offset by the mitigation requirements. Please note, saleable mineral development is subject to the disturbance cap. If the BLM finds that implementation of the Montana GRSG Habitat Conservation Program is effective in meeting management goals and objectives for GRSG conservation, the BLM, in coordination with the State of Montana and FWS, and based on best available scientific information, may revise the management decisions and associated GRSG habitat management area maps through plan maintenance or plan amendment, as appropriate, to achieve our shared goal of consistent and effective GRSG management and conservation across all lands regardless of ownership.

The BLM reaffirms its commitment to revisit this concern in coordination with the State of Montana once the Montana GRSG Habitat Conservation Program is implemented and demonstrating efficiencies in meeting management goals and objectives for GRSG conservation. However, at this time, the BLM respectfully declines to adopt the recommendation to allow new gravel mining consistent with the Montana Executive Order because it is not consistent with the purposes, policies, and programs of federal laws and regulations applicable to public lands, in particular BLM’s Sage-Grouse Strategy, its Special Status Species Policy, and its goal to provide regulatory certainty for the conservation of the Greater Sage-Grouse and its habitat so as to potentially reduce the need to list the species.

Issue: Actions for federal surface management when there is underlying non-federal mineral estate.

Governor's Concern: the Montana RMPs include the following (or similar) split-estate management language:

"Where the federal government owns the surface, and the mineral estate is in non-federal ownership in PHMA and GHMA, apply appropriate surface use COAs, stipulations, and mineral RDFs through ROW grants or other surface management instruments, to the maximum extent permissible under existing authorities, in coordination with the mineral estate owner/lessee." (MSFO Table 2.5, Action 8, pg 2-76)

The intended application of this provision, even with a generic reference to "existing authorities," exceeds the rights of a split-estate surface owner. [Western Energy Co. V. Genie Land Co., 195 Mont. 202, 208, 636 P.2d 1297, 1301 (1981)] The BLM does not have the authority to approve or disapprove a split-estate mineral owner's actions. Where the mineral estate is state or private, state law and the Montana Executive Order are the governing authority.

BLM Response: This issue does not identify an inconsistency between the BLM actions and State or local resource related plans, policies, or programs. The language in the PRMPs states that the resource protections would be put in place by BLM "...to the maximum extent permissible under existing authorities, in coordination with the mineral estate owner/lessee." The existing authorities recognize the mineral estate holder's property rights.

Issue: If state school trust lands are encompassed by federal land, reasonable access must be granted to the State of Montana across the surrounding federal lands for all uses of that state land.

Governor's Concern: If state school trust lands are encompassed by federal land, reasonable access must be granted to the State of Montana across the surrounding federal lands for all uses of that state land. For example, access would include ROWs or land use agreements for roads, pipelines and power lines, if needed for the state to develop and produce oil and gas from a surrounded state tract. Designation of sage grouse habitat for avoidance or NSO, if used to deny access and use of state school trust lands, would conflict with the BLM's legal obligation to provide such access. The Montana RMPs should be revised to recognize the state's right of access to landlocked state school trust land, including within avoidance and NSO areas.

BLM Response: This issue does not identify an inconsistency between the BLM actions and State or local resource related plans, policies, or programs. The BLM will continue to provide access to non-federal inholdings, including state school trust lands, in accordance with existing law, regulations, and policy.

Issue: The grazing provisions in the Montana RMPs, while not inconsistent with the Montana Executive Order, are confusing and may be impractical to implement in the field.

Governor's Concern: Clarification is needed in the tables in all Montana RMPs related to desired conditions for grass height. Of primary concern is how this suite of metrics will be used,

as a weight-of-evidence decisionmaking tool, or as independently applicable metrics. There needs to be clarification as to how perennial grass, stubble, and forb heights are addressed, and it needs to be clear that perennial grass height is not synonymous with stubble height in the pasture, or even with average residual grass height for the entire allotment. The literature currently does not support taking the grass heights measured at successful sage-grouse nest sites and extrapolating this to a grass height needed in a landscape scale management unit to provide ample sage grouse nesting habitat. Language similar to that in the Miles City and Billings/Pompeys Pillar National Monument RMPs would be appropriate: “Adequate nest cover based on ecological site potential and seasonal precipitation; 4.4-11.3 inches (11.4-29 cm).” This is in line with current science and allows for conditions that may occur that are beyond the control of the land user.

BLM Response: This issue does not identify an inconsistency between the BLM actions and State or local resource related plans, policies, or programs. However, the BLM will provide additional clarification in the RODs on the following points.

The GRSG Habitat Objectives as presented in the PRMP provide vegetation objectives for all sage-grouse life history stages and are based on the habitat conditions and the best available science within the planning area. These objectives will assist the BLM with meeting, or moving toward meeting, applicable land health standards in GRSG habitats through the establishment of measurable desired outcomes in which the BLM plans to achieve during the life of the plan.

These habitat objectives may not be obtainable on every acre within the designated GRSG habitat management areas. Therefore, the application and determination on whether the objectives have been met will be based on the ecological site potential of the site in question to meet the desired condition identified in the table.

Issue: The RMPs need to be clear on the meaning and significance of avoidance in regard to Right-of-Ways and collocation by underground pipelines.

Governor’s Concern: The Montana RMPs indicate that major Rights-of-Way “would avoid” GHMAs and both major and minor Rights-of-Way “would avoid” PHMAs. In the Montana Executive Order, collocation by pipelines with roads, transmission lines, and other linear features is recognized as a preferred approach in Core Areas, to minimize habitat fragmentation. The Montana RMPs should be amended to clarify that right-of-way collocation is appropriate as a preferred approach.

BLM Response: In the Montana PRMPs, PHMA and GHMA are Avoidance Areas for major Rights-of-Way. Avoidance areas are defined in the plans as “An area identified through resource management planning to be avoided but may be available for ROW location with special stipulations.” While the special stipulations and conservation measures for specific major ROW projects are not determined in the PRMP (including co-location), the project specific NEPA analysis will consider the impacts to GRSG and will include mitigation measures that aim to avoid, minimize, and provide compensatory mitigation for unavoidable impacts to the GRSG. Co-location of major ROW projects may be a viable mitigation measure for many projects and will be analyzed as part of any project specific environmental review.

Thus, since co-location is permitted in Avoidance Areas under some circumstances, there is no inconsistency between the BLM actions and State or local resource related plans, policies, or programs and BLM therefore respectfully declines to adopt this recommendation.

Issue: Montana BLM's stated commitment in the Montana RMPs to move to an "all lands" approach in the future is too vague.

Governor's Concern: I appreciate the Montana BLM's stated commitment in the Montana RMPs to move to an "all lands" approach in the future, but the language lacks sufficient specificity as to the mechanisms and timing that would be necessary to ensure that appropriate amendments would occur. Given that:

- Montana has been undertaking active sage-grouse conservation efforts during the last 10 years providing strong evidence for our commitment;
- almost all of the Montana areas at issue are in the same management zone as critical areas in Wyoming (Management Zone 1);
- the landscapes and threats are similar across those areas;
- the two states manage bird populations within Management Zone 1;
- the Montana Executive Order is virtually identical to the Wyoming Core Area Strategy;
- the Wyoming Strategy has received an interim approval from the U.S. Fish and Wildlife Service; and,
- the BLM plans in Wyoming have largely adopted the Wyoming Strategy.

BLM Response: 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.

Moreover, 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 Greater Sage-Grouse and its habitat so as to potentially reduce the need to list the species, the BLM finds it is essential to provide the certainty that management actions will occur in the identified habitat management areas for the Greater Sage-Grouse. The BLM therefore respectfully declines to adopt this recommendation.

As noted in your letter, there are several aspects of the BLM RMPs that are different than the approach identified in Montana Executive Order No. 10-2014. The BLM has not been able to achieve consistency or incorporate several aspects of the State's policies and programs including Montana Executive Order No. 10-2014 for the reasons noted above. However, as previously noted, if the BLM finds that implementation of the Montana GRSG Habitat Conservation Program is effective in meeting management goals and objectives for GRSG conservation, the

BLM, in coordination with the State of Montana and FWS, and based on best available scientific information, may revise the management decisions and associated GRSG habitat management area maps through plan maintenance or plan amendment, as appropriate to achieve our shared goal of consistent and effective GRSG management and conservation across all lands regardless of ownership.

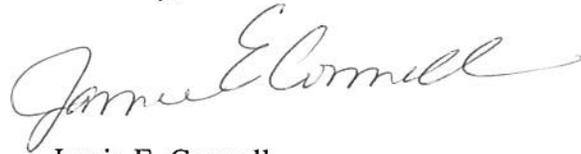
Please note that you have the opportunity to appeal this response to the Director of the BLM pursuant to 43 CFR 1610.3-2(e). Such an appeal must be filed within 30 days of your receipt of this letter, by September 8, 2015. Please submit appeals to:

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

Thank you for your continued interest and participations in the Montana Greater Sage-Grouse planning effort. We look forward to continued partnership with the state to develop clarifying language to address the State's concerns as noted above as well as on implementation of these plans. We look forward to meeting with you regarding your concerns and our responses and appreciate the time and attention that you and your staff have placed on this important effort.

If you or your staff has any questions, please contact John Carlson at (406) 538-1918.

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